

Strategic Litigation Impacts

EXECUTIVE SUMMARY



INDIGENOUS PEOPLES' LAND RIGHTS

OPEN SOCIETY JUSTICE INITIATIVE

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Open Society Justice Initiative



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Cover photo: Tony Karumba | AFP | Getty
On the cover: Endorois elders perform a ritual on March 20, 2010 on the shores of Lake Bogoria.
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Executive Summary

“The community now believes they exist and they have a future. The case gave them psychological healing.”

—Charles Kamuren, Endorois Welfare Council, Nakuru, Kenya, July 2016

“We now have confidence that we have control over our land and that we have the right to fight for our rights.”

—Ilam Senin, Kampung Orang Asli Bukit Tampoi village, Malaysia, August 2016

“After the ruling we had many meetings and debated for a long time what to do. It made us think and talk about our struggle more. The resolution from the court was important and it made us stronger. It spoke of a truth.”

—Serafin Lopez, Xákmok Kásek community, Paraguay, July 2016

The right to land constitutes the basis for access to food, housing, and development, and is therefore an essential human right. But it is unlike other human rights in at least one respect: the possibility to enjoy it is, for most people, rapidly and permanently disappearing. In particular, indigenous peoples, who represent roughly five percent of the world’s population, struggle to exercise their right to land, forced to cede ground to state development, corporate land grabs, armed conflict, rising sea levels, and exponential population growth.

According to the World Bank, “[w]hile Indigenous Peoples own, occupy or use a quarter of the world’s surface area, they safeguard 80% of the world’s remaining biodiversity. Some of the most biologically important lands and waters are intact as a result

of Indigenous Peoples' stewardship. They hold vital ancestral knowledge and expertise on how to adapt, mitigate, and reduce risks from climate change and natural disasters. However, only a fraction of these lands are officially recognized by states, whether they are lands Indigenous Peoples traditionally owned or possessed under customary title." The inability of the world's roughly 370 million indigenous peoples to access and control their land threatens their very existence and acutely jeopardizes proper management of this unique global good.

The rule of law should be an essential protection against these existential threats. In recent years, indigenous peoples have increasingly turned to the courts as non-legal tactics—such as protests—have failed to protect their historic lands from arbitrary seizure and their communities from eviction and the ensuing destruction of their livelihood and culture. Non-litigation actions such as protests are increasingly being met with violent attacks, such as the 2016 assassination of Honduran activist Berta Cáceres. In 2015 alone, 185 environmental activists were killed, 42 of whom were simply participating in protests.

Around the world, existing power dynamics strongly privilege almost all other economic and political interests over those of indigenous peoples. Today, indigenous peoples are three times more likely than others to live in extreme poverty. But the guarantee of equality before the law makes litigation a particularly promising way for indigenous peoples to attempt to right this extreme power imbalance and exercise their right to land. Since the introduction of protective legal norms, notably the International Labour Organisation's Indigenous and Tribal Peoples Convention in 1989 and the UN Declaration on the Rights of Indigenous Peoples in 2007, more and more indigenous peoples have turned to the courts to seek remedies, using litigation as a significant element of their broader strategies to protect their ways of life. Litigation on land rights is now a growing, global phenomenon. This study seeks to shed light on the impacts of strategic litigation on indigenous peoples' exercise of their rights to lands and territories.

There is significant extant literature concerning indigenous engagement with litigation in common-law countries such as Australia, Canada, New Zealand, and the United States, but less is available regarding litigation for the rights of indigenous peoples in other jurisdictions. This study focuses on three highly diverse countries which have significant, long term, if less well known, experience with litigation on land rights: Kenya, Malaysia, and Paraguay. The report offers insights into the distinctive nature of litigation as a strategy to fulfill indigenous peoples' right to land, but also questions its effectiveness.

The use of strategic litigation as a tool to secure indigenous peoples' land rights has been fraught with obstacles and shortcomings. Chief among them are courts' typi-

cally weak knowledge of relevant legal norms, and their tendency to focus on formal law and land title, which ignore indigenous customs and land usage, and the international customary law statutes that protect them. Indigenous peoples and their legal teams are usually submitted to legal processes which impose an onerous burden of proof on the indigenous plaintiffs. Furthermore, the general political and economic playing field is tilted against indigenous rights, usually favoring formal, individualistic, and commercial land possession. Other challenges are more material, including a general lack of affordable legal aid, language barriers, political and judicial corruption abetted by wealthy land developers, and the physical remoteness of plaintiffs from courts.

Fortunately, despite the obstacles, litigation has proven to be an increasingly effective vehicle to challenge the lack of recognition of land rights for indigenous peoples. As the dozens of semi-structured interviews illustrate, strategic litigation had a particularly empowering impact on communities, their sense of agency, and their awareness of their rights. With several landmark decisions on the books in each of those countries, it is clear that strategic litigation can be a game-changer in what some scholars refer to as “unlocking” or “reframing” land disputes that were usually lost by indigenous peoples in the past.

Three broad categories of “impact” frame this and the other studies in the Strategic Litigation Impacts Series: (1) material outcomes (both direct and indirect); (2) judicial, jurisprudential, institutional, and policy changes; and (3) impacts on attitudes and behaviors toward and of indigenous peoples and their rights to. Field researchers gathered testimony from a diverse range of actors, including members of the concerned indigenous communities, public officials, NGO leaders, lawyers, paralegals, activists, journalists, government officials, judges, corporate officials, policy-makers, and representatives of non-affected communities. Together, this testimony is intended to provide a “360-degree” perspective on this complex topic.

Below are the report’s principal findings.

1. **In most situations, legal pleadings on behalf of indigenous peoples did not begin as “strategic litigation” per se.** Previously inchoate or discrete litigation efforts were typically made more “strategic” over time by being deployed together with other advocacy tools, generating progressive jurisprudence that could benefit others. It was not until the cases reached a higher court (either nationally or internationally) that they were viewed as possible vehicles for social change beyond the interests of individual claimants.
2. In all three countries, the communities’ previous attempts at negotiation, mediation, and dialogue had not borne fruit. Indigenous communities were left with no realistic alternative but to seek justice through the courts. **Even if it was their**

last resort, many interviewees described how taking legal action became a central element of their struggle, whether or not it resulted in restitution.

3. **Implementation of judgements in favor of indigenous communities was uniformly poor.** In several instances, indigenous peoples won a case in court, but reaped limited material benefits due to the state's failure to enforce the judgment.
4. **Even if implementation was absent, winning a case proved to be significant at all three levels of impact.** The positive rulings put potent political tools into the hands of the indigenous communities that they probably could not have wielded had they not brought suit. For example, some indigenous communities were able to return to their historic lands in Paraguay following unlawful eviction, because the positive ruling emboldened them to simply move back. And the fact of **a win in court prompted positive feelings of empowerment, rights awareness, and self-advocacy (non-material impacts)**. Sometimes, a win inspired other communities to file, generating more broad-based pressure on the courts to address systemic rights violations.
5. Strategic litigation usually took place in a very challenging environment, in which land rights were not properly protected or embedded into the legal framework of the state. In such contexts, litigation offered a platform for indigenous peoples to challenge the state's failings. As demonstrated in the research for this study, **litigation prompted a new interpretation of the law to counteract the lack of land rights recognition**. In this scenario, the judiciary interpreted the existing legal framework in ways that enhanced the integration of indigenous customary land rights.
6. Indigenous communities usually sought material remedies, such as land title, monetary compensation, health services, access to education, or paid jobs. Cash awards, in the form of damages or compensation, constituted an important source of alternative income for some communities. Material remedies also advanced their enjoyment of social and cultural rights. Hence, **it is important to judge the impacts of these efforts by looking at the broader economic and social rights that these judgments may secure**.
7. An important non-material result of litigation was that the legal challenge supported the development of new power relationships between the concerned communities and other interests, notably private actors. **It sometimes contributed to challenging the imbalance of power that the state and private companies uniformly enjoy over indigenous peoples.**

8. **Politically, strategic litigation for indigenous peoples' land rights had limited effect on government policy.** In the three concerned countries, there was no direct executive or legislative action to give effect to any judicial pronouncements favorable to indigenous peoples. **However, litigation did have a substantial impact on the work of some state institutions,** sometimes leading to the establishment of new institutions and administrative practices for monitoring, supporting, or negotiating indigenous peoples' concerns (such as in Malaysia and Paraguay) or implementing related judgments (such as in Kenya).
9. Even where material gains were minimal or contested, strategic litigation generated non-material outcomes, such as shifts in attitudes and behaviors within the judiciary and within the communities themselves. Across the three countries, many members of the communities at issue reported that the process of litigation, separate from any resulting judicial decision, sometimes caused internal rifts and changed traditional decision-making processes, while at other times it provided a sense of empowerment. Overall, **there is evidence that strategic litigation substantially improved rights awareness and a sense of agency among concerned communities.** The way the communities organized, and the degree to which they were united (or not), played crucial roles in affecting whether cases were successful, and whether positive judgments were ultimately implemented.
10. **Strategic litigation influenced attitudes and behavior toward indigenous peoples' right to land among external stakeholders as well.** For example, it prompted civil society organizations and donors to lend the community their support, leading to the development of joint post-litigation advocacy strategies among mainstream civil society actors who might not have engaged with indigenous peoples previously and provision of development funds. However, strategic litigation had little apparent impact on mainstream society's perception of indigenous people and their rights. **It did little to change negative and often discriminatory attitudes of non-indigenous populations.** While some positive impact was noted in generating more evenhanded or supportive media coverage and more respectful language from state institutions, by and large the act of litigating appeared to have had a more powerful impact on the indigenous communities than on the majority populations.

Open Society Justice Initiative

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The world is increasingly encroaching on indigenous peoples' traditional lands. Around the globe, indigenous communities are forced to cede ground to state development, corporate land grabs, rising sea levels, environmental degradation, and population growth. The right to land provides the basis for access to food, housing, and development. But for indigenous peoples, traditional lands are more than this; they represent essential ties to their ancestors, their culture, and their languages. Losing their land means losing their way of life.

In recent years, indigenous groups have increasingly turned to the courts as non-litigation tactics such as protests have failed to protect their lands from seizure and their communities from eviction. This comparative study, based on dozens of interviews in Kenya, Malaysia, and Paraguay, examines the ways indigenous communities and their advocates are using litigation in an effort to defend their rights and win compensation. In so doing, it finds a sobering reality: even when successful in court, indigenous groups rarely get their land back. They can also suffer financial loss, breakdown of community cohesion, and reprisal. But the study does find benefits of litigation, including gaining alternate lands and financial compensation, better informed courts and general populations, and community empowerment. It also reveals the importance of less quantifiable results of litigation, including official apologies, increased group cohesion, and cultural renewal.

This study—the third in a five-part series examining the impacts of strategic litigation—takes a clear-eyed view of the promises and limitations of using litigation to assert land rights. It suggests that while litigation is no panacea, it can still be a helpful tool for indigenous groups seeking to defend their culture, their livelihoods, and their traditional lands.



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