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Epistemic Injustice and Indigenous Peoples in the Inter-American Human Rights System

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ABSTRACT

In this paper we examine the epistemic treatment of Indigenous peoples by the Inter-American Court and Commission on Human Rights, two institutions that have sought to affirm the rights of Indigenous peoples in the wake of colonialism and industrial encroachment onto Indigenous land. The Court and Commission have sought to do this in two ways. First, they have insisted on a *right to consultation*, according to which any Indigenous peoples who would be affected by industrial activity must be given a say in the decision-making process. Second, they have given an expansive interpretation of the *right to property* in order to encompass Indigenous relations to land. We argue that although the right to consultation and the expanded right to property have led to a number of landmark legal victories for Indigenous peoples, they nonetheless have an epistemic dark side in that they foster forms of epistemic injustice. What happens in the course of consultation often involves a kind of epistemic *objectification* of Indigenous testimony that amounts to radical testimonial injustice. And the requirement that Indigenous peoples frame their relation to land in the language of ‘property’ stifles their ability to articulate that relation, thus amounting to a hermeneutical injustice.

KEYWORDS

Indigenous communities; silencing; testimonial injustice; hermeneutical injustice

1. Introduction

Indigenous peoples throughout the Americas have suffered extraordinary injustices in the course of colonial occupation and rule. They have been enslaved, forcibly removed from their land, and denied any autonomy or say in regard to their own land, families and bodies. Today, many Indigenous communities face threats to their lives, livelihoods and land in the form of large-scale natural resource exploitation and development.

In recent decades, these communities have sought legal protection from the Inter-American Court and Inter-American Commission on Human Rights.¹ In response, the Court and Commission have built up a significant and progressive body of jurisprudence and commentary on the rights of Indigenous and traditional communities (Pasqualucci 2006).

In this paper, we examine two important ways in which the Court and Commission have attempted to protect Indigenous territory from unwanted extractive and industrial development. First, they have insisted on the realisation of the *right to consultation*, according to which any Indigenous peoples who would be affected by a proposed development or industrial activity must be given a say in the decision-making process. Second, they have adopted an expansive interpretation of the *right to property* that encompasses Indigenous uses of and relations to land. Both of these legal innovations can be seen as efforts to empower the speech of Indigenous communities. The

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right to consultation gives these communities a legally-recognised ‘voice’, while the expanded right to property equips these communities with a legally-recognised ‘language’ – a conceptual repertoire in which to articulate their claims and assert their rights.

We shall argue that although the right to consultation and the expanded right to property have led to a number of landmark legal victories for Indigenous peoples in the Inter-American system, they do have an epistemic dark side in that they foster forms of epistemic injustice. What happens in the course of consultation, we argue, often involves a kind of epistemic objectification of Indigenous testimony that amounts to radical testimonial injustice. And the requirement that Indigenous peoples frame their relation to land in the conceptual language of ‘property’ stifles their ability to articulate that relation, thus amounting to a hermeneutical injustice.

2. The Right to Consultation and the Sarayaku Case

One of the key ways that the Court and Commission have sought to protect the interests of Indigenous peoples is by insisting that states recognise and realise their right to consultation. What this means is that states must enter into dialogue with Indigenous peoples before making any decision or implementing a policy that will affect these peoples’ lives or livelihoods – including any decision to licence exploration, mining and other industrial developments on Indigenous territory. This consultation must be *free* (those consulted are not subject to intimidation, bribery or other activities that might inhibit their participation), it must take place *prior* to a decision being taken, and those who are consulted must be adequately *informed* about the nature and impacts of the proposed activities.²

The right to consultation has been interpreted in quite a demanding way by both the Court and the Commission, such that its proper fulfilment requires an open, meaningful communicative exchange in which Indigenous peoples are given a proper say. A clear statement of the way the right to consultation has been interpreted within the Inter-American system comes from the Court’s judgment in the case of *Saramaka People v Suriname*:

the State has a duty to actively consult with [the] community according to their customs and traditions [...] This duty requires the State to both accept and disseminate information, and entails constant communication between the parties. These consultations must be in good faith, through culturally appropriate procedures (*Saramaka People v Suriname*, para 133).

There are three things especially worth noting about the right to consultation, as it is interpreted in this judgment of the Court, and others like it. First, it is a collective right, belonging to the community itself, not only the individual members of the community. So the *community itself* must be given the opportunity to voice concerns, make claims, make demands, and so on, with respect to the proposed activities. The right to consultation thus seems to presuppose some notion of group speech, and a central purpose of consultation is to *give these affected groups a say*.³

Second, and relatedly, the community must be allowed to speak ‘according to their customs and traditions’, and the consultation must occur ‘through culturally appropriate procedures’. This means that the political structure – the decision-making processes and choice of representatives, for instance – of the community must be respected. In short, the community must be allowed to speak for itself, in its own way, on its own terms.

Third, the right to consultation imposes a duty on the State to both ‘accept and disseminate information’ and to conduct consultation processes ‘in good faith’. This suggests that the State cannot treat mandatory consultation as a mere legal formality but should approach consultation in a spirit of openness. While it need not accept every (or even any) claim or bow to every demand of the community, it should at least make an effort to *hear* what the community has to say.

Our suggestion is that although Indigenous communities are meant to be given a proper say through consultation processes, all too often what these Indigenous communities say is not given its epistemic due.⁴ Indeed, there are cases in which what these communities say is given *no epistemic*

consideration at all. This is particularly evident in the landmark case of the *Kichwa People of Sarayaku vs the State of Ecuador*.

The case concerned the State of Ecuador awarding a concession to a private oil company to begin oil exploration activities on the traditional territory of the Kichwa People of Sarayaku, an Indigenous community. The Sarayaku People⁵ were neither consulted, nor did they consent to the oil exploration activities, and when they discovered and resisted those activities, the oil company tried to secure their compliance through various illegal means – including bribes, intimidation, and fraud. Ultimately, the Court found in favour of the Sarayaku People, ruling that they had not been properly consulted in line with international law.

One of the interesting things about this case is that the Court took the unusual and unprecedented step of conducting a site visit, travelling deep into the Amazon to themselves consult with the Sarayaku People.⁶ During this site visit the *yachak* (a spiritual leader of the Sarayaku People), Sabino Gualinga, described Sarayaku as ‘a living land, a living jungle’. In other testimony, he detailed different layers or ‘pachas’ of the jungle, including one at a subterranean level: ‘Beneath the ground, *ucupacha*, there are people living as they do here. There are beautiful towns down there, and there are trees, lakes and mountains’ (*Sarayaku v Ecuador*, para 150). The President of the Sarayaku People, José Gualinga, also described the profound interrelatedness of the forest system, claiming that ‘[the forest] gives us the power, potential and energy that is vital to our survival and life. And everything is interconnected with the lagoons, the mountains, the trees, the beings and also us as an exterior living being.’⁷

We want to draw attention to the way the Court hears these claims, because we think the Court fails to hear them as they are meant, or indeed as they deserve, to be heard. The first thing to note in this connection is that the claims are made by authorised spokespersons for the Sarayaku People, in the context of explaining the community’s opposition to oil exploration activities that would involve drilling under the ground and destroying parts of the forest.⁸ This context, together with the fact that there is nothing in the claims to suggest they are anything other than straightforward assertions, suggests that they should be interpreted as the Sarayaku People’s assertions about the state and nature of the environment under threat – about what is under the ground, and about how the different elements of the environment are profoundly interdependent.⁹ However, the Court’s judgment suggests that this is not the way they hear those claims. Without evaluating the truth of those claims – without appearing to consider whether there are people living under the ground or that the forest provides power, potential and energy that is vital to the community’s survival – the Court simply finds ‘the Kichwa People of Sarayaku have a profound and special relationship with their ancestral territory, which [...] encompasses their own worldview and cultural and spiritual identity’ (*Sarayaku v Ecuador*, para 155).

In contrast to the testimony that it receives from ‘expert’ witnesses – scientists, anthropologists and historians – the testimony of the Sarayaku People receives very different epistemic treatment. Their claims are not taken as bearing on the nature of the environment and the impacts of the drilling on that environment, nor are they added to or weighed against the testimony of environmental scientists. Rather, their claims are taken as expressions of their ‘worldview’ and ‘cultural identity’. This is particularly apparent when one views this treatment side by side with the way the Court treats the statements of, for example, the environmental engineering expert, William Powers. In his testimony, Powers described the likely impacts of drilling in the forest, including the clearing of vegetation, impacts on water courses, soil erosion, etc. These claims were not taken by the Court as expressive of William Powers’ ‘worldview’, but simply as straightforward assertions about the likely impacts of the proposed activities on the environment in question (*Sarayaku v Suriname*, para 174).

3. Consultation and Testimonial Injustice

We think that the Court’s treatment of Indigenous testimony in this case can usefully be viewed through the lens of Miranda Fricker’s notion of ‘testimonial injustice’ (Fricker 2007).¹⁰ Testimonial

injustice occurs when a hearer assigns a speaker lower credibility than is deserved, because of a prejudice about speakers of her sort. In typical cases, this means that the speaker is not believed by the hearer, even though she should be, and hence the speaker is prevented from sharing her knowledge. According to Fricker, this harms the speaker in her capacity as a knower or epistemic agent, by unduly excluding her from the communal epistemic practices of sharing and pooling knowledge. The speaker who suffers testimonial injustice is denied a fundamental form of epistemic respect. She is not treated as an 'informant' or active epistemic subject but only as a 'source of information' or epistemic *object* from which 'knowledge might be gleaned' (Fricker 2007, 132).

In the Sarayaku case, the speaker is the Sarayaku People, which speaks through its authorised leaders, while the hearer is the Court. Our suggestion is that the Court does not consider the Sarayaku People to be credible with respect to the nature of the environment, and so does not give their testimony about the environment any epistemic consideration whatsoever.¹¹ Instead, the testimony of the community about the environment functions for the Court only as a source of information about the community's culture or worldview. This amounts to what Fricker calls an 'extreme' kind of testimonial injustice characterised by a 'radical communicative dysfunction' (Fricker 2007, 140). Far from giving this community its say the Court here only succeeds in *silencing* them.

In cases of 'extreme' testimonial injustice, the speaker is perceived as so utterly lacking in credibility that her testimony is given no epistemic consideration at all. So it is not that her testimony is heard, understood and dismissed because of 'deflated' credibility, but rather that there *is* no 'genuine credibility judgment in respect of the speaker's utterance ... the [hearer] never really hears the [speaker] at all – her utterance simply fails to register with his testimonial sensibility' (Fricker 2007, 140). This kind of extreme testimonial injustice deserves to be called 'silencing', according to Fricker, because although the speaker is not really prevented from speaking, she may as well be. As far as the hearer's response goes, it is *as though* she (the speaker) has not spoken.¹²

It seems to us that this notion of radical testimonial injustice can help to illuminate what is going on in the Sarayaku case. The testimony of the community about the state and nature of its environment is *not* heard by the Court and then dismissed. Rather, this testimony does not even register with the 'testimonial sensibility' of the Court. This is suggested by the fact that the Court fails to entertain questions about the truth or falsity of that testimony. It seems plausible that this stems from a perceived utter lack of credibility in this domain. In contrast to the scientific experts called upon to give testimony, the Court does not recognise the Sarayaku People as having any epistemic authority to describe the state of the environment. Instead, the words of the community are seen by the Court as having an altogether different significance: they are to be used as evidence of what their 'worldview' is. In our view, this is a good example of the sort of epistemic objectification that Fricker sees as the primary harm in testimonial injustice.¹³ Instead of being treated as an informant capable of *sharing* knowledge, the community is treated instead as a mere 'source of information' from which knowledge – in this case, knowledge of the community's beliefs or 'worldview' – can be gleaned.

If this claim, that the Sarayaku People were subject to a radical form of testimonial injustice, holds true, one may still wonder just how problematic this really is. After all, the example may seem to lack the characteristic *systematicity* of the most troubling forms of testimonial injustice – the way testimonial injustice both tracks and entrenches a more general social disadvantage. In particular, it may seem that the Court's treatment of the Sarayaku People's testimony does not entrench or exacerbate the social disadvantage of the Sarayaku People; indeed, quite the opposite, for the Court here finds *in favour* of the Sarayaku People, and so this judgment ought to radically *improve* their social situation.

While we agree that Court's decision in this case is an important victory for the Sarayaku People, we nonetheless think the Court's treatment of their testimony has the potential to entrench a certain kind of social disadvantage, namely a kind of social epistemic marginalisation. To see this, it is important to note, first, that what the Court recognises in this case is the right of the Sarayaku People to be consulted. Hence, it does not prevent the State of Ecuador from licensing oil extraction or other industrial activities on Sarayaku territory.¹⁴ What the Court has done, however, is to provide Ecuador

with a way to interpret Indigenous testimony in any future consultation process – an interpretative practice that we have argued amounts to the silencing of the Sarayaku People. In determining whether to award a future licence for oil extraction, Ecuador is unlikely to consider the impact of such activities on the environment as it has been described by the community. It is unlikely to ask what the impacts of oil drilling will be on fauna, flora and the people living under the ground. Following the Court's lead, Indigenous assertions about the environment need not be taken as such. As a result, the Court might undermine the very advances it hopes to secure for the Sarayaku People.

It is also necessary to view the case in a wider legal context: as a precedent-setting judgment that will likely inform not only legal adjudication in the domestic courts of the member states but also actual consultation practices. It is no accident that in this case, which centres around issues of community consultation, the Court went to great lengths (literally) to themselves consult with the community in question. In our view, this was not simply a symbolic gesture but rather an effort to model a just, respectful and culturally-sensitive consultation process. The Court's efforts to go to the community (rather than have representatives come to the Court) is an effort to engage with the community in a manner that accords with the traditions and practices of the community. Insofar as the Court's own consultation with the Sarayaku People is meant to serve as an exemplar for the community consultation it requires of States, it is thus plausible that the interpretive practices of the Court – including the 'silencing' we have identified – will be perpetuated in consultation processes. In other words, because of its landmark status, the Court's judgment in the Sarayaku case threatens to entrench the practice of epistemically marginalising Indigenous communities, treating them not as *informants* with knowledge to share about their natural environments, but only as *sources of information* from whom knowledge, such as knowledge about their culture and worldview, can be gleaned.¹⁵

4. The Property Approach

The right to consultation is meant to ensure that Indigenous peoples participate in decisions that affect them. In conjunction with the recognition of this right, the Court and Commission have also sought to recognise and protect the rights of Indigenous peoples to their territories by adopting an expanded interpretation of the right to property. If the right to consultation is meant to give Indigenous communities a legally-recognised 'voice', the right to property gives them a legally-recognised 'language' in which to assert their rights and entitlements.

The Court and Commission have looked for ways to interpret human rights law¹⁶ so as to protect Indigenous territory, even in circumstances when these communities have been denied legal title or formal recognition of their rights. The Court has found that Indigenous claims to territory are protected by the right to property in Article 21 of the American Convention.¹⁷ Article 21(1) and (2) provide:

- (1) Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
- (2) No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

The right to property, the Commission has stated, 'must be interpreted and applied in the context of indigenous communities with due consideration of principles relating to the protection of traditional forms of ownership and cultural survival and rights to land, territories and resources.'¹⁸ In other words, the Court and Commission have adopted a broad interpretation of the right to property that is not limited to traditional, individual rights to own, use and dispose of material and immaterial goods.

One of the key ways in which the Court and Commission have sought to expand the right to property is through the recognition of a communal form of Indigenous land tenure (*Maya Indigenous Community of the Toledo District v Belize*, para 116). In the *Mayagna (Sumo) Awas Tingni Community v Nicaragua* case, a member of the community stated that ‘the lands are occupied and utilized by the entire Community. Nobody owns the land individually; the land’s resources are collective.’¹⁹ As a result, the Court found that ‘property’ need not be confined to individual rights to private property, but can also include the collective rights of Indigenous communities.

Another way in which the Court and Commission have sought to extend the right to property is to protect what these institutions see as the unique relationships Indigenous peoples have to their land, requiring different protections to classic property rights to ownership, use and disposal. The Court and Commission have found that Indigenous peoples have ‘distinctive’ and ‘special’ relationships with their territories, which ‘warrant special measures of protection’ and that the right to property must be interpreted to accommodate these relationships.²⁰ Over a number of judgments, the Court and Commission have read into and extended the right to property to include and protect interests in cultural identity, juridical personality, effective judicial protection, traditional law and the meeting of basic needs (Antkowiak 2013).

However, while the Court and Commission have adopted an expansive interpretation of the concept of property, they do not fully disassociate the concept from its colonial history, nor do they transform it into a concept apt for articulating Indigenous relations to land.

In the next section of this paper, we argue that the ongoing use of the concept of property by the Court and Commission amounts to what Fricker calls a hermeneutical injustice. This is most apparent when the concept of property is understood in its historical and colonial context. It is, after all, a concept that emerges from a colonial and historically imposed understanding of land (see Arneil (1992, 592); Dannenmaier (2008, 64); Singer (1989, 1827)). The refusal to recognise Indigenous relationships to land was at the heart of discriminatory practices associated with colonial rule. Theorists such as Locke (1988), Grotius (1925) and Vattel worked to justify colonial invasion on the basis that the colonised land was on ‘discovery’ no one’s property. Indigenous territory was classified as ‘unoccupied lands’, available for appropriation. Vattel argued ‘the savages stood in no particular need, and [...] made no actual and constant use [of the land]’ (as quoted in Dannenmaier 2008, 65). This refusal to recognise and understand Indigenous relations to land is one of the ways in which the material and cultural oppression of the colonial project went hand in hand with hermeneutic oppression.

A number of recent cases illustrate how, despite the expanded interpretation of property developed by the Court and Commission, it remains an ill-suited concept for articulating Indigenous relations to land. In the matter of the *Case of the Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* (2013) (Inter-American Court of Human Rights), the Court recognised the community as having ‘an almost umbilical relationship with the land, a vital relationship that can be perceived by the words they use, according to which the land is their mother and also their father’ (para 340). While the community describes land as family, Article 21 protects property, and property can be expropriated for reasons of public utility and on payment of just compensation. The concept of property does not envision familial or reciprocal relationships between Indigenous peoples and their territories.

Property is a concept also ill-suited to the idea that Indigenous identities and knowledge emerge from or are vested in their territories. For example, the Mi’kmaq people have said that ‘... it is our connection to land, and the life that lives on it, which make us human – to lose these connections is to become dehumanized and lost, while to maintain connections to land is to remain whole, not only as individuals but as peoples’ (Lawrence 2009, 49). In a case before a US court, Ammoneta Sequoyah, a Cherokee representative, argued that the knowledge of the Cherokee people is ‘in the ground’ and that if the valley was flooded (as the result of the construction of a dam), he would lose his knowledge of medicine.²¹ Property does not protect interests in identity and selfhood or knowledge.²² We do not have property rights in ourselves or our identities.

The fact that love, friendship, family, identity and knowledge are not generally considered to be property interests, and that they cannot be valued, sold or owned, suggests that there are limits to what an expanded interpretation of the property right can achieve. The concept of property cannot fully encompass the complex and reciprocal relationships that Indigenous communities have with their territories. As a result, it is a concept that still imposes a certain ideology of land onto Indigenous people.

5. Hermeneutical Injustice and the Property Approach

In our view, the fact that Indigenous peoples are required, in this context, to articulate their relation to land in the ill-suited language of property amounts to a form of *institutional hermeneutical injustice*. Hermeneutical injustice, according to Fricker, occurs when people of a certain socially disempowered type are precluded from rendering some aspect of their own experience intelligible because of a ‘gap’ in the available hermeneutical resources where these resources include more than just socially shared concepts, but also languages, social norms, social practices, narratives, and various other tools for understanding one’s own social experience and that of others.²³ In cases of ‘structural hermeneutical injustice’, this lacuna arises precisely because members of these groups are denied full participation in the ‘practices by which social meanings are generated’ (Fricker 2007, 152), thus leading to a bias or ‘structural identity prejudice’ in the ‘collective hermeneutical resource’.

As several commentators have pointed out, there is a crucial ambiguity in this formulation, which allows for two distinct forms of hermeneutical injustice. For the idea that one’s experience might be ‘obscured from collective understanding’ and that one might be prevented from making one’s social experience intelligible could be given either a *cognitivist* or a *communicative* reading (cf. Goetze 2018). On the cognitivist reading – which is given priority in Fricker’s early work – the gap in available hermeneutical resources renders one unable to make sense of or understand one’s own experience.²⁴ Victims of hermeneutical injustice are thus mired in a kind of ‘hermeneutical gloom’; they ‘find themselves having some social experiences through a glass darkly, with at best ill-fitting meanings to draw on in the effort the render them intelligible’ (Fricker 2007, 148).²⁵

In contrast, on the communicative reading, being unable to render one’s experience intelligible is a matter of being prevented from sharing with others – making intelligible *to them* – some aspect of one’s experience that one understands perfectly well. This too can be produced by a hermeneutical lacuna, in this case not a gap in the ‘shared’ resources, but rather a mismatch between the resources available to the speaker and the hearer. The several philosophers who have drawn attention to this form of hermeneutical injustice emphasize that hermeneutical resources are not wholly collective, gathered together into one set that is ‘shared’ by everyone (see e.g. Medina 2012; Mason 2011). And once we recognise that there is not some single collective hermeneutical resource but rather a plurality of discursive practices and resources developed by different groups of greater or lesser social advantage, it should be clear that not all hermeneutical injustice should be conceived as a ‘cognitive disadvantage’ on the part of its victims. From within their own marginalised discursive practices, the members of disempowered groups may have no trouble making sense of their own experiences. Their problem, then, may be better conceived as a *communicative* disadvantage – a matter of being rendered unable to intelligibly communicate one’s perfectly good self-understanding to dominant groups who lack the hermeneutical resources to understand them.²⁶ Furthermore, in many cases, including the one under discussion here, this kind of communicative disadvantage is no innocent ‘gap’ but rather a kind of *blockage* or ‘hermeneutical domination’ (cf. Catala 2015) through which the dominant group’s hermeneutical resources is actively imposed onto the non-dominant group.²⁷

Clearly, the cognitivist form of hermeneutical injustice is not what is involved in the difficulties faced by Indigenous people when articulating their relation to territory. These communities have highly developed customs, systems of knowledge, rituals and mythologies through which they are able to understand and describe their connection to their territory. They are by no means mired in

some sort of ‘hermeneutical gloom’, nor is there a conceptual lacuna that hobbles their self-understanding in this area.

The communicative form of hermeneutical injustice gets a lot closer to capturing the intuitive injustice faced by these Indigenous communities. The difficulty they face is not in gaining an understanding of their relation to their land but of articulating that relation in a foreign conceptual vocabulary. Yet even the communicative form of hermeneutical injustice does not seem to capture perfectly what is going here, because it does not seem quite right to frame this difficulty in articulation as a problem of *communicating*. That is, it does not seem right to say that the Court here is failing to comprehend the claims of Indigenous peoples vis-à-vis their relation to their land, or indeed that it is blind to the conceptual infelicities involved in transposing those claims into the language of property. In fact, the Court here makes a substantial hermeneutical effort to take those claims on board within the legal framework in which it operates. This is especially clear when we note the Court’s attempts to expand and finesse the legal concept of property, so as to accommodate the communal nature of Indigenous land tenure, and the *sui generis* relation Indigenous peoples have with their land. If there is a failure of understanding here, it cannot so easily be pinned on the Court.

We want to suggest that the hermeneutical injustice in this kind of case is not purely communicative, but that it has a distinctively institutional dimension. In this case, the relevant institution is the legal system in which the Court and the Commission operate. In order to have their claims about their relation to land count for something within this institution, Indigenous peoples need to articulate themselves using the operative ‘language’ or conceptual repertoire of this institution. The problem is that Indigenous communities have historically been hermeneutically marginalised within this institution, in the sense that they have not been allowed to be active participants in the practices through which the relevant legal concepts and their meanings have been developed. The result is that asserting themselves and claiming their rights means translating their lived experiences – including, crucially, their relation to land – into concepts whose meanings may be ill-fitting for those experiences, such as the concept of property. No notion of property can do justice to the idea that the land is one’s mother and one’s father; nor can it capture the sense that to be displaced from one’s territory is to be dehumanised. But because of the privileged institutional status of the concept of property, it becomes legally necessary to re-frame Indigenous experiences and relations to land in terms of this ill-suited concept. Insofar as this can be thought of in terms of Indigenous peoples rendering their relation to land ‘intelligible’, this is not so much a matter of communicating that relation to the Court as it is a matter of achieving a sort of legal intelligibility.

The cost of this hermeneutical injustice should not be underestimated; it means that the law is unable to serve these communities as it should. When communities are compelled to frame their claims before the Court as claims to property, they can at most receive protection of their property rights.

6. Conclusion

Our primary aim here has been to identify the sometimes hidden ways in which Indigenous communities have been victims of epistemic injustice within the Inter-American Human Rights System. We have argued that such communities have been subjected both to radical testimonial injustice and to a distinctive sort of institutional hermeneutical injustice. By way of conclusion, we will very briefly and sketchily consider the further question of how these practices of epistemic injustice might be addressed.

Fricker’s own proposal for addressing epistemic injustice is via the cultivation of distinctive corrective virtues – the virtues of ‘testimonial justice’ and ‘hermeneutical justice’. The virtue of testimonial justice, according to Fricker (2007, 92), ‘neutralizes the impact of prejudice in [the virtuous hearer’s] credibility judgements’, and can be exercised by the hearer doing such things as adjusting her credibility judgment upwards or reserving judgment when she suspects prejudice may be

influencing her assessment of a testifier's word. In recent work, Fricker (2012) has made it clear that this virtue is not restricted to individual hearers but is something that can and should be cultivated in collective bodies, including institutions such as courts (see also Anderson 2012).

It is not totally clear, however, how even an institutional virtue of testimonial justice would help to address the sort of *radical testimonial injustice* that we have suggested is involved in the Sarayaku case. This is because the virtue of testimonial justice is meant to have an impact on the hearer's credibility judgments, but radical testimonial injustice affects the hearer's perception of the speaker prior to questions of credibility. In cases of radical testimonial injustice, the hearer does not even recognise the speaker's speech for what it is – does not so much as recognise that the speaker is offering testimony – and so questions of the speaker's credibility with respect to that testimony never arise.

Since radical testimonial injustice is a fundamentally communicative dysfunction, perhaps it calls for a slightly different sort of corrective virtue – what might be called 'communicative justice'. Communicative justice means not allowing prejudicial views about a speaker, including views about the speaker's epistemic authority in certain domains, to distort one's perception of what a speaker is up to with her words – which communicative acts she means to perform. To have the virtue of communicative justice is to be open or attuned to what the speaker is doing. In the Sarayaku case, this would mean the Court is open to the possibility that the community is making assertions about its environment, rather than simply claims about its culture or 'worldview'.²⁸

As for hermeneutical injustice, Fricker suggests that this can be addressed by hearers giving speakers the epistemic benefit of the doubt when they struggle to make something intelligible. In other words, the virtue of hermeneutic justice requires hearers to display 'an alertness or sensitivity to the possibility that the difficulty one's interlocutor is having as she tries to render something communicatively intelligible is due not to its being nonsense or her being a fool, but rather to some sort of gap in the collective hermeneutical resources' (Fricker 2007, 169).

It should be clear, however, that this form of hermeneutical justice will not fully address the institutional hermeneutical injustice that occurs when Indigenous communities are required to articulate their relation to land in the ill-suited language of property. Indeed, the persistence of this kind of hermeneutical injustice is perfectly compatible with the Court and the Commission displaying exactly this virtue – displaying sensitivity to the hermeneutical challenges faced by these communities, and even attempting to mould the available hermeneutical resources to help these communities overcome those challenges.

Perhaps what is needed to address this particular sort of institutional hermeneutical injustice, then, is not a solution focused on the virtues of hearers but rather what Elizabeth Anderson (2012) calls a 'structural remedy' – one which targets the structural root of the problem. In this case, the root of the problem is that Indigenous peoples have been marginalised from the discursive practices through which the conceptual vocabulary of international law has been developed. One way to address this, then, would be to insist on greater participation of Indigenous peoples in these practices and to explore how Indigenous systems of law can be integrated into international law.²⁹

Notes

1. The Inter-American Court and Commission are regional human rights bodies dedicated to adjudicating disputes that arise in relation to the conduct of State parties to the American Declaration on the Rights and Duties of Man and the American Convention of Human Rights. Generally speaking, individual petitioners will only have recourse to the Commission and Court when they have exhausted all domestic remedies (including approaching domestic courts first). What this means is that by the time an Indigenous community approaches one of these bodies, they have likely been through various levels of judicial and quasi-judicial dispute resolution. Here we focus on the regional bodies as precedent-setting institutions that shape the interpretation of rights throughout the region. In future research, we will examine practices of epistemic injustice in domestic tribunals and whether and how these are impacted by the Inter-American system's jurisprudence. For more on the Inter-American system, see Townsend (2019).

2. Inter-American Commission on Human Rights, 'Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources' (2009); *Kichwa Indigenous People of Sarayaku v Ecuador* (2012) (Inter-American Court of Human Rights); *Saramaka People v Suriname* (2007) (Inter-American Court of Human Rights).
3. Group speech is a complex, philosophically challenging phenomenon, but giving an account of it goes beyond what is needed here. Instead, we shall assume that when a group authorises a spokesperson to speak in its name (within certain discursive and contextual bounds), the speech of that person (in those bounds) should be recognised as the speech of the group. This form of 'proxy' or 'authority-based' group speech is widely recognised in the literature (see e.g. Lackey 2018; Ludwig 2014), and in cases of consultation with Indigenous communities the speech of the communities often take this form.
4. See our Townsend and Townsend (2020) for an exploration of the treatment of Indigenous speech through the lens of feminist speech act theory, rather than epistemic injustice. We see these as complementary, rather than competing analyses, See footnote 12.
5. Here we refer to the Kichwa People of Sarayaku as the 'Sarayaku People' following a convention adopted in the Inter-American Court's judgement.
6. Typically, the Court would not undertake the consultation process in this manner but may (on finding a violation of the right to consultation) direct the state party to rectify their conduct by, among other remedies, undertaking consultation themselves.
7. *Ibid.*, para 152.
8. As mentioned above, we take it that speech of the community's authorized spokespersons in this case is to be counted as the speech of the community. In doing so, we are setting aside complex questions pertaining to dissent and power relations within the community, including questions about whether women and other social sub-groups are meaningfully included in the speech of the community. We hope to explore these intra-group dynamics in future work. Thanks to José Medina for suggesting this.
9. We acknowledge that our interpretation of the community's claims as straightforward assertions may be mistaken: the community may be engaging in 'mythical discourse' rather than straightforwardly describing the environment. More importantly, it may be that the distinction between an expression of a 'worldview' and straightforward description is not a feature of the community's discursive practice (cf. Tsosie 2017). Hence it would be helpful to know more about what the community took itself to be doing with these claims, and whether the community felt it had been properly heard by the Court. These are empirical questions, whose answers are obviously not contained in the Court's judgment – our primary source of evidence here. We plan to collaborate with a legal anthropologist in order to investigate such questions in further work.
10. Though our focus here is on the Court's reception of the community's testimony, it is worth noting that there is a prior instance of testimonial injustice involved in this example. That is, the fact that the Sarayaku community was not consulted by the State in accordance with international law can itself be classified as a sort of testimonial injustice – specifically, what Fricker calls 'pre-emptive testimonial injustice' (Fricker 2007, 130). Pre-emptive testimonial injustice occurs when certain groups are not called upon to share information at all. Thanks to Breno Santos for encouraging us to distinguish these two moments of testimonial injustice in this case.
11. Note that giving due epistemic consideration does not mean that the Court must accept or believe the claims made by the community. The Court may disagree with the community or favour the testimony of another party (in accordance with the relevant rules on evidence) while still giving due epistemic consideration to the community's testimony. Had the Court recognized that the community was describing the environment and found that the community was factually wrong, this would not amount to an epistemic injustice (although it may point to other kinds of injustices in human rights law and raise additional questions about the capacity of the law to accommodate diverse perspectives). Here our aim is to highlight the Court's failure to hear the community's testimony and not to answer the perhaps more complex question of what the Court should do once it recognizes the community's claims not as a cultural 'worldview' but as descriptive. Thanks to the anonymous reviewer for pushing us to clarify this point.
12. Note that Fricker (2007, 141–142) contrasts her model of silencing with the 'communicative conception' of silencing developed by Jennifer Hornsby and Rae Langton (Langton 1993; Hornsby 1995; Hornsby and Langton 1998), according to which a speaker's capacities to perform certain illocutionary acts in certain circumstances can be disabled because of her audience's failure to recognise what she is up to. However, as Medina (2012) has pointed out, these two conceptions of silencing are 'perfectly compatible'. In fact, it seems to us that the sort of silencing involved in radical testimonial injustice may be viewed as a species of the illocutionary silencing discussed by Hornsby and Langton, since the failure of a piece of testimony to register with the hearer's 'testimonial sensibilities' can be seen as a failure of uptake or 'reciprocity'. See Townsend and Townsend (2020) for discussion of the Sarayaku case within the Hornsby-Langton framework.
13. This is a point on which several philosophers (see e.g. Pohlhaus 2014; Davis 2016; Cusick 2019) have challenged Fricker, arguing that the primary harm of testimonial injustice is better understood as *othering* (or 'derivatisation') than as objectification. Though this issue (of what the primary harm in testimonial injustice is) is orthogonal to our main argument here, we follow McGlynn (2020) in maintaining that an objectification account, suitably construed, can accommodate the concerns these critics have raised.

14. There is a further question to be asked about the adequacy of the right to consultation as a means of protecting Indigenous interests in territory. Many have argued that Indigenous peoples should be secured not just a right to consultation but also to consent. For further discussion on this, see Townsend and Townsend (2020).
15. It is undeniable that hearing and understanding all testifiers as they intend to be heard and understood is not an easy or straightforward task for this or indeed any court. The difficulty here not only relates to the problem of addressing conflicting testimony (something courts are often required to do) but also of judges recognizing the ways in which their own assumptions and prejudices interfere with what they hear and understand in that testimony. In this paper, we highlight an injustice that is hidden, even to the Court itself. The Court has to recognize its own limitations as an audience before it can even begin to grapple with the challenge adjudicating between competing accounts of the world. Thanks to an anonymous reviewer for comments on this point.
16. The Court and Commission have looked beyond the American rights instruments and beyond relevant domestic law in their determination of the rights of Indigenous peoples. For a discussion on the Court's interpretive approach, see Lixinski (2010).
17. For more extended discussion of the Court and Commission's approach to Indigenous rights to property, see Townsend (2020).
18. *Maya Indigenous Community of the Toledo District v Belize* (2004) (Inter-American Commission of Human Rights), para 115.
19. *The Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001) (Inter-American Court of Human Rights).
20. See *Saramaka People v Suriname*; *Mary and Carrie Dann v United States* (2002) (Inter-American Commission of Human Rights); *The Mayagna (Sumo) Awas Tingni Community v Nicaragua*; *Sawhoyamaya Indigenous Community v Paraguay* (2006) (Inter-American Court of Human Rights).
21. *Ammoneta Sequoyah and others v. Tennessee Valley Authority*, (1980) (US 6th Circuit Court).
22. It is possible that Indigenous territory would be more suited to protection under rights to family (Article 17), or rights to physical, mental and moral integrity (article 5). Notions of selfhood and identity might be better protected under rights to dignity (recognised in articles 5 and 11).
23. Thanks to Breno Santos for encouraging us to adopt this broad construal of 'hermeneutical resources'.
24. The two main examples of hermeneutical injustice that Fricker (2007) gives – of post-natal depression and sexual harassment – can both be classified as 'cognitivist'. This focus has led some philosophers to suggest that Fricker has overlooked the communicative form of hermeneutical injustice (see esp. Mason 2011).
25. In more recent work, Fricker (2016) refers to this as a 'maximal' case of hermeneutical injustice.
26. Fricker (2016) refers to this sort of case as a 'minimal' case of hermeneutical injustice.
27. Thanks to Trystan Goetze, José Medina and Breno Santos for help in addressing this point.
28. This raises the question of what epistemic practices should be adopted by institutions such as courts to avoid prejudicial views distorting their perceptions, and how these practices might be accommodated within the often rigid framework of law and legal adjudication. We hope to explore these questions, as well as questions about the nature and cultivation of institutional virtue, in future work.
29. Obviously a lot more needs to be said about how such participation and involvement should proceed. For an interesting-sounding research project along these lines, see Paulo Ilich Bacca 'Indigenizing international law', blog of the American Philosophical Association: <https://blog.apaonline.org/2019/08/23/indigenizing-international-law-part-1-learning-to-learn-from-below/>

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