

# LAW AGAINST THE STATE

Ethnographic Forays into Law's  
Transformations

Edited by

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## CHAPTER 1

# JURIDIFICATION OF INDIGENOUS POLITICS

Stuart Kirsch

The emergence of the ‘indigenous’ as an international legal category has opened up new avenues for claims to recognition and redistribution (Barsh 1994; Anaya 1996; Rosen 1997; Niezen 2003, 2010; Gilbert 2006). However, the juridification of indigenous politics requires translation across cultural and political boundaries (Clifford 1988; Bunte and Franklin 1992; Kirsch 2001; Miller 2001; Graham 2002; Povinelli 2002; Richland 2008). This process produces gaps between the *experience-near* formulation of indigenous knowledge and practices and the *experience-distant* language of jurisprudence. Clifford Geertz (1983: 57–8) invokes these terms with reference to ethnographic representation, distinguishing between the language through which people naturally and effortlessly refer to what they think, feel and believe in contrast to how these thoughts, emotions and beliefs are described by anthropologists and other social scientists. This distinction may also be applied to the process of juridification through which indigenous peoples and their interlocutors, including lawyers, judges and anthropologists, represent their claims in legal terminology that has the capacity to alienate the participants from their own speech (Das 1989: 316).

Post-colonial scholars express strong reservations about the juridification of indigenous politics. Veena Das (1989: 316) refers to the

Earlier versions of this chapter benefitted from discussion at York University, the University of Iowa, the University of Manchester, and the workshop on ‘Law against the State’ at the Max Planck Institute for Social Anthropology, although I bear sole responsibility for the result. I am especially grateful to Julia Eckert for suggesting the rubric that helped frame the text.

imposition of 'legal domination ... in all spheres of life' as part of the contract 'such groups have been compelled to establish with the forms of domination belonging to the structures of modernity'. Arif Dirlik (2001: 181) argues that the reduction of political opposition to the 'language of jurisprudence ... signals a consolidation of hegemony'. Elizabeth Povinelli (2002: 159) questions whether legal systems can adequately address past injustices 'without performing an ideological critique of the institutions themselves'. Dipesh Chakrabarty (2000: 85) describes how cross-cultural translation involves the mediation of homogenising middle terms that cloak implicit claims to universality. However, he also recognises that social and political movements require access to information encoded by these universalising terms, which are the categories employed by 'bureaucracies and other instruments of governmentality', and consequently serve as reservoirs of power (Chakrabarty 2000: 86).<sup>1</sup> He defines the task of analysis as attending to the gaps or traces of difference produced by these acts of translation (Chakrabarty 2000: 93–94).

In this chapter, I compare three international legal cases concerned with indigenous rights, paying particular attention to the gaps between indigenous discourse and the language of jurisprudence. In contrast to post-colonial arguments about hegemony, these cases suggest a range of potential outcomes. The claims articulated in these legal proceedings may have a kind of 'looping effect' (Hacking 1994) in which indigenous ideas and practices are refashioned through their engagement with the courts. Here, the gaps produced by juridification undergo partial closure as indigenous peoples appropriate and deploy the language of the courts. What may initially have been experience-distant terminology can become internalised as indigenised concepts (Sahlins 1999) offering new political resources. Another possibility for closing the gap is the transformation of legal discourse as a result of interaction with unfamiliar concepts and practices, resulting in the formation of hybrid legal precedents. Alternatively, the courts may fail to recognise or incorporate indigenous concerns into their decisions, reifying difference. A final possibility is that the discourse used in legal proceedings may elide certain forms of difference. The

<sup>1</sup> These disjunctions might be compared to what Kim Fortun (2001: 8) refers to as the double-binds faced by political activists, which may 'foreclose certain lines of inquiry, disable certain forms of knowledge, and legitimate discriminatory social categories'. She describes how political and legal struggles create new subject positions and require new vocabularies: 'Subjects are drawn into new realities and fields of reference [in which] traditional constructs of society and culture no longer seem adequate' (Fortun 2001: 13).

examples considered here illustrate some of the potential consequences of juridification, including the internalisation of new concepts, the creation of new hybrids and the reification or elision of difference.

This chapter examines these transformations by drawing on examples from my experience as an engaged anthropologist working with and on behalf of indigenous communities in three legal venues. The first case considers subsistence rights in a lawsuit against the Australian-owned Ok Tedi mine in Papua New Guinea. The second example addresses claims for compensation regarding the loss of culture (or a 'way of life') and the right to a healthy environment in the wake of US nuclear weapons testing in the Marshall Islands. The third case involves ongoing legal claims regarding the recognition of indigenous land rights in Suriname. By examining the gaps that emerge through the juridification of indigenous politics, this essay addresses the following questions: what are the different pathways through which indigenous rights claims are formulated? How do they draw on local understandings, national histories and international discourses? What role do lawyers, anthropologists and NGOs play in this process? How do the constraints of the legal regimes in which these claims are articulated affect their content or presentation? Finally, how does the juridification of indigenous politics create new resources, reify or elide difference, or lead to new hybrids?

## SUBSISTENCE RIGHTS IN PAPUA NEW GUINEA

The pivotal issue in the Ok Tedi case was subsistence rights. The Ok Tedi copper and gold mine in Papua New Guinea has discharged 80,000 metric tons of tailings and waste rock into the Ok Tedi and Fly rivers daily since production began in 1984, and more than 1 billion metric tons of sediment in total, polluting these waterways beyond recognition and causing widespread deforestation (Kirsch 2006; Bolton 2009). Since the mid 1980s, the people living downstream from the mine have objected to its environmental impacts and demanded compensation commensurate with its consequences for their subsistence practices (Kirsch 2007). They circulated petitions, staged protests and lobbied the company for change and the state for enforcement of existing laws. They travelled from Papua New Guinea to Australia, to Rio de Janeiro for the 1992 Earth Summit, and to North America and Europe to enlist support from environmental NGOs, church groups and governments. Their participation in the 1993 International Water Tribunal in Amsterdam (International Water Tribunal 1994) inspired their lawsuit against Broken Hill Proprietary

Ltd. (BHP), the majority shareholder and managing partner of the Ok Tedi mine, in the Supreme Court of Victoria in Melbourne, where BHP is incorporated (Banks and Ballard 1997).

The legal case against BHP and the Ok Tedi mine initially addressed the environmental impact of the project on the property of the downstream landowners. However, BHP challenged the lawsuit on the basis of legal doctrines which prevent the Australian courts from determining claims related to 'land or immovable property situated in another jurisdiction' (Gordon 1997: 153). The lawyers needed to restate their claims without making reference to property rights.

Ethnographic information proved to be the key. The rights of the Yonggom people who own land along the west bank of the Ok Tedi River, where most of their contemporary villages were established in the 1970s, differ from the rights of the people who relocated to these villages from smaller Yonggom settlements scattered throughout the rainforest. The Yonggom refer to landowners as *ambip kin yariman*, the persons responsible for lineage land. The other people living in these villages are known as *animan od yi karup*, persons who derive their livelihood (food and wealth, *animan* and *od*) from the land. Yonggom settlers in the new villages were granted use rights to the land and the river for subsistence purposes: extracting the starch that is the mainstay of their diet from the sago palms that grow along the river and in the swamps that crisscross the region; growing bananas and other crops in their gardens; and hunting, fishing and harvesting timber and other forest products. Both groups of people experienced losses as a result of the mine's impact on the riverine environment and the surrounding forests. Consequently, access to resources for subsistence use became the central issue in the case rather than property rights (see Ribot and Peluso 2003).

The lawyers subsequently reformulated the case to focus on the impact of the Ok Tedi mine on the subsistence economies of the people living downstream, arguing that:

what distinguishes these claims from the usual claims that come before courts is that these plaintiffs are people who live a subsistence lifestyle. They live substantially, if not entirely, outside the economic system which uses money as the medium of exchange. But to say that does not alter the fact that if they are deprived of the very things which support their existence, they suffer loss. Of course it is a loss which appears in an uncommon guise because typically the courts have dealt with claims that are rooted in society's adherence to the monetary medium of exchange ... What Mr Myers [the lawyer for BHP] says really proceeds from the

unstated assumption that a thing is only economic if it is passed through the system of monetary exchange, and there is simply no reason in theory or in law for that to be so.

(Julian Burnside, cited in Gordon 1997: 154–55)

The judge in the case endorsed this line of reasoning, determining that:

to restrict the duty of care to cases of pure economic loss would be to deny a remedy to those whose life is substantially, if not entirely, outside an economic system which uses money as a medium of exchange. It was put that, in the case of subsistence dwellers, loss of the things necessary for subsistence may be seen as akin to economic loss. If the plaintiffs are unable or less able to have or enjoy those things which are necessary for their subsistence as a result of the defendant's negligent conduct of the mine, they must look elsewhere for them, perhaps to obtain them by purchase or barter or perhaps to obtain some substitute.

(Byrne 1995: 15)

With this judgement, the court confirmed the commensurability of subsistence rights and the economic rights associated with property ownership, establishing important legal precedents for both the subsistence rights of indigenous peoples and corporate liability for abrogating those rights. While not legally binding beyond its original jurisdiction, such legal determinations circulate widely and may influence lawyers and judges in related cases (Gordon 1997: 154).

Despite its deployment in the courts, there is no Yonggom equivalent to the concept of subsistence rights. The relationship between the *yariman* and his land may be translated as ownership but has other meanings as well. The central actor in divinations held to seek the cause of a persistent illness, or *anigat*, is the *anigat yariman*. This role is filled by the senior kinsman or guardian responsible for the patient's well-being. Similarly, the sponsor of an *arat* feast, who coordinates the labour and exchange relations of the participants, is known as the *arat yariman*. The *yariman* relationship is based on the responsibilities of kinship, guardianship and sponsorship. Given that *ambip kin* refers to both a specific parcel of land and the lineage that holds the rights to that land, *ambip kin yariman* refers to the person or persons responsible for the land belonging to the lineage. With these responsibilities comes the political authority to limit the access of others as well (Schoorl 1970). Although the Yonggom are able to acquire use rights to land from others through assertion or appeal (Schieffelin 1976), they do not recognise subsistence rights in the abstract.

Despite the gap between Yonggom concepts and the legal argument made on their behalf, the notion of subsistence rights adequately represented the interests of the plaintiffs. It is well established that indigenous commitment to hunting, fishing and other subsistence practices often persists even in the context of a predominantly cash economy (Sahlins 1999). At its most fundamental level, the Ok Tedi case addressed the capacity of the affected communities to preserve their relationships to the land, both in terms of the ability to carry out traditional subsistence practices and the larger significance of these practices (Kirsch 2006). The concept of subsistence rights provided a valuable shorthand for the stakes in the Ok Tedi case: the ability to sustain meaningful and productive relationships to the land in the face of devastating environmental change.

The concept of subsistence rights also proved useful to the Yonggom in their negotiations over the case. They affirmed the distinction made by the courts between a subsistence economy and ‘an economic system which uses money as a medium of exchange’, as indicated by the following complaint about the inadequacy of compensation payments in 1998, two years after the lawsuit was settled out of court: ‘The company doesn’t face this problem [of inadequate resources]. They eat in the mess, while we live on hunting and gardening. We cannot afford to buy fresh meat in the stores. Once our [compensation] is spent, it is difficult to make ends meet. The environment has already been destroyed; the only option is to provide us with additional funds’ (Kirsch 2006: 212). During a village meeting the same year, one of the leaders of the campaign against the mine raised the following question: ‘What are we going to do without money? When we say fortnightly [compensation] payments, it means survival’ (Kirsch 2006: 208). In arguing that compensation must be paid every two weeks, he compares the wages people earn in a monetary economy to subsistence practices. Although he does not use the term subsistence, he argues that environmental degradation threatens their survival. The concept of subsistence rights, whether directly or indirectly invoked, becomes a key trope for indigenous politics when their ability to obtain one’s livelihood from the land is threatened or abrogated rather than taken for granted (see Ivy 1995). In other contexts, subsistence practices have become metonymic of indigenous ways of life and consequently key symbols of indigenous identity (Sahlins 1999; Nadasdy 2003), and therefore central to the questions about culture and loss that are the subject of the next section of this chapter.



In the Ok Tedi case, lawyers for the plaintiffs introduced the novel concept of subsistence rights, which established an important legal precedent and provided the people living downstream from the mine with the means to express their concerns about the economic consequences of pollution. The juridification of indigenous politics resulted in changes to both legal concepts and local political claims.

#### LOSS OF A WAY OF LIFE AND THE RIGHT TO A HEALTHY ENVIRONMENT IN THE MARSHALL ISLANDS

The second case addresses damages resulting from US nuclear weapons testing in the Marshall Islands during the 1940s and 1950s.<sup>2</sup> In 1999, I was one of three anthropologists invited to conduct preliminary research in support of a claim by the people of Rongelap Atoll to the US Nuclear Claims Tribunal, which was established to adjudicate claims for property damage, loss and suffering (Kirsch 2001; Johnston and Barker 2008). The people we interviewed expressed concerns about their 'loss of a way of life' and the violation of their 'right to a healthy environment'.<sup>3</sup> During an advisory committee meeting, we were told that: 'Land gives you the meaning of life and the role of each individual in society' (Johnston and Barker 2008: 63). Another participant at the meeting told us: 'You cannot put enough value on land ... How do you put a value on something that people consider as a living thing that is part of your soul?' (Johnston and Barker 2008: 63). A third person at the meeting framed his concerns in terms of culture and society: 'When the bomb exploded, the culture was also gone, too. It is impossible for people to act in their proper roles' (Johnston and Barker 2008: 186). During one of our interviews, we were told that: 'We have lost our knowledge, our ability, our moral standing and self-esteem in the community. What we were taught is no longer practical. To be a good fisherman, you have to know where to fish on an island. A lot has been lost, not just our land' (Johnston and Barker 2008: 189).

<sup>2</sup> It is the Rongelap case to which Dirlik (2001) refers in the comment cited above.

<sup>3</sup> The 'right to a healthy environment' was initially recognised in Principle 1 of the 1972 Stockholm Declaration on the Human Environment, and subsequently elaborated by the 1992 UN Conference on Environment and Development in Rio de Janeiro, which argued that 'human beings ... are entitled to a healthy and productive life in harmony with nature'. While not legally binding, these declarations form the basis for discussion about the right to a healthy environment.

My colleagues Barbara Rose Johnston and Holly Barker (2008) document these claims in greater detail in their submission to the Nuclear Claims Tribunal. They point out that earlier awards for compensation by the tribunal were based on land values derived from a record of lease payments in the Marshall Islands. They argue that real estate values fail to take the social and cultural values of land into account. Conventional real estate values also ignore the marine resources that sustained the Marshallese way of life. Johnston and Barker's (2008: 57) focus on 'the loss of access to use a healthy ecosystem ... [and the] problems resulting from the inability to interact in a healthy landscape and seascape in ways that allow the transmission of knowledge and the ability to sustain a healthy way of life' suggests a more holistic way to assess the consequences of nuclear weapons testing for the people of Rongelap.

During previous testimony before the Nuclear Claims Tribunal, the anthropologist Laurence Carucci discussed the hardships experienced by the people from Enewetak after they were relocated to Ujelong, a remote, uninhabited and largely desolate atoll. Carucci described how the women from Enewetak were unable to weave mats because there were no pandanus trees on Ujelong. The lack of mature breadfruit trees also meant that a generation of young men grew up without the opportunity to make and sail canoes, skills and experiences that were both essential and highly valued by their predecessors (Carucci, cited in Kirsch 2001: 173). Such material losses can have significant cultural consequences. However, contemporary anthropologists have generally avoided the issue of culture loss, which is associated with a disciplinary past in which it was commonly assumed that people would assimilate and cultures would disappear (Kirsch 2001). Yet these examples from the Marshall Islands, and similar claims by other indigenous peoples (Kambel 2002; Wood 2004; Demian 2006), indicate the need for additional attention to the question of culture loss.<sup>4</sup>

On 17 April 2007, the Nuclear Claims Tribunal issued its decision in the Rongelap case, 'calling for payment of just over \$1 billion in compensation to the claimants, a figure reflecting the costs for remediation and restoration of Rongelap (and associated islands/atolls), future lost property value and compensation for damages from nuclear testing'

<sup>4</sup> The proliferation of claims about cultural property (Brown 2003; Hirsch and Strathern 2004) index these concerns.

(Nutu 2007: 42). The amount of compensation awarded was substantially greater than in prior judgements by the Nuclear Claims Tribunal for Enewetak (\$323 million in 2000), Bikini (\$563 million in 2001), and Utrik (\$307 million in 2005). Each successive award incorporated and expanded upon prior judgements in terms of the calculation of their losses (Johnston, cited in Nutu 2007: 43).

However, specific claims by people from Rongelap about the loss of a way of life and the right to live in a healthy environment were explicitly downplayed by the three judges of the Nuclear Claims Tribunal. The tribunal weighed two methodologies for assessing the value of land. The 'residential/agricultural use approach' calculated the 'damages to natural resources, real or personal property, subsistence use, revenues, and profits and earning capacities' (Plasman and Danz 2007: 14, n.32). The second methodology relied on real estate values in which property had been rented or sold, and yielded the higher value. However, the tribunal previously established that compensation rates should be set with reference to the 'highest and best use' of the land, which they identified as agricultural and residential use rather than government purchase or rental. Consequently, the award to the people on Rongelap was based on lost use values rather than real estate values (Plasman and Danz 2007: 11–12).

In making its determination, the tribunal disputes Johnston and Barker's assertion that 'lost use values assessed by the appraisers are incomplete in that they fail to address ... natural resource damage and loss of lagoon, reef heads, clam beds, reef fisheries, turtle and bird nesting grounds'. Instead, the tribunal argues that the assessment of agricultural and residential use 'explicitly includes these uses' because in many cases the rights to marine resources were directly linked to the ownership of land (Plasman and Danz 2007: 14, n.32). Similar reasoning applied to the symbolic or cultural value of resources, including 'cultural resource damage and loss of access to family cemeteries, burial sites of *iroij* [chiefs], sacred sites and sanctuaries, and *morjinkot* land [given by the chiefs to commoners for bravery in battle]' (Plasman and Danz 2007: 14, n.32). The tribunal even argued that land which was culturally significant but had no discernable economic value – providing the example of an uninhabited and unused outer island in an atoll – was implicitly included in their analysis (Plasman and Danz 2007: 19, n.41). According to the tribunal, all of these specific cultural values were taken into account by the generic procedures of economic

accounting and therefore did not require independent assessment. The tribunal also determined that 'the loss of access to a healthy ecosystem' was adequately addressed by the award for the loss of use (Plasman and Danz 2007: 19, n.41). Additional compensation was provided for the pain and suffering caused by inadequate and unhealthy living conditions, and by subjecting people from Rongelap to unnecessary medical procedures.

Specific claims made by the people of Rongelap about the loss of a way of life and the right to a healthy environment were not explicitly recognised by the Nuclear Claims Tribunal. But based on the larger value of the award for Rongelap in comparison to previous judgements by the tribunal, these claims were implicitly folded into their assessment of land values. The judgement significantly expanded prior valuations of land in the Marshall Islands even though it did not assign specific economic values for the loss of culture or the right to a healthy environment.

The hearings of the tribunal also failed to contest the fundamental power of the state to reduce its subjects to the conditions of *bare life* (Agamben 1998). Even though the tribunal cannot question the sovereign power of the state, it can unmask that power by showing how it operates, thereby revealing false claims made by the state concerning its responsibilities towards its subjects. Thus the hearings provided the people from Rongelap with the opportunity to challenge the state's claim to moral authority through testimony about their experiences. Johnston and Barker (2008: 225) conclude that the 'expert witness report and the tribunal hearings served as a truth and reconciliation committee, with Marshallese experts providing the testimony and the declassified narratives of scientists and scientific findings providing the damning substantiation'. Chakrabarty's (2000: 93) observation that 'the point is to ask how this seemingly imperious, all-pervasive code [of history or the law] might be deployed or thought about so that we have at least a glimpse of its own finitude, a glimpse of what might constitute an outside to it' is applicable to the proceedings of the Nuclear Claims Tribunal. The testimony of the people from Rongelap, and in particular their claims about the loss of a way of life and the right to live in a healthy environment, remains independent from the language of the court; there is no fusion or merger of the two. Yet this alternative accounting of events acts as a mirror in which the state is forced to view its own image.

## FREEDOM IN SURINAME

The final example addresses indigenous land rights in Suriname. In 2009, the Lokono (Arawak) and Kaliña (Carib) peoples filed a complaint with the Inter-American Commission on Human Rights against the Republic of Suriname. Their complaint challenges the state's refusal to recognise indigenous land rights despite their obligation to do so under the UN Declaration of the Rights of Indigenous Peoples, to which Suriname is a signatory. It builds on the landmark 2007 judgement in the case of *Saramaka People v. Suriname* (2007, 2008), in which the Inter-American Court on Human Rights 'expanded the scope of protection for groups seeking to protect ancestral lands and resources, moving for the first time beyond indigenous peoples to extend protection to other tribal groups', namely the Maroon peoples who escaped from slavery during the seventeenth and eighteenth centuries to establish largely autonomous communities in the rainforest (Shelton 2008: 168; Price 2011). The Lokono and Kaliña territories in the lower Marowijne region of east Suriname have been progressively reduced and degraded by mining, logging and the expansion of the town of Albina onto indigenous lands. Three nature reserves have been established on indigenous land without permission, one of which has become a major industrial zone. BHP Billiton, the mining company responsible for the Ok Tedi mine in Papua New Guinea, mines bauxite in the Wane Creek Nature Reserve.<sup>5</sup> The Wane Hills mine has ravaged the landscape, transforming rainforest into barren red earth. A decade of restoration efforts amount to scattered plots of stunted trees. Mining company roads through the nature reserve have attracted legal and illegal logging, and the removal of the bauxite layer has spurred extraction of the underlying kaolin deposits. Until recently, Wane Creek was the most important hunting and fishing ground of the indigenous communities living in the lower Marowijne region. In January 2009, I was invited by the Association of Village Leaders in Suriname (VIDS) and the Forest People's Programme in the UK to conduct research on these issues and the question of indigenous land rights for submission to the Inter-American Court on Human Rights (Kirsch 2010).

Like the Yonggom people living downstream from the Ok Tedi mine, the Lokono and Kaliña attest to the impacts of development and environmental degradation on their subsistence practices, which require them to become more deeply involved in the monetary economy. As

<sup>5</sup> BHP merged with Billiton to form BHP Billiton in 2001.

one person told me: 'Before it was okay if you didn't have money, but now we need money [to survive].' They are no longer able to feed their families by hunting, fishing and agriculture. Members of these communities told me that participation in the monetary economy is fine for those persons who possess the skills required to earn a living wage, but that others are unsuccessful. Even though they share food among themselves when they hunt and fish, they do not redistribute the wages earned through employment. This leads to new structural forms of inequality.

Like the people from Rongelap affected by nuclear weapons testing, the Lokono and Kaliña also describe how these economic and environmental changes have affected their ability to reproduce their own culture. Many of the practical skills associated with subsistence production are no longer regularly taught by fathers to their sons and mothers to their daughters: 'In some families, there are no elders to teach them these things. And even to get the materials needed ... you can no longer find them locally because of logging, but have to travel long distances.' However, new markets for Amerindian products including cassava bread and beer (*kasiri*), agricultural produce and wild fruits have recently emerged in the town of St Laurent du Maroni, across the river from Albina in French Guiana. Participation in these markets provides them with the opportunity to improve their standard of living by using local knowledge and skills. But the viability of these practices remains at risk owing to environmental degradation from mining and logging.

The Surinamese legal scholar Ellen-Rose Kambel (2002: 148–53) identifies three discourses used by the Kaliña and Lokono to challenge the state's refusal to recognise indigenous land rights: (1) the argument that the land cannot be owned, which appears to be an older discourse now on the wane given its incompatibility with contemporary political objectives, (2) the reference to historical precedent, that they were the original inhabitants of the land and therefore have the right to exclude others, and (3) the importance of land rights for preserving their freedom. Kambel (2002: 154) notes that only the first two rationales for indigenous land rights have been taken up in national debates. However, it is the link between land rights and freedom that emerged most emphatically in my discussions with the Lokono and Kaliña in east Suriname. This corresponds with anthropologist Joanna Overing's (1986: 151) observation that 'Amerindians of the South American rain forest, and particularly of the Guianas, place a strong value upon the freedom of the person, have an aversion to political tyranny, and demonstrate concern

over the ambiguous relations between personal freedom and both socio-political right and constraint' (1986: 151, references omitted).

I first became acquainted with Amerindian concerns about freedom in Suriname while examining BHP Billiton's plans for a new bauxite mine in the Bakhuis Mountains in west Suriname (Goodland 2009). Initially, the Lokono communities living closest to the proposed mine site were enchanted by the prospect of economic development. Although the Lokono I spoke with recognised that modern mines provide relatively few jobs, they hoped the project would have a multiplier effect on the local economy. Their desire for greater economic opportunity evokes economist Amartya Sen's (1999) definition of the goal of development as enhancing human freedom, including a people's ability to shape their own destiny.<sup>6</sup> However, their views differed from Georg Simmel's (1978) observations about the relationship between money and modernity. Simmel describes how the universal form of value created by money is a vehicle for realising new forms of the self that are freed from prior attachment to particular people, places and things. Thus the attraction of money has generally been taken to signify the negation of tradition, which is replaced by the modern project of self-realisation (Maclean 1994). But when I interviewed young men about their desires for the future, their answers always included living in their villages: they did not dream of the bright lights of the city, but wanted economic opportunities that would allow them to stay home. They did not think of money as the path to individualisation and modernity, but as the means to remain traditional (see Sahlins 1999).

The women I spoke with in west Suriname also invoked the discourse of freedom in relation to money, albeit differently from the men. Women had their own reasons for supporting the mining project. What concerned them the most were recent economic changes that gave men privileged access to money through wage labour. They told me that traditional gender roles were complementary: in their gardens, men cleared the forest and wove the *matapi* for squeezing cassava while the women planted, weeded, harvested and prepared the root crop for consumption. Each gender needed the other's labour. In contrast, today women find themselves dependent on their husbands for money and object to their loss of autonomy. For them, regaining their freedom requires access to

<sup>6</sup> However, Chakrabarty (2000: 44–45) argues against the identification of the modern state with freedom, as the state achieves its goals through projects of reform, progress and development that may be coercive or violent.

their own source of income. They see potential development opportunities associated with the mine as a means to earn the money required to overcome their current dependence on their husbands. In contrast to Simmel (1978), Lokono women seek financial independence in order to reclaim their autonomy and ensure they can provide for their families. Access to money becomes the means to achieve traditional values, to reassert the interdependence of women and men and to fulfill their responsibilities to their children.<sup>7</sup>

In focus groups and interviews with the Lokono and Kaliña people in east Suriname, the most striking element of discussions about land rights was also their invocation of freedom. People told me that they only feel free on their own land, where they are able to do as they please. Without land rights, they emphasised, one is not truly free, because 'anyone can show up with a piece of paper and say they own our land'. Many people described freedom in terms of their ability to hunt and fish in the rainforest. When I asked the young men about their future, they told me they wanted to stay on their land because: 'We love this place. We want our own place where we can live. We like to be free.' Today, however, they are 'not free enough [because] other people are coming into our territory'. When describing the nature reserve established on their land, they expressed their criticism in terms of the resulting constraints on their freedom: 'Before we were free to go there, but now someone is imposing rules on us'. Many people also brought up stories about 'no trespassing' signs on indigenous lands that have been alienated from their rightful owners.

When the Lokono and Kaliña spoke to me about freedom, they also mentioned the freedom to be indigenous, to possess their own culture and follow their own way of life. Kambel (2002) notes that the Lokono and Kaliña are familiar with the provisions of the UN Declaration on the Rights of Indigenous Peoples, including the 'collective right to live in freedom, peace and security as distinct peoples' and the ability to express 'indigenous cultural diversity' without prejudice. In this sense, the freedom to be indigenous implies the right to determine and reproduce important cultural values, which resonates with claims made in the Rongelap case about the 'loss of a way of life'.

<sup>7</sup> When BHP Billiton withdrew from the project after the economic downturn in 2009, and the results of an independent review of the mining project (Goodland 2009) were presented to the community and in the capital of Paramaribo, the Lokono began to express doubts about the Bakhuis project. People also questioned their earlier enthusiasm that money would solve their problems, recognising that it will create new problems as well.



The concept of freedom also has broad historical resonance in Suriname, a Dutch colony from 1667 until 1975. Most of the inhabitants of Suriname are descendants of slaves or indentured labourers. Creoles make up 32 per cent of the population and are the strongest political faction; the Maroons, descendants of escaped slaves who settled in the rainforest, constitute another 10 per cent of the population. The largest group of people in the country is composed of the descendants of Hindi-speaking Indians who moved to Suriname as indentured labourers after the abolition of slavery, and comprise 37 per cent of the population. Another 10 per cent of the population is made up of the descendants of indentured labourers from Java. Given the historical significance of forced and coerced labour in Suriname, freedom is a powerful unifying discourse among its citizens, including the Amerindian communities, which comprise between 1.5 and 2.0 per cent of the country's population.<sup>8</sup>

In these examples from Suriname, freedom is a multivalent concept that simultaneously references traditional ideas about persons, gender and social relations; the freedom to hunt and fish in the rainforest; the UN Declaration on the Rights of Indigenous Peoples, which supports the freedom to be indigenous; and freedom in a recently independent country comprised largely of the descendants of slaves and indentured labourers. Concerns about freedom are neither exclusively indigenous nor modern, and are simultaneously a shared concern of members of the state and the basis of a claim to difference. The importance of freedom resonates across social divides in Suriname even as it is invoked in support of indigenous land rights. Its multivocality means that any gaps or differences in how freedom is invoked may be partially concealed by these shared meanings.

## CONCLUSION

This chapter examines the gaps created through the juridification of indigenous politics. Are indigenous claimants alienated from their own speech by being forced to formulate their claims in the language of legal jurisprudence? In the Ok Tedi case, claims based on indigenous practices challenged a fundamental principle of the common law, which

<sup>8</sup> As Nikolas Rose (1999) argues, freedom is also a pervasive discourse of modernity that goes hand in hand with the modern state's capacity to organise and regulate the behaviour of its population.

previously restricted claims for damage to property owners. Local subsistence practices provided a new model for redressing industrial forms of pollution and the consequences of environmental degradation for the people living downstream from the Ok Tedi mine, establishing important legal precedents. The concept of subsistence rights was equally novel for the indigenous plaintiffs, although it provided them with a powerful means of expressing their grievances. In the Marshall Islands, the claimants from Rongelap articulated their concerns in terms of previously circulating discourses about the loss of a way of life, or culture, and the right to a healthy environment. Although the Nuclear Claims Tribunal avoided ruling directly on these claims, its final assessment of the damages caused by nuclear testing was clearly influenced by the presentation of indigenous views at the hearings. The gap between local conceptions and judicial verdict remains, but the people from Rongelap welcomed the opportunity to present their testimony to the tribunal. Finally, the Amerindian communities in Suriname invoke the multivocal discourse of freedom in presenting their claims, which simultaneously incorporates their relationship to the rainforest, social relations, new claims about indigenous rights and national history. Their claim unifies what might otherwise be disjunctive social positions.

There are other consequences of these claims as well. Some travel as legal precedents for other indigenous communities to adopt, such as the notion of subsistence rights in the Ok Tedi case. In the Marshall Islands, however, claims about the right to a way of life and the right to a healthy environment were not endorsed by the court but may still circulate as contemporary political discourses rather than legal precedents. The Nuclear Claims Tribunal was unable to challenge the sovereign power of the state, but the people of Rongelap were able to call attention to the moral failings of the state. We do not know how the Inter-American Court on Human Rights will respond to claims about freedom and land rights in the Suriname rainforest. There are concerns about privacy and governmentality in all three cases, as participating in legal processes always invites the scrutiny of the court, but this also reflects the larger paradox of indigenous politics, in which those who are different must bear the responsibility for commensuration (see Povinelli 2002).

Another important question concerns efficacy. It may take so long for a case to reach the courts that problems are compounded, as in the Ok Tedi case, in which legal remediation has provided more than one billion dollars in compensation to the state and the affected communities, but came too late to save the river (Kirsch 2007). In the Marshall Islands

case, the Nuclear Claims Tribunal made a record award to the people of Rongelap for the harms they experienced, although full monetary payment is contingent on the US Congress substantially increasing its funding to the programme. At present the tribunal is only able to make payments for the medical consequences of nuclear testing. Finally, even if the Amerindian land rights case is successful in the Inter-American Court on Human Rights, this does not guarantee that the Republic of Suriname will change its laws accordingly. Despite being a signatory to the Inter-American Commission, and therefore bound by its decisions, Suriname has thus far failed to implement its findings in the Saramaka case (Price 2011), although pressure on the state through various multi-lateral development agencies and banks may eventually compel it to do so. Turning to the courts for justice does not guarantee a positive outcome, and may only partially deliver on the claims being made.

Success in court and the objectives of social movements are not identical, however, although the cases analysed here indicate that questions of meaning, claims for recognition and redistribution, the opportunity to put state power on trial and the possibility of defining the terms of contestation that drive social movements may be addressed in legal proceedings. These cases also provide opportunities for indigenous claimants to influence both legal jurisprudence and political contests, either through the universal language of legal precedent, or through the horizontal exchange of ideas among indigenous peoples (Appadurai 2002). This development represents an important political accomplishment, as the opportunities of indigenous peoples to influence legal knowledge as well as larger debates about state power, the environment and freedom have historically been limited. However, their success is contingent on their willingness to enter into intercultural conversations that have the potential to transform all of the participants.

Finally, these cases require consideration of the role played by engaged anthropologists in mediating between legal language and indigenous knowledge and practices. Although the gap between legal concepts and indigenous ideas may initially seem too great to bridge, interventions by anthropologists can help frame problems in ways that prove valuable to the indigenous participants. This may be true even for rapid ethnographic assessment, despite its shortcomings in comparison to long-term ethnographic research (Macdonald 2002). Although there is no template or formula for making such interventions, these practices may not be as remote from conventional ethnographic work as they appear, as all ethnography is contingent on acts of translation and representation, and

must align empirical findings with the aesthetic requirements of particular languages of expert knowledge and genres of writing.

There will inevitably be gaps between some indigenous claims and their legal presentation. They may be reduced through looping effects in which new claims are internalised. They may yield legal precedents which generate change or contribute to related political projects. They may also facilitate the critique of power by providing testimony about the moral failings of the state. Alternatively, they may conceal their own presence through the use of multivocal terms which elide difference and consequently mobilise recognition and support. However, they may also end up reifying difference. The juridification of indigenous politics cannot escape the universalising power of legal language, but can create new political opportunities.

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