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Politics' Continued Erosion of Sustainable Development for Brazil's Indigenous Peoples

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| Brazil |

"La fiebre del oro, que continúa imponiendo la muerte o la esclavitud a los indígenas de la Amazonia, no es nueva en Brasil; tampoco sus estragos" (Galeano 2004)

The plight of indigenous peoples in Brazil tragically illustrates the progressive erosion of the pillars of sustainable development. Although indigenous peoples play a crucial role in promoting sustainable development *for all*, they have always been in the peripheries, suffering from widespread and pervasive discrimination, and often remaining invisible to policymakers and society in general. This not only affects their health and well-being (Coimbra Jr. and Santos 2000), but also their rights, access to justice, and the quality of justice that they receive (see Cunha 1994).

The provisions in the Brazilian Constitution, which aim at empowering indigenous peoples, have been progressively diluted throughout the years — not only on account of the avalanche of lawsuits respecting demarcation of their lands culminating with the 'Raposa Serra do Sol Decision' 2009[1]. On the one hand, the Raposa Serra do Sol decision affirmed the legality of the model of continuous demarcation of indigenous lands and rejected the thesis that this would constitute a violation of the Brazilian sovereignty. However, on the

other hand, the decision established the so-called temporal frame of the occupation ("marco temporal de ocupação") pursuant to which indigenous people have the right to the lands that they occupied at the time the Constitution was enacted (October 5, 1988); and established nineteen institutional safeguards on the use of the lands. In what interests us here, these safeguards restricted the indigenous communities' right to participation in the decision-making respecting their lands by setting forth, among other things, that "the exploration of strategic energy alternatives … at the discretion of the competent bodies (Ministry of Defense and National Defense Council), will be implemented irrespectively of consultation with the indigenous communities involved" (emphasis added). Despite the strong criticism levelled against the temporal frame and many of the safeguards, on grounds that they create new laws (Yamada and Villares 2010), Raposa Serra do Sol became a leading case, which has been reaffirmed thenceforth, and which became binding upon the federal authorities in respect to any demarcation of indigenous lands (Advocacia Geral da União 2017). , but, also, of the incapability of the State to enact the laws necessary to bring these provisions to full life.[2]Since the enactment of the Constitution, the Brazilian Parliament has been discussing different draft legislations purporting to regulate the provisions in the Brazilian Constitution respecting exploration of resources in indigenous lands and respecting the rights of indigenous communities over their lands. The inability to reach an agreement on any of them shows the complexity of the topic, as the debates at a recent open session at the Commission for Human Rights and Minorities of the Brazilian Chamber of Deputies illustrate (Câmara dos Deputados do Brasil 2019). To an extent, the inability of Parliament to adopt the necessary laws regulating the topic is behind the Raposa Serra do Sol decision (Yamada and Villares 2010).But it is with the current political leaders, who call for a new type of "gold rush," a rush for minerals and energy resources, that discrimination becomes canalised into official discourse (Survival International 2020).

Discrimination finds its way into official policies which attempt to facilitate the use of indigenous lands for certain activities, as illustrated by a recent draft legislation of the government's authorship, regulating the exploration of minerals and energy resources in indigenous lands (Poder Executivo 2020), which is forcefully rejected by the indigenous communities for eroding their rights (Associação dos Povos Indígenas do Brasil (APIB) 2020a). To persuade the public of their agenda, these leaders invoke *resources* and *cultural* nationalism, affirming the urgent need to protect the country's "culture" and "resources"

against those described as others (for example, Presidente da República do Brasil 2019).

Indigenous communities (as well as international organisations, non-governmental organisations, and even academics) are invariably among the others who need to be "integrated into our society" (Bolsonaro 2019) (or expelled, or silenced). In reaching out to the masses and circumventing institutions, leaders play the old game of populism, which is well-known in Latin America (Svampa 2019). But these leaders are also playing a new game that can be described as post-truth right-wing authoritarianism. They make ample use of social media to impart *hatred* for others into their audiences, engaging in a pedagogy of *monsterisation* (similar to what is described in Fernandes, Souza e Silva, and Barbosa 2018) that is grounded on resources and cultural nationalism. Therefore, nationalism becomes a strong norm that displaces the norms and the principles of justice that underpin sustainable development.

The response to this type of politics requires the strengthening of *norms* and *justice* to promote sustainable development *for* the peripheries and, in this manner, sustainable development for all. With our attention placed on the Brazilian indigenous peoples, in this short article, we argue that sustainable development is a work in progress; we discuss the importance of certain norms for ensuring sustainable development, and the manner these norms have been eroded by the current political games, and finish with some thoughts on justice.

Sustainable development as a work in progress

The idea of sustainable development for all rests on a fragile equilibrium between meeting the needs of the present generations "without compromising the ability of future generations to meet their own needs" (World Commission on Environment and Development 1987). The pursuit of this equilibrium offers solid grounds for a pedagogy of coexistence in which *solidarity* substitutes for hatred for the "others" (cf Fernandes, Souza e Silva, and Barbosa 2018).

But striking this equilibrium is a difficult task. First, not all members of the present

generations have the same level of power in the decision-making that affects them. Second, future generations do not have any say in the present-day decision-making that will affect their lives. Third, participation is not enough: some decisions that affect both present and future generations — for instance, those concerning adaptation to climate change, management of ecosystems or just transition to a low-carbon economy – are complex and require both scientific and traditional knowledge.

This is why it is necessary that the most vulnerable individuals and communities, those in peripheries, such as indigenous communities, be able to effectively participate in the decision-making that affects their lives; and that norms be in place to guide present generations when making decisions so as to not jeopardise the most vulnerable in the present and in the future.

At the national level, modern constitutions establish the fundamental norms to guide decision-making. Dozens of constitutions across the world affirm the objective to promote sustainable development. Some go further: the Ecuadorean Constitution affirms that *nature* "has the right to *integral respect* for its existence and for the *maintenance* and *regeneration* of its life cycles, structure, functions and evolutionary processes" (Ecuador 2008). Constitutions also establish mechanisms for the individual and community to participate in decision-making on issues that affect their lives.

The Colombian constitution states that "every individual has the right to enjoy a healthy environment" and calls for the "community's participation in the decisions that may affect it" (Colombia 1991). Likewise, constitutions attempt to empower those who are vulnerable. Article 231 of the Brazilian constitution upholds that "utilization of water resources, including their energy potential, and prospecting and mining of mineral wealth on indigenous lands may only be done with the authorization of the National Congress, after hearing from the communities involved" (Brasil 1988).

So, in different constitutions, norms that promote sustainable development are similar, which is not accidental. This diffusion of norms across countries is pushed by international processes (cf Risse, Ropp, and Sikkink 2013; Droubi 2017). In fact, many of these norms are supported in international treaties (for instance, 'Convention C169' 1989; 'Paris Agreement'

2015). Article 231 of the Brazilian Constitution, for instance, finds a place in the context of Convention C169, which is mandatory to countries, such as Brazil, which have accepted it.

This Convention affirms that “governments shall establish or maintain procedures through which they shall consult [indigenous] peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands” (‘Convention C169’ 1989, Art. 15[2]). But international efforts complement the national efforts in another way, for instance, when the UN affirms that, irrespectively of national laws, businesses have the *international* responsibility to carry out due diligence to ascertain the human rights impacts of their activities including by means of “meaningful consultation” with the affected communities (UN OHCHR 2011, Principle 18; see Droubi 2015).

There have been transnational efforts, carried out by myriad international and national actors, to strengthen norms that are crucial to securing sustainable development for all. We call these actors norm entrepreneurs: they are those who bring visibility to the peripheries; define problems that affect them; promote norms to address these problems, and help society understand and internalise these norms up to a point where compliance with them is “automatic.” As more individuals become aware of the problems, and comply with these norms, they demand compliance from other actors — such as businesses and governments. To talk about sustainable development is to talk about a work in progress at the national and international levels, aimed at the building of individual and collective identities, so that sustainable behaviours be seen as “natural.” Below, we discuss some of these problems and norms.

From ecological sustainability to indigenous knowledge and participation

The idea behind the principle of ecological sustainability is not new (Boff 2017), and this principle requires that economic activities be developed with respect for the carrying capacity of ecosystems (Ross 2009; Bas Vilizzio et al. 2019). It is important for all pillars of

sustainable development — the economic, the environmental, and the social. For instance, it is clear today that unsustainable exploitation of resources leads to the destruction of ecosystems, which jeopardises human health (Corvalan, Hales, and McMichael 2005; Aragão et al. 2016; Galvani et al. 2016). Notably, the destruction of ecosystems displaces animals who come closer to human habitats, facilitating the transmission of pathogens across species, to humans, causing epidemics (Sttele et al. 2020; Vidal 2020).

This creates pressure on public institutions, such as health systems, which fail to deliver on their objectives. While this affects whole populations, it is particularly injurious to the peripheries (for instance, APIB 2020b; Food and Agriculture Organization of the United Nations 2020; also, Cambricoli, Santana, and Nogueirão 2020; Laughland 2020). Because the peripheries are the most affected, inequality rises, increasing social distress. Hence, ensuring ecological sustainability is paramount, but this principle also depends on respect to other norms.

To be sure, the protection of the carrying capacity of ecosystems involves decisions about complex issues, which requires specialised knowledge — not only scientific but also traditional knowledge. As judge Weeramantry of the International Court of Justice explained, a decision-maker should "bear upon [the analysis of a situation] the *scientific* knowledge available" at the time the analysis is carried out ('Nuclear Tests (Revision) Case' 1995). This is the principle of inter-temporality, which is also affirmed in the Kyoto Protocol and the Paris Agreement ('Doha Amendment to the Kyoto Protocol' 2012; 'Paris Agreement' 2015).

Recent studies suggest another aspect of the principle, which refers to *indigenous and local* knowledge about management of the environment, which is proving crucial for protecting ecosystems (Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services 2019) and adapting to climate change (Adger et al. 2014). Evidently, complying with the principle of inter-temporality, here formulated to encompass traditional knowledge as well, creates challenges in theory and in practice. From an epistemological viewpoint, for instance, there arise questions about the manner scientific and traditional knowledge are to be conciliated (for an interesting discussion, Santos 2007).

In practice, decision-makers often encounter insurmountable difficulties in transforming scientific recommendations into policies (Droubi 2020). What is more, the design of political institutions and processes is not usually receptive to different cosmologies, especially those from the peripheries.

Multiple studies show that nature declines less rapidly in indigenous lands, and that the *participation* of indigenous communities in decisions respecting their lives enhances the protection of ecosystems (Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services 2019, B6, D5). So, not only does their participation improve the prospects that their needs are properly met (World Health Organization 1999); but it also helps protect the environment for present and future generations. Moreover, the Interamerican Court of Human Rights affirms that indigenous communities have the *right* to participate in the decision-making in respect to economic activities in their territories ('Sarayaku v. Ecuador Case' 2012; see Droubi 2015, Courtis 2009). Actually, the call for their participation has a long pedigree, as the 1987 Brundtland Report illustrates (World Commission on Environment and Development 1987).

As to the substance of the right to participate, Convention C169 requires governments to consult indigenous people in good faith and in a form appropriate to the specific circumstances of a case; and to have proper procedures in place that enable indigenous peoples to *freely* participate at *all* levels of decision-making and give their *informed* agreement or consent to a decision (ILO Convention C169; see also UN 2017, Article 19).

So, participation should not be reduced to a tokenistic exercise[3] Yet, the risk of becoming a tokenistic exercise seems always present, and many of the implications of this situation are not immediately understood. In a recent debate, a member of the Federal Prosecution Service warned that, in the present context of high levels of violation of indigenous rights (he illustrates with the presence of more than twenty thousand illegal miners in the Yanomami reserve alone), the debates about draft legislations regulating the exploration of minerals and energy resources in indigenous lands may have the effect of legitimising present violations (Câmara dos Deputados 2019)..

The populist charge against norms, institutions

and actors

The current right-wing populist wave, marked by cultural and resource nationalism, attempts to establish a type of new constitutional moment — that is, a profound renewal of norms and institutions, including those which are there to protect indigenous communities. Populism finds much of its legitimacy by invoking resource nationalism, which becomes a powerful norm, competing with and prevailing over principles such as ecological sustainability, inter-temporality, and participation. It is also a norm that justifies an attack on institutions: national institutions are circumvented (Alessi 2020); international institutions are denounced (Alves 2020). In the name of nationalism, peripheries and norm-entrepreneurs are silenced, and universities and academics are decried and attacked (Scholars at Risk 2019). In short, the norms, institutions and actors who have been promoting sustainable development for indigenous and other vulnerable communities are eroded and weakened.

Much of this becomes clear, for example, in the Brazilian president's speech that opened the works of the UN General Assembly in 2019. In one go, he lectured about sovereignty over the Amazon in the narrowest of the terms; defended the exploitation of gold and other minerals in indigenous territories; affirmed that non-governmental organisations want to keep native Brazilians in the condition of "cavemen"; attempted to replace a well-known indigenous leader, who has been acting as a norm entrepreneur for indigenous rights, with someone of his own choice; and called for the principle of sovereignty, and for all international and domestic laws, to be guided by his version of the Christian faith (Presidente da República do Brasil 2019). On the ground, invasions of indigenous territories by armed individuals and groups looking for minerals, have spiralled out of control (Reuters 2019); while the government reportedly uses the pandemic to push for the legalisation of past and current invasions (APIB 2020b; D. Phillips 2020) and the weakening of environmental protection (Colombari and Mesquita 2020). Warnings about an impeding genocide multiply (Phillips 2020). All this has been causing a profound change in the identity of the country (Passarinho 2019).

Clearly, the response to populism requires the strengthening of norms and actors. But if

populism relies on a narrow version of resource nationalism to justify an unsustainable exploitation of resources, the norms underpinning justice, and energy justice in particular, emerge as a strong force against populism — and in favour of sustainable development (UN 2019).

New Justice for Indigenous Communities, for all

The erosion of justice for indigenous communities continues to happen worldwide (see Tzai 2019). As indicated previously, it is evident in particular around a race for resources. These resources are of different types but generally contribute to economic development and it can be stated that in many cases the race is only set to continue. The demand may change for the different types but overall it will remain the same in terms of continued impact on indigenous communities and even local communities in general. Economic development continues at a pace where societal inequality continues to rise.

Multiple Nobel Prize Winners of recent times have focused on the rise of inequality. These include Joseph Stiglitz for example, and even 2019 winners Esther Duflo and Abhijit Banerjee. Actions against indigenous communities result in the continuation of inequality in society; they have never resulted in positive benefits to rectify the problems created. In essence, the lands of indigenous communities are exploited, and the revenues extracted are not distributed fairly.

Society has been moving on and there is a growing realisation that more justice in society is needed. At the core of the problem is the race for energy resources, and when these resources are being extracted, this should happen in accordance with a new set of norms. The ‘old’ way of doing things has clearly not worked. Indeed, there is widespread recognition of this worldwide. The new research area of ‘energy justice’ has arisen to address this call for more justice so as to ensure issues of inequality are addressed (Heffron and McCauley 2017).

At the core of energy justice are the application of five key forms of justice (Heffron and McCauley 2018), which are:

- *Distributive justice*: this concerns the distribution of benefits from the energy sector and also the negatives (i.e., are oil and gas revenues shared sufficiently?; who suffers the environmental damage?);

- *Procedural justice*: the focus here is on legal process and the necessary full legal steps (i.e., are all the steps for an environmental impact statement observed?);

- *Recognition justice*: are rights recognized for different groups in society? (i.e., in particular are we recognizing the rights of indigenous communities?);

- *Cosmopolitanism justice*: this stems from the belief we are all citizens of the world and asks if we have considered the effects beyond our borders and from a global context?;

- *Restorative justice*: any injustice caused by the energy sector should be rectified. This form focuses on the need for enforcement of particular laws (i.e., energy sites should be returned to former use, hence waste management policy and decommissioning should be properly done).

These five forms of justice need to be applied to ensure more beneficial outcomes for society from resource exploitation, in particular where indigenous communities are concerned (see 'recognition justice'). The benefit of these forms of justice, which collectively can be stated as forming the essence of 'energy justice,' is that they aim to address the problem before it is created. Too often the focus on climate justice and environmental justice comes only after the problem is created. There needs to be accountability and action to address inequality, and these must begin at the source of the problem activities around resource exploitation.

There are legal steps here in terms of Environmental Impact Assessments, but clearly these are not enforced worldwide and do not meet the five forms of justice that energy justice consists of. Indeed, Environmental Impact Assessments only apply at the project development phase, and in the majority of countries there is no formal monitoring of the operation of the project or the closure of the project. That is changing, but were this addressed over the full project lifecycle, perhaps only then would indigenous communities

not suffer. In this context, early steps have been made in some countries in developing a 'social-licence-to-operate' mechanism (Heffron et al. 2018).

Indeed, Colombia, for example, has been more progressive in protecting indigenous communities than Brazil with a type of 'social-licence-to-operate.' In a few cases, the project developer and indigenous and local communities were not able to reach an agreement despite the promise of major expenditure by the project developer. As a result, the project did not go ahead (Heffron et al. 2018). In essence, the project developer was unwilling to meet new norms (i.e. ensure energy justice was considered in terms of the five forms of justice) that had been demanded. In legal terms, Colombia had moved beyond having Environmental Impact Assessments as its only major legal hurdles in securing permission to extract (and in essence exploit resources).

Towards a New Dynamic — Sustainable Development for All

All of society has to take a role in addressing the injustices suffered by indigenous communities in Brazil. Development in the lands of indigenous communities, the attacks on their way of life, and their displacement into marginalised communities who suffer inequality should not be at the whim of a 'strongman' type of political leader. Consistent and independent actions that are grounded in seeking and ensuring *participation* (and inclusion as broadly defined) and *justice* need to apply to these communities in Brazil.

The bolstering of sustainable norms and procedures, which promote free and informed participation in the decision-making and the effective delivery of justice, are mechanisms that contribute to the empowerment of indigenous people, allowing for their cosmologies and knowledges to be recognised in their own terms, rather than in contrast to the hegemonic cosmologies and knowledges, in contrast with the hegemonic definition of "nationalism" (in other words, participation and justice contribute to the strengthening of a paradigm of potency, as described in Fernandes, Souza e Silva, and Barbosa 2018).

Here we call for indigenous communities to be treated under new emerging international norms of energy justice. If all stakeholders involved in resource extraction are accountable under energy justice norms (i.e. through, *Distributive justice*, *Procedural justice*, *Recognition justice*, *Cosmopolitanism justice,* and *Restorative justice*) then any development that does occur will ensure that indigenous communities do not suffer the disadvantages of economic development and or enter into a pathway of inequality, one which has been created for too many already in the existing system. It is time for change, and as stated earlier, several of our other South American nations are already taking action. This call for energy justice needs to move beyond the short-term nature of current politics.

We also call for the reaffirmation of the norms underpinning sustainable development. We call for norm-entrepreneurs — indigenous leaders, human rights defenders, academics — to be recognised for the important role they play in helping society learn new attitudes and adopt new behaviours. Their effort has already proved important: for instance, big mining companies seem more cautious in what concerns the exploration of minerals in indigenous lands (Fellet 2020). It is increasingly clear that the destruction of the environment may lead to events such as the current pandemics, placing institutions under stress and further increasing inequality. So, today more than never, it is important for all segments of society to understand that indigenous knowledge helps in the protection of the environment, in the management of ecosystems, and in the adaptation and mitigation of climate change. The participation of indigenous peoples in decision-making fosters sustainable development for all.

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