

CONFERENCE REPORT

The Impacts of Strategic Litigation on Indigenous Peoples' Land Rights

NAIROBI, 21-22 JUNE 2016

The Open Society Justice Initiative convened a two-day consultation of 40 diverse stakeholders to reflect on the impacts of strategic litigation on indigenous peoples' enjoyment of their land rights. The comparative inquiry drew on the experience of three focus countries: Kenya, Malaysia and Paraguay as well as regional judgments. The meeting was held within the framework of a multi-year inquiry to sharpen shared understandings of the achievements, limitations, risks, and ultimate impacts of strategic litigation around the world. Members of six different indigenous communities together with their attorneys, land rights activists, a government official, scholars and others interrogated the impacts of this critical legal advocacy tool.

Below is a summary of comments arising from the discussions. They are offered in the hope that the insights and good practices identified could contribute to the ever more effective use of strategic litigation around the world and spark further innovations. (Some good practices were articulated on a subsequent joint workshop with the Katiba Institute, see p. 8). Among the findings:

1. Indigenous peoples' struggle for access to and control of their historic lands using the courts is relatively new and statutorily weak. The rights' justiciability has been tested only since the 1990s or so; as a result, drawing conclusions about these cases' impacts is somewhat premature. Nonetheless, strategic litigation has already been correlated to some positive results, such as restitution of historic lands, monetary compensation, community empowerment and the development of more progressive jurisprudence.
2. But the extenuated legal process can cause severe financial and psychological hardship on claimants and rifts within communities. In the worst cases, negative judgments can permanently close off legal avenues for indigenous communities to enjoy their land rights and saddle communities with retrograde jurisprudence that will adversely affect all people seeking relevant remedies in that jurisdiction.
3. There is a strong need for better and faster implementation of judgments; more and better documentation of historic habitation; more resources for litigators and for judicial training; and for any legal action to be accompanied by robust advocacy.
4. The nascent legal framework enshrining indigenous peoples' right to their historic lands and the complex, multi-dimensional nature of their attachment to the land, creates distinctive challenges for proper legal argumentation and strategies.

Contents

Introduction	2
Material Impacts of Strategic Litigation	3
Policy and Judicial Impacts of Strategic Litigation	4
Non-material Impacts of Strategic Litigation.....	5
Challenges to Effective, Sustainable Litigation	6
Contributing Factors to Effective Strategic Litigation of Indigenous Peoples' Land Rights Cases	7
Annex: Good Practices for Litigating for Indigenous Peoples' Land Rights	9

Introduction

1. In 2014 the Open Society Justice Initiative (JI), began to look for empirically based insights into the use of strategic litigation as a social-change agent (“the Inquiry”). The inquiry is a collaborative effort of litigators, legal scholars and activists from around the world in the form of multiple international meetings, four published thematic reports, four conference outcome documents and a concluding reflection by JI’s executive director, James A. Goldston.¹ To facilitate, an Advisory Panel of more than 20 international experts has overseen a qualitative, comparative study of strategic litigation’s practical experience in four rights areas, with three case studies informing each study. A total of 17 researchers conducted several months each of intensive field-based research for each study in a dozen countries. The themes and geographies represented in the inquiry were selected for maximum diversity and range, including progressive rights and prohibitions; civil, common and customary tribal law traditions; examples of successes, failures and unintended consequences; on behalf of both individuals and peoples, etc. The purpose was not to seek evidence of strategic litigation’s value or lack thereof, but to surface and learn from the complex experiences of court-centered social change.
2. The inquiry understands “impacts” in three broad and sometimes overlapping forms: **material impacts, policy and legal impact, and non-material or attitudinal and behavioral change**. The meeting, which was moderated by the Justice Initiative’s executive director James A. Goldston, was structured around those categories.

¹ The meeting in Nairobi was the fourth and final Peer Consultation in the Open Society Justice Initiative’s Inquiry. The first, which took place in Budapest in July 2014, examined strategic litigation’s impacts on Roma experiencing segregation in Czech, Greek and Hungarian schools, and in Europe as a whole. Lead researcher Adriána Zimová and a team of researchers published a 90-page study on the subject, drawing on discussions in Budapest as well as original legal analysis and over 100 interviews.

The second Peer Consultation – held in New Delhi in September 2015 – looked at the impacts of strategic litigation on equal access to quality education in Brazil, India and South Africa. The third, on custodial torture in Argentina, Kenya and Turkey, took place in Istanbul in December 2015. Concluding summary documents are available for the second, third and fourth studies on the OSF website; the in-depth studies are due for publication in 2017.

3. The Nairobi consultation helped frame the final thematic study in the series, due for publication in 2017. Its lead researcher, Professor Jérémie Gilbert, and field researchers Joel Correia (Paraguay), Colin Nicholas and Yogeswaran Subramaniam (Malaysia) and Kanyinke Sena (Kenya), benefited from the guidance of the gathered experts at the early stages of their research. The field researchers then undertook about six weeks of field research.

Material Impacts of Strategic Litigation

4. While it is often not possible to demonstrate direct causality between a case or a legal judgment and a result, meeting participants identified the following among these cases' material impacts. The outcomes are often contradictory.
5. Numerous landmark judgments handed down by domestic courts in Malaysia, and by regional human rights bodies with respect of Kenya and Paraguay have achieved positive material changes in the lives of plaintiffs and their communities. Notable among them are the 2006 judgement of the Inter-American Court of Human Rights in *Sawhoyamaxa Indigenous Communities v Paraguay*² and the 2010 African Commission for Human and Peoples' Rights decision ordering the Kenyan government to restore the Endorois community lands at Lake Bogoria in *Endorois Welfare Council v. Kenya*.³ To date, very few victorious indigenous communities have actually been able to return to their ancestral lands, however. For example, following rulings in their favor, the Sawhoyamaxa community (Enxet Sur) and the Xákmok Kásek community of Paraguay were able to re-occupy their respective historic lands only by force. More common are awards of non-original land.
6. The impacts of filing such claims were perceived variously by different participants. Some observed that litigation and the threat of litigation caused a quantifiable reduction in the number of evictions from indigenous peoples' historic lands, because those initiating the evictions feared court sanctions. Others reported a quantifiable increase in the number of claims filed, as one community felt empowered by others' actions. (The latter, it was noted, carries the potentially negative consequence of creating backlog in the courts and slowing access to justice for some complainants.)
7. States are better at providing restitution through monetary compensation than return of lands. For example, in *Sawhoyamaxa*, the Inter-American Court ordered the Paraguayan state to establish a USD \$1 million fund for the development of the affected community and to pay \$20,000 to various families for the deaths of 19 persons who died due to forced dispossession and state inaction to adjudicate their land claims in due time or within reasonable scope of the related juridical process. a one-time payment of \$20,000 to the complainants. However, several participants noted the general difficulty involved in monetizing compensation for losses suffered, complicating and slowing implementation of positive judgments. And in Kenya, some compensation has been issued at low sums, considering those evicted to have been

² *Sawhoyamaxa Indigenous Community v. Paraguay* IHRL 1530 (IACHR 2006)(OUP reference)

³ Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, 276/2003, African Commission on Human and Peoples' Rights, 4 February 2010.

squatters, rather than providing greater restitution to them as lawful land owners.

8. Private companies responsible for unlawful evictions have attempted to compensate by providing alternate housing and creating local jobs for members of the affected communities. These jobs were generally deemed to be inappropriate to their lifestyles, poorly paid, menial and not commensurate with previous income levels or livelihood lost.
9. Another material impact has been the further impoverishment of indigenous communities to pay for legal representation, regardless of the outcome of the case. In some cases, however, the community organizing necessary to bring a case also stimulated indigenous peoples' economic empowerment, prompting some affected communities to create alternate sources of income.
10. Other material outcomes are the plaques and monuments created to commemorate positive judgments, such as in the Endorois case, as a form of restorative justice.

Policy and Judicial Impacts of Strategic Litigation

1. The principal policy impact of successful litigation in these cases is state recognition and passage of laws recognizing indigenous peoples' land rights, such as Kenya's Community Land Bill. In some cases, such legislative developments have led to a measurable increase in the number of such claims brought. Conversely, in some places, successful litigation has resulted in laws being adopted making it even harder to litigate indigenous land rights claims.
2. In some countries, jurisprudence has also been developed favoring indigenous peoples' land rights.
3. Some states have ordered the establishment of institutions and agencies to address the concerns of indigenous people and to implement judgements. For example, "land courts" now exist in Kenya specifically to address environmental and indigenous land claims.
4. Some resulting policies allow for increased participation of indigenous communities in decision-making about their land, such as land management committees in Kenya following the adoption of their 2015 Land Act.
5. Some new administrative barriers have been created, such as requiring indigenous peoples to obtain "land permits" in order to remain on their own lands, or "provisional leases," which companies can use to develop indigenous land where a judgement is still pending, complicating possible restitution in practice.
6. Positive policy developments have included the creation of mechanisms for revenue allocation for marginalized groups, such as the Equalization Fund in Kenya.
7. Some judgments have spawned profit-benefit sharing between communities and corporations laying claim to ancestral lands.

8. In response to some judgments, donors to government development programs have adopted a policy of suspending programs with a negative impact on indigenous communities.

Non-material Impacts of Strategic Litigation

Participants identified a myriad of changes in attitudes and behavior –positive, negative and inherently contradictory – spawned by strategic litigation of these cases.

11. Some participants noted that communities obtaining favorable judgements subsequently received better treatment by the state, such as improved access to healthcare.
12. Others noted the opposite: that the government has become increasingly resistant to complying with judgments, occasionally leading to a complete breakdown of relations between indigenous communities and government agencies such as the police. Others alleged that corrupt officials become more willing to rally against indigenous peoples' land rights petitions and even exact reprisals. One Kenyan participant recounted cases of individuals belonging to communities that chose to litigate suffering retaliatory employment discrimination at government and government-affiliated offices. Unattributed violent attacks were also reported against communities that choose to litigate, including further evictions, arson, beatings and rape.
13. Some observed that the Judiciary demonstrated increased sympathy toward indigenous cases, handing down an increased number of positive judgments the more frequently they were asked to adjudicate them. A similar pattern was observed among policy makers, who were seen to become more willing to accommodate indigenous land claims the more frequently they encountered them.
14. Others noted heightened public awareness on indigenous peoples' rights, specifically their right to land, and even an increase in human rights awareness more generally among both indigenous and non-indigenous communities. Some observed that the act of demanding land rights in the courts also encouraged indigenous peoples to demand their other human rights, such as to health and education.
15. Local and community radio was identified as being particularly influential in raising awareness about the role of the courts in these matters. This was deemed particularly true since radio is the best mass conduit for the oral history of indigenous peoples, and can therefore most readily engender positive attitudes toward their cause.
16. There were differing experiences shared about the role of the media as a whole, however. One participant reported that "There is no point in litigating unless you engage the media." But others deemed the national media incapable of "proper" coverage as it is often ill-informed about the issues and susceptible to bribery from interested parties, such as the state and private development.

17. Monetary awards sometimes create conflict within indigenous communities – particularly between the claimants receiving compensation and others – and among indigenous peoples. However, it was noted that the Endorois were so empowered by the judgment in their favor that they have spontaneously encouraged other tribes to bring claims, as well. Others observed that community leaders who spearheaded the litigation have used, or are perceived as having used, judicial decisions to pursue personal economic and political interests not necessarily consistent with the interests of the community as a whole.
18. Some participants observed that more communities were now advocating for their rights and resisting unlawful land grabs as a form of deterrence, instead of waiting for government protection.
19. Numerous participants noted that the act of preparing cases, litigating and pressing for implementation had the effect of empowering women in particular, especially in herding communities where the men worked for extended periods outside a fixed abode.
20. Much was said about the positive and negative effects of litigation on complainants' and communities' psychological health and sense of identity. Some reported a sense of pride and solidarity among the indigenous communities that have won such cases. Others reported feelings of loss, neglect and exasperation due to delays in the judicial process, the constant uncertainty about the future, failed implementation of court decisions, and resentment over lost time and resources – even when they received a positive judgment. A Paraguayan expert noted that those conflicting sentiments can co-exist even within a single community.
21. Judgments have also in some cases increased international NGOs and donors' willingness to support implementation of judgments favorable to indigenous peoples. But in others, donors were reported to have withdrawn funding to communities due to the long delays in implementation of judgments.
22. Cases are increasingly ending with indigenous peoples opting for settlement instead of litigation, due to some judicial bodies being reluctant to take up and rule on indigenous peoples' land rights in the first place.

Challenges to Effective, Sustainable Litigation

23. Weak domestic and international legal norms and awareness of them
24. Corruption and politics can make it difficult and even impossible for litigators and indigenous claimants who seek to litigate these kinds of cases.
25. Reprisals against complainants, community leaders, lawyers and paralegals from the state and/or private actors
26. Inherent legal complexities in litigating indigenous peoples' land rights
27. Inexperienced and/or ill-informed and/or biased and/or corrupt and/or disinterested lawyers and judges, and the paucity of lawyers willing and competent to take on such cases

28. Inadequate financial resources to secure and sustain expert legal counsel
29. Majority interest claims overriding community land rights
30. A legal environment that does not enable indigenous peoples' land rights
31. Gaps in authority among relevant state agencies, such as the Ministry of the Interior, Ministry of the Environment, national human rights institutions, the office of the ombudsman, etc., and lack of resources and/or will to bridge them
32. The absence of a regional human rights court in Asia
33. The complex and multi-layered nature of the injustices at issue
34. Disposition of those who migrated to indigenous communities' historic lands and now claim ownership
35. Documenting title and/or historic inhabitation of disputed lands
36. The long waits involved in obtaining a ruling on and achieving implementation. During long trials, presiding judges can be transferred, necessitating delays and losing the familiarity with the issues that the prior judge had acquired, with negative implications for a timely, positive ruling.
37. The remedies awarded by the courts can be ineffective, such as compelling affected communities to negotiate the terms of their own evictions in situations of acute power imbalance with land lords
38. Indigenous communities' inability to reach consensus on desired remedies
39. The size of indigenous communities – sometimes in the tens of thousands – and their complex lifestyles making it hard to ascertain which remedies will be effective and sustaining adequate communication between attorney and client over the course of the case.

Contributing Factors to Effective Strategic Litigation of Indigenous Peoples' Land Rights Cases

1. Pre-existing rights awareness
2. NGOs identifying opportunities and encouraging communities to bring a case
3. Good, sustained, close relationship between the lawyers and the community
4. Selfless, sustained commitment by litigator(s)
5. The existence of a sustainable bridge between lawyers and communities before, during and post judgment, such as paralegals
6. A skillfully framed legal argument and selection (where possible) of judicial forum
7. Allies in government
8. Capacity/integrity/personal sensibilities of judges
9. Complainants' and attorney's ready access to information about existing options for seeking remedies
10. Communities that are engaged and share the lawyer's/lawyers' vision of desired outcomes and intrinsic value of litigating these cases
11. Well-informed, sympathetic media coverage, to suggest to the judges that "This is what the public wants"
12. High-profile external allies to give the demands legitimacy in mainstream society
13. Use of multi-disciplinary expertise in framing the legal arguments and providing expert testimony, such as anthropologists, economists, environmentalists
14. Expertise in not only domestic courts but in both regional and trans-national systems

-
15. Community cohesion and strong leadership or community organization are often critical to sustaining the case and mitigating the unintended ill-effects on the community.
 16. Sustained capacity building on the part of NGOs and/or the communities' legal counsel is also essential to ensure that the communities may enjoy their rights.

Co-written by Erika Dailey, Robert Gullery and Stella Obita

Annex: Good Practices for Litigating for Indigenous Peoples' Land Rights



Workshop on Effective Practices in Litigating Indigenous Peoples' Land Rights
23 June 2016

Effective PIL Practices

Draft

Below is a draft compilation of responses to the question “What is the one thing you have done to make your work maximally impactful on behalf of clients in public-interest cases and in the advancement of indigenous peoples' land rights in particular?” It is offered in the hope that these hard-won insights may benefit other cases brought to achieve the land rights of indigenous peoples.

1. Clarify from the outset who is the client. (Individual petitioners? Community representatives? Class action? How are clients chosen and by whom?)
2. Insure that legal counsel and the complainant(s) share a common understanding of access to justice and how to achieve it.
3. Critical importance of community engagement and engagement of public opinion.
4. Engage a broad spectrum of stakeholders as allies in the process.
5. Select the petitioner(s) carefully. It is essential that they i) be capable of engaging with a typically protracted court process that can take many years; ii) be committed to seeing the case through to the end no matter what; iii) grant the attorney permission to pursue the case even if the claimant withdraws; iv) evoke empathy.
6. Communication:
 - a. Advance messaging that indigenous peoples' land rights are a mainstream human and peoples' rights issue, not an esoteric or fringe human rights issue that is 'optional.'
 - b. continuous information loop between the petitioners/communities and the attorneys
 - c. capacity building of the communities to own the case
 - d. arrange for judicial training, if possible

-
- e. If this is not possible, or in addition, undertake public awareness campaigns of the rights of indigenous peoples to land to demonstrate to judges indirectly that there is public demand for the protection and exercise of these rights
 7. Exhaust all other means of achieving the objectives (advocacy, petitioning, etc.) before undertaking a case.
 8. Importance of evidence, and multi-disciplinary evidence in particular
 - a. Engage petitioners/communities in gathering evidence -- including maps, histories – and in generating evidence – such as giving oral histories of the land and the community, videotaping images of the disputed land and infringements on it, mapping of cattle grazing patterns via GPS collars, etc.
 - b. Identify expert witnesses that the court will find credible to provide expertise in history, anthropology, geography, cartography, environment, sociology, etc.
 - c. Prepare expert witnesses carefully.
 9. Select jurisdiction carefully, particularly where there is evidence to suggest that the court may be favorably or negatively pre-disposed.
 10. Do no harm. If the case is assigned to a judge who is known to be indifferent to, ignorant of, or hostile to the claim, claimant and/or issue, withdraw the motion right away and seek a more promising judge (if possible) or wait for a more opportune moment.
 11. Promote the exercise of “conventionality control”: Encourage the Supreme Court or constitutional court to interpret laws and resolve conflicts not only in line with constitutional rights, but also in accordance with human rights principles enshrined in both international and regional human rights conventions, and pronounced in regional judgments. This approach increases the likelihood of congressional approval of pro-rights laws submitted by the executive.
 12. Proper drafting of pleadings and proper preparation of cases. This includes carrying out both factual and legal research to assist the court in delivering well-reasoned positive judgments.
 13. Legal counsel
 - a. Should be ethical, self-sacrificing, must develop personal relationships with the claimant(s) and communities, be completely committed to achieving a positive judgment and other benefits for the petitioner(s), and reasonably be expected to be available through the judgment and implementation phases.
 - b. Should bring the highest possible standards of ethical and professional rigor, including dressing particularly well during pleadings.
 - c. Should see themselves first and foremost as human rights defenders, and secondarily as litigators.
 - d. Should emphasize the inherent value of human life and the importance of the intangibles, avoiding exclusively instrumental arguments.
 - e. Should respect the culture of the complainant(s).
 - f. Should be prepared to accompany the process through the implementation phase, i.e. for many years.
 - g. Should consist of a team of lawyers, ideally including domestic and international litigators

-
14. Petitioners
 - a. Should be chosen carefully, looking for the person who evokes the greatest sympathy with both their personal story and their appearance and demeanor in court.
 15. Remedies
 - a. Craft the entire legal strategy around the remedies sought.
 - b. Include 4-5 minimum remedies. Assist the judge in finding a “way out” in cases where the judge may be under political pressure to rule against the claimant, so that you can still achieve something.
 - c. Insure that the remedies sought are realistic and actionable.
 - d. Do not litigate on the strength of the case alone. Ensure you also scope the arguments against your case.
 16. Settlement is preferable to attempting an appeal, wherever possible, because attorneys, claimants and advocates are exhausted by that stage and may accept a negative judgment for lack of will and resources.
 17. If the client withdraws, arrange for the submission of amicus briefs to persuasively argue the public interest value of the case to allow it to continue to judgment
 18. Litigate for precedent-setting judgments.
 19. Advocate with government entities that may have greater expertise in land rights and indigenous peoples' rights issues than generic state law bodies, such as home affairs, environment, wildlife.
 20. Develop a risk management strategy with multiple fall-back options, and agree those options with the complainant(s), at the outset of the case.
 21. Raise the rights awareness of the entire affected communities, so they can claim rights at the same time the case is being adjudicated, and so they can help insure that the petitioners do not withdraw from the case, but pursue it in the interests of the group.
 22. Litigate before regional human rights systems whenever possible, to insure that states are unable to ignore the rulings. Domestic litigators and litigants should be informed about and take advantage of all regional remedies. They should reference regional protection systems to take advantage of those courts' messaging that rights are not static, but constantly changing.
 23. Use complementary advocacy strategies, e.g. UPR, so press the government to issue a statement of commitment to resolving the claim(s) and/or to implementation.
 24. Take advantage of independent bodies within the government, such as the office of the ombudsman, national human rights institutions, and UN Special Rapporteurs.
 25. Take advantage of freedom of information protections to facilitate discovery and allow the complainant(s) to exercise corollary rights.

-
26. Develop a clear risk-management strategy in case it is decided to publicize the case in tandem with litigation, to avoid endangering the journalists and bloggers who will be covering the case.
 27. Keep recalibrating the orientation of the strategy to respond to internal and external threats and opportunities.

For further information, contact Erika.Dailey@opensocietyfoundations.org.

