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Indigenous Peoples and Litigation: Strategies for Legal Empowerment

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Summary:

Across the globe indigenous peoples are increasingly using litigation to seek remedies for violation of their fundamental human rights. The rise of litigation is to be placed in the larger issue of increased land grabbing, natural resources exploitation and the general lack of recognition of their rights at the national level. This lack of legal rights is usually coupled with a lack of political will to address the issues faced by indigenous peoples, often leading to serious human rights violations, leaving indigenous advocates with few options but to turn to courts as a last resort to seek remedies. This article examines some of the issues faced by indigenous peoples and their advocates when engaging in human rights litigation. The goal is to offer a practice-based reflection on the encounter between courts and indigenous peoples with a specific focus on analysing strategies to ensure their legal empowerment. This is particularly important knowing the technicality, externalities and complexities of the process of litigation, and the fact that many decisions do not get implemented. In this context this article explores how the process of litigation in itself can support legal empowerment and the wider fight for justice.

Keywords: indigenous peoples; litigation; legal empowerment; implementation; land rights

Introduction

Indigenous peoples are increasingly using litigation to seek remedies for violation of their fundamental human rights. The last decade has been rich in case law, including significant legal decisions in Belize,[1] India[2], Ecuador,[3] Colombia,[4] Indonesia,[5] and Ecuador, just to name a few. There are several factors explaining this increased recourse to litigation. The lack of protection and recognition of indigenous rights, especially rights to land and natural resources, is usually coupled with a lack of political will to address the issues faced by indigenous peoples. This leaves indigenous advocates with few options but to turn to courts as a last resort to seek remedies. The rise of litigation is also to be placed in the context of increased land grabbing, and the general fact that most indigenous peoples live on territories where the last remaining non-exploited natural resources are located (IWGIA, 2017). It is not that these issues are new as indigenous peoples have historically been victims of forced displacement, loss of land, extreme marginalisation, discrimination and violence. What is new is the use of international human rights law in litigation to push back against these violations. This reflects the significant development of international human rights standards concerning indigenous peoples' rights over the last few decades, notably the adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007 but more broadly the larger development of the jurisprudence on indigenous peoples' rights. The lack of adequate norms and policies to protect indigenous rights at the national level means that indigenous advocates have to rely on international human rights law to address the gap in the national legal systems. As noted by the UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), many national courts have referred to and relied on international norms in their

[1] Supreme Court, *SATIIM (Sarstoon Temash Institute for Indigenous Management) v Attorney General of Belize* (2014)

[2] *Jagpal Singh &Ors. vs. State of Punjab & Ors.* - Supreme Court of India, 2011

[3] *Leonel Ufredo del Pezo Yagual (President of the Montañita Commune) et al*. - Corte Constitucional del Ecuador (Constitutional Court of Ecuador) -2013

[4] See T-661/15 - Corte Constitucional de Colombia (2015); Constitucional : Sentencia T-379/14 - Corte Constitucional, Colombia Constitutional Court Sentencia T-129/11, (2011).

[5] Constitutional Court Decision 55/PUU-VIII/2010, reviewing Law 18 of 2004 on Plantations, issued 6 September 2011 (Plantation Law case (2011); Constitutional Court Decision 3/PUU-VII/2010, reviewing Law 27 of 2007 on the Management of Coastal Areas and Small Islands, issued 16 June 2011 (Coastal and Remote Areas Law case (2011); *The Indigenous Peoples' Alliance of the Archipelago (AMAN) v Government of Indonesia*- Constitutional Court (2013).

litigation, notably the UNDRIP (EMRIP, 2017). This all contributes to the "legalization" and the increased "juridification" of indigenous rights (Kirsch, 2012).

Using international human rights arguments in national legal settings is complex, requiring multifaceted advocacy strategies, interdisciplinary expertise and long-term commitments. It requires technical skills to navigate the complex legal process, as well as a long-term strategic engagement, not only form the concerned communities but a range of actors including lawyers, NGOs, anthropologists and other external experts. Litigation is lengthy, costly and technical. The process is also challenging due to its formalistic and adversarial nature. There is also the danger of losing the case, creating bad precedents, and facing years of non-implementation. Indeed, despite winning in court, positive decisions are often not implemented (examples include Kenya, Belize, Paraguay, Surinam). Despite these challenges, going to court has become a significant vehicle used by indigenous communities to gain access to justice, with litigation often becoming a point of reference, even a trigger, for wider mobilisations (OSF, 2017). Litigation has become a significant part of indigenous struggle for justice, with almost every country where indigenous peoples live having witnessed cases of human rights litigation. This change is worth highlighting as historically law and legal institutions have usually been on the side of powerful actors, with indigenous peoples being on the losing end facing forced removal and criminalisation. This make the increased recourse to human rights litigation even more significant since it marks an important shift in terms of indigenous peoples struggle for the protection of their fundamental rights.

In this context, this article takes stock and analyses some of the issues faced by indigenous peoples and their advocates when engaging in human rights litigation, with the goal of offering some reflections on how litigation can support wider advocacy strategies for legal empowerment. The article is interested to understand how the litigation process can support empowerment of indigenous communities who are usually facing extreme forms of discrimination and marginalisation. To offer a logical framework of analysis the article follows a step-by-step analysis of the process of litigation by first focusing on the pre-litigation preparation (section 1), the court hearings (section 2), and then the remedies, reparations, and post-ruling implementation phase (section 3). The analysis relies on several court cases, but the article does not hinge on any particular case study or situation. The cases are mentioned as illustrations of the common issues faced by indigenous peoples and their

advocates when engaging in human rights litigation. The article does not examine how litigation contributes to the development of new norms and jurisprudence on indigenous rights as ample literature on this is already available. [6] Equally, the aim is not to analyse the interrelationship between litigation, formalistic legal processes and indigenous peoples from an ethnographic perspective, as this also well-documented.[7] Moreover, the article does not take sides on whether litigation contributes or not to the imposition of westernized legal approaches to indigenous rights (Hendry & Tatum, 2016). Instead, the article adopts a practitioner's perspective, as the objective is to offer a practice-based analysis of some of the strategies used by indigenous advocates to engage in litigation to examine how it could support wider fight for justice and legal empowerment.

1. Going to Court: Standing, Representation & Evidence

The pre-trial phase is probably the most demanding and intensive phase of litigation. It involves a meticulous process of gathering evidence, building trust between the community, the lawyers and the wider legal team, choosing the forum for legal action, developing the legal argumentation and advocacy skills on international human rights law, identifying any experts who can provide input on key elements, and deciding who will speak on behalf of the communities. The choice of the legal forum is also a significant issue, especially for domestic litigation as careful attention is needed on the legal basis for supporting indigenous rights not

[6] See James Anaya and Claudio Grossman, "The Case of Awas Tingni v. Nicaragua." Arizona Journal of International and Comparative Law 19: 1–16 (2002); Miranda, Lillian Aponte. "Indigenous people as international lawmakers." *U. Pa. J. Int'l L.* 32 (2010): 203; Clive Baldwin and Cynthia Morel, "Using the United Nations Declaration on the Rights of Indigenous Peoples in Litigation." In *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, edited by Stephen Allen and Alexandra Xanthaki, 121–43 (Portland, OR: Hart, 2011); Carpenter, Kristen A., and Angela R. Riley. "Indigenous peoples and the jurisgenerative moment in human rights." Calif. L. Rev. 102 (2014): 173..

[7] See Maria Sapignoli, *Hunting Justice: Displacement, Law, and Activism in the Kalahari* (CUP 2018); Stuart Kirsch, *Engaged Anthropology: Politics Beyond the Text* (University of California Press, 2018), Robert Hitchcock, *Organizing to Survive: Indigenous Peoples' Political and Human Rights Movements* (Routledge Press, forthcoming); Goodale, Mark. "Dark matter: Toward a political economy of indigenous rights and aspirational politics." *Critique of Anthropology* 36.4 (2016): 439-457.
Sieder, Rachel. 2010. "Legal Cultures in the (Un)Rule of Law: Indigenous Rights and Juridification in Guatemala." In Cultures of Legality: Judicialization and Political Activism in Latin America, edited by Javier Couso, Alexandra Huneeus, and Rachel Sieder, 161–181. Oxford and New York: Oxford University Press.; Hale, Charles R. 2006. Activist Research V. Cultural Critique: Indigenous Land Rights and the Contradictions of Politically Engaged Anthropology. Cultural Anthropology 21 (1): 96-120; Daniel M. Brinks, "Access to What? Legal Agency and Access to Justice for Indigenous Peoples in Latin America", 55:3 The Journal of Development Studies, 348-365 (2019)

necessarily limited to the constitutional treatment of international human rights law but also relating to other legal bases in domestic law such land laws or property rights.

1.1. *Collective Claims & Legal Standing*

In case of human rights violations, and especially when it comes to land and natural resources, indigenous peoples usually go to court on behalf of their community, or larger groups, rarely as individuals. This is often a challenge as many legal systems are based on individual claims, or a few named individuals taking legal action. Generally, the rules concerning legal standing are based on individuals having to demonstrate a sufficient connection to the harm suffered. The fact that most national systems do not allow for collective claims significantly restrict the possibilities of collective action for indigenous peoples. This was illustrated by case of the Endorois community in Kenya, a group of approximately 60,000 people who have for centuries lived in the area around Lake Bogoria. They were dispossessed of their ancestral land through the creation of a Game Reserve. In 1997 members of the Endorois community lodged a claim in the Kenyan High Court for relief which included an order declaring that the concerned land was the property of the Endorois community and should be held in trust on their behalf. The claim was dismissed, notably due to the fact the High Court could not address the community's collective right to property.[8] In 2003 the Endorois people successfully took the case to the African Commission on Human and Peoples' Rights. However not all communities will have access to regional human rights institutions, and in any case it is normally necessary to engage in litigation at the national level first in order to demonstrate exhaustion of domestic remedies . The predominant individualistic approach to justice in most legal systems is a significant challenge for the communities' collective claims.[9]

The solution is often to lodge the complaint under the name of a few selected representatives instead of the whole community. For example, in the current constitutional court case concerning the Batwa in Uganda, the community had to decide who will represent them and take forward the case on their behalf. The Batwa are an extremely marginalised

[8] Centre for Minority Rights Development (Kenya) & Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, ACHPR Communication 276/2003 ("Endorois") at par 12.
[9] See also Supreme Court of New Zealand in Proprietors of Wakatu and Others v Attorney-General ("Wakatu"), [2017] NZSC 17.

community, who have been forcibly evicted from their ancestral territories, leading them to poverty, marginalisation and destitution. In 2010, they decided to seek legal remedies by starting a process of constitutional court litigation. Deciding who in the Batwa community should put their name forward in the court's application was a significant part of the process as they are a community numbering more than 6,000 individuals but scattered in many different locations. Some members of the community were initially reticent to take the legal route, since they did not want to take an apparently antagonistic approach against the government and would have preferred other mediation avenues. This reflects both their culturally relational approach to addressing problems, as well as a sense of complete vulnerability to state power. Traditionally, the Batwa are hunter-gatherers, and as most hunter-gathering communities have egalitarian decision making processes based on consensus-building (Biesele, Hitchcock, and Schweitzer, 2000). In a world dominated by a western individualistic (often male and hierarchically) leadership, such egalitarian consensus building processes are become complex to navigate. Engaging in litigation often require the nomination of leaders to represent the communities in the court, a process which could be at odd with traditionally more egalitarian indigenous systems. In this case, the Batwa had a multitude of meetings before deciding who should be put forward, nominating twelve representative petitioners. The community decision making process worked well as ultimately the representatives were carefully selected and approved by the community to speak on behalf of the collective. It took a few years to reach that point of consensus as it is a very time consuming and iterative exercise. But it is an important step as communities have to feel confident that the case is taken on their behalf and also that it reflects their choices and their rights as a collective community.

The number of representatives to be nominated by the communities is also an important issue. The long process of litigation that took place in Botswana offers a good illustration. Botswana has been at the centre of a long series of court cases concerning the forced eviction of some of the San communities in the Central Kalahari Game Reserve (CKGR), leading to serious human rights violations of the concerned communities.[10] The case

[10] Central Kalahari Legal Case No. MISCA 52/2002 *in the Matter between Roy Sesana, First Applicant, Keiwa Setlhobogwa and 241 others, Second and Further Applicants, and the Attorney General* High Court of Botswana (2006); High Court Civil Case No. MAHLB 000 393-09 *In the matter between Matsipane Mosetlhanyene, First Appellant, and Gakenyatsiwe Matsipane, Second Appellant, and the Attorney General Respondent* (2011)

attracted significant attention internationally and is usually perceived as a 'legal' victory for the San as it contains important legal recognition of their customary land rights. The case was filed to the court with the names of 243 specific applicants. Only the applicants listed in the court case got their rights formally recognised, not the whole communities who were forcedly removed. Hence the legal decision concerns only these applicants not the entire concerned San communities. This restriction came as a late realisation for many other residents of the reserve. The importance of 'listing' as many victims as possible is also illustrated by the case of the Maya communities of southern Belize. The concerned communities had to go twice to the courts to seek remedies. A first case was litigated in Supreme Court in 2007 on behalf of the residents of two villages. Later on the government asserted that the ruling only applied to these two communities listed in the case and not all the concerned Maya communities. Consequently, the court ruling applied only the named communities who were legally recognised as entitled to the recognition of their customary land rights. The other Maya communities had to go back to court to undertake a new case including this time all concerned communities and not only the two that were initially specifically nominated on the first case.[11]

The nomination of representative claimants is complex as their representative capacity might be challenged. For example, in Namibia in an ongoing case concerning the ancestral land rights of the Hai||om (San) people over the Etosha National Park from which they have been forcedly evicted (Dieckmann, 2014). To be able to claim their land rights, the concerned communities had to go to court to establish the representative capacity of the claimants that were selected by the communities. As noted by the applicants in their arguments to the court: "(…) the best and only way to assert those rights is through a representative action they bring on behalf of the Hai||om people. If they are not permitted to represent the Hai||om people in the proposed action, it is almost certain that the action will never be brought. The rights of the Hai||om will then go unprotected and unfulfilled."[12] This has resulted in a first application in court to determine who has the right to represent the collective claim, ultimately raising the issue of how an indigenous community should be

[11] *Maya Leaders Alliance et al. v. Attorney General et al*. [Claim No. 366 of 2008], Belize S. Ct. Judgment of 28 June 2010.

[12] High Court of Namibia (Main Division), CASE NO: A 206/2015- Applicants' Heads of Arguments, November 2018 (on file with author)

represented in litigation. As a counter-argument, the government has insisted the community be represented by the officially established traditional authority: "if the Hai||om people really existed as a collective rights-holder, it would have had representative and decision-making of its own. (…) The fact that these structure do not exist (…) demonstrates that the Hai||om do not have the degree of political organisation required to constitute a rights-bearing collective."[13] However, for many concerned applicants the traditional authority does not represent their rights and interests, and is acting as a branch of the government rather than a true representative of the communities. This conundrum is not specific to Namibia as in recent years more and more governments have set up processes for the official recognition of traditional authorities (Larson, 2010 & Sapignoli, 2014). These officially established or recognised traditional authorities are not always representative of the customary decision-making process, or the 'rightful' voice of the community, and could undermine the possibilities of the victims to seek collective remedies in court. The case in Namibia is still ongoing but should elaborate on the relationship between officially established authorities and the communities and how they should be represented in litigation.

Overall, the first hurdle of legal standing is already a significant step in the litigation process. It requires communities to counter-act the individualistic approaches to litigation and come with solutions to name representatives. There are different ways to do so, but commonly one key element is the need to have strong, efficient and cohesive decision making process since the cases involve collective decisions and nomination of representative plaintiffs. Engaging with litigation requires efficient decision-making structures within a community; traditional processes may require reinforcement or replacement by contemporary structures in order to affect the time-bound collective agreements required in litigation. It is also important to note that this process of nomination and representation is not always necessarily at ease with some of the individual rights of members of the concerned communities. In collective claims there is always a danger of the clash with individual rights. This is particularly acute when it comes to ensuring women's rights as the processes could be dominated by patriarchal systems of representation. As noted by Sylvain: "[W]hile collective rights can serve to promote and protect culture, women's rights are often designed to protect women from the claims of culture. This tension becomes particularly problematic for

[13] Ibid, First' Respondent submission, p. 10, para 11 and 12

indigenous women." (Sylvain, 2011, at 91) There is no ready-made solution to address this as each situation differs, but the case of the Batwa in Uganda is a good illustration on how this could be addressed. The long process of community meetings to decide to go to court and to decide who should act as representative of the claim was time consuming because it engaged the whole community, ensuring that the voices of the older, younger and women were integrated. As a result, many of the representative petitioners are women. Moreover, even where claims on behalf of a group or class are permitted, they will often need to be brought in the names of a subset of the group's individual members, heightening the personal risk of reprisals against those individuals and weakening the collective framing of the claim. There has been increased levels of harassment, reprisal and violence against indigenous defenders. In 2019, Front Line Defenders recorded the killing of 304 human rights defenders, 40% of whom were working on land rights, indigenous peoples' rights and environmental rights (Front Line Defenders, 2019 - 7). Engaging in litigation and putting their name forward is often attracting reprisals, something to bear in mind when engaging in litigation and putting the name of selected community representatives to the claim.

1.2. *Legal Representation & Trust*

The choice of the lawyers is a significant issue not only in terms of the potential outcome of the case (you need a good lawyer) but in community's relationship with their advocates. Indigenous cases require long-term involvement and the establishment of a very strong trust between the communities and their legal representatives. The choice of lawyers also involves the practical issues of cost and long-term case management. Finding 'affordable' legal representatives for often impoverished communities is challenging. The cost are high when the court procedings last for several years. For example, the High Court case in Botswana was labelled as the most expensive claim ever undertaken in the country's history. Indigenous communities are usually disenfranchised and do not have the necessary network and contacts with legal firms. Finding lawyers who understand the challenges faced by indigenous peoples, their human rights, and who are able to commit on a long-term basis is challenging.

Engaging in long-term human rights litigation does not happen in a vacuum as it is often part of a much larger human rights campaign. It involves a network of actors supporting indigenous rights struggles like lawyers, NGOs, experts, and donors. Very often the court

cases are channelled through the interaction with one or several of these actors. In recent years, there have been some significant changes in the profile of some of the main international NGOs working on indigenous rights with an increased focus on supporting litigation. The case in Botswana was largely supported and financed by Survival International, the case in Uganda via the Forest Peoples Programme (FPP), and the Ogiek case in Kenya via Minority Rights Group International (MRG). Although these organisations are not necessarily 'litigation' organisations, they have witnessed a shift in their global approach to support indigenous rights from more anthropological advocacy to using litigation to push for change and support indigenous communities. The increased legalisation of indigenous struggles has led to a need to create longer-term relationship between communities and their legal counsels. As a result, some NGOs have developed in-house legal capacity. For example, FPP have a team of lawyers tasked with developing and supporting the legal strategies of their community partners, including conducting international- and national-level litigation and the use of non-judicial remedies. Likewise MRG had their own lawyers to conduct the litigation and the legal strategy, working in conjunction with lawyers in Kenya. This has not only the advantage of ensuring a long term perspective and engagement by the legal team with the cases, but also relies on long term trust that already exist between the concerned communities and the NGOs. In cases where there is no direct and dedicated legal representatives, communities have to rely on trusted person who can act as "go-betweens" the communities and the lawyers, these are often anthropologists, local community leaders, or community paralegals.

The work of these legal representatives includes traditional 'litigation skills' such as the development of a legal strategy and legal drafting and representation, but also involves community consultations, capacity building, organisational support, financial support, strategic communications, and international advocacy and outreach. Since the courts are often located very far from the location of indigenous territories and the technicality of the lengthy process, legal representatives – often working alongside a local civil society organisation partner – act as the main 'brokers' between administrative and legal institutions and the communities. They often will be the only contact and engagement with the formalities of the process, which usually happens quite far away from the communities. In this context the trust of the communities in their legal representatives is essential, as their voices will be expressed mainly via their legal representatives. The personal involvement of

the legal representatives with the communities to develop, nurture and sustain the long term trust that is necessary to support indigenous communities with the lengthy and formalistic legal process is crucial. As noted by Odeendall, who is the legal counsellor of the Hai||kom applicants in the case in Namibia, the role of the legal counsel is nearly to become part of the 'family' as outside the purely legal role, the legal counsel has to develop personal relationships with the key applicants, ensuring their well-being, providing support throughout the long term process of the court case.[14]

Legal representatives are also key to ensure a good interaction between the different lawyers that are potentially involved in the case. Due to the complexity of the cases involving reliance on national, regional and international legal instruments, jurisprudence and doctrine, it is often necessary to have several lawyers to deal with each specific legal fields of the court case. Indigenous peoples' human rights are a very specialised field, and local lawyers might not have the knowledge and understanding to develop legal argument relying on international indigenous peoples' human rights. As noted by Lomax, the FFP lawyer who is co-counsel in the case of the Batwa in Uganda: "the role of lawyers in these domestic litigation (and in other contexts) seems to be about sticking up for the highest aspirations of the communities, while supporting them to navigate the compromising choices they may be asked to make/consider, while also ensuring that their local lawyer is emboldened to fully represent the ambitions of the community at their highest, without closing off routes to compromise."[15]

A good illustration of the relationship between international and local lawyers comes from the case of the Maya communities in south Belize. In that case, which went from local and national courts to regional courts and back, there was an important integration of international and comparative indigenous peoples' rights. The legal argumentation was successful in incorporating these international norms in the specific local context of Belize. Integrating international, comparative and national legal argument is usually a complex and important issue. As such, international legal arguments are key to challenge the failure of the national systems on indigenous rights. The collaboration between national/local lawyers and

[14] Willem Odendaal, Interview with the author, 26 June 2019.

[15] Tom Lomax, E-mail message to the author, 25 June 2019.

international lawyers is crucial as the lack of national/local laws to protect indigenous rights is the first reason for indigenous peoples to go to courts. In the case of Belize, this materialised in the collaboration between the local lawyer, Antoinette Moore, and an international legal team led by James Anaya (former UN Special Rapporteur). The obligations of Belize were highlighted in view of its commitments under the American Declaration, the ICCPR, and the ICERD. The claim also asserted that ILO 169 and the draft OAS and UN declarations indicated the existence and content of customary international law and general principles concerning the rights of indigenous peoples. In such context it is important that both interests align. As analysed by Kroshus-Medina**:** "While the Q'eqchi' and Mopan Maya sought affirmation of their rights to land in southern Belize, their North American allies were pursuing an additional goal at the same time: they sought to strengthen and extend indigenous land rights in international law." (Kroshus-Medina 2016, 148)

Overall, the role of legal representatives is a significant element of the litigation process, it is somewhat similar to the role of a music conductor as it involves a clear control of the tempo, listening critically and shaping the ensemble to ensure that applicants, lawyers, and experts witness are ready, and controlling the interpretation and pacing of the content of the court case. They also have to keep an eye on the financing of the case, and ensure a harmonious collaboration between a different set of actors, including donors, administrative institutions, and other lawyers, and crucially executing clear preparations of the evidence and the legal arguments underpinning the remedies being sought.

1.3. *Gathering Evidence: Anthropologists & Mappers*

Going to court involves a complex and time-consuming process of gathering evidence. Despite the national specificity of the legal systems, the requirements to prove rights to land and natural resources are similar across the globe. Since indigenous peoples' rights to lands, territories, and resources derive from customary occupation and use, courts have put the onus of proving 'ancestral' and 'customary' occupation on the concerned communities. Ironically, the burden of the proof is on the victims of forced displacement and land dispossession who have to prove their rights to their own ancestral territories. A challenge

for indigenous peoples is to prove their rights within legal systems which usually do not recognise indigenous customary land rights. Most legal systems are based on the individual and exclusive property rights deriving their legitimacy from state granted title. Post-colonial legal systems do not cater easily (if at all) with non-exclusive and mobile land and resource use and occupation patterns, as they are still predominately based on western imported colonial concepts of property law based on concepts of individual, permanent, exclusive and sedentary ownership. In this context, proving indigenous collective and (sometimes) non-exclusive rights over lands, territories and resources is challenging. Indeed many indigenous communities, especially hunter-gatherers and pastoralists use and occupy land and natural resources in a cyclical manner to ensure a sustainable use of the resources. Indigenous communities and their legal representatives must challenge individual and formalistic property rights showing that even though land and natural resources might have been used in a mobile fashion following seasons, or migration patterns, these nonetheless constitute collective customary land rights.

In this quest to prove ancestral and customary land rights, anthropologists have become key actors. Anthropologists are usually key experts to demonstrate indigenous peoples' historical ties to the land. Their role is particularly important to build evidence on cultural, customary and traditional land usages, often providing expert affidavits in support of indigenous claims. Most indigenous rights litigation relies on anthropologists to provide and support historical and ethnographic evidence. As noted by Sapignoli: "Evidence and expertise are brought to bear as ways to bring facts to the attention of the court, to lend authority to the facts that make up an argument, and to describe the essential qualities of a people." (Sapignoli, 2017 at 211) For example, the case of the Ogiek ruled by the African Court on Human and Peoples' Rights in 2017 was hugely dependant on evidence provided by anthropologists to prove the Ogiek's ancestral customary land rights. As noted by Claridge, the lead advocate from MRG in the Ogiek case:

> The complicated factual matrix of evictions and treatment of the Ogiek over the years also needed to be clearly detailed and evidenced. Both of these processes required vast documentation and anthropological research, within social science libraries, in Kenya's national archives as well as online research. There was also a detailed evidence gathering process (…) in order to unearth relevant documents proving ownership, such as maps, correspondence with local and national authorities dating

> back many years, pleadings and related evidence in the numerous land disputes brought by the Ogiek before the national courts. (Claridge, 2018)

This reliance on anthropological historical documentation, and physical evidence gathering is typical of indigenous land claims. As noted by Kirsch, an anthropologist who has acted as an expert in several cases, anthropologists "are able to render local understandings and perspectives in terms legible to the court." (Kirsch, 2018) For example, in a case concerning the Akawaio of Isseneru village in Guyana before the Inter-American Commission on Human Rights, the anthropological evidence was used to demonstrate that local place names were toponyms in their language, establishing historical ties to the land the state had denied (Kirsch, 2016). But as Kirsch notes one complexity for the anthropological expert is to ensure their affidavits are "legible to all three of the overlapping, but sometimes incommensurate frames of the lawyers and the legal system, the communities seeking recognition of their rights, and the discipline of anthropology." (Kirsch, 2018)

In addition to anthropological evidence, participatory communal mapping is an important element of the legal battle to claim land rights. Community's participatory mapping have become important elements to prove economic, cultural, and spiritual connections to lands and territories. Participatory mapping is used as a tool to prepare legal arguments and developed narratives on land use and occupation. In the mapping process, communities get a chance to collectively gather evidence about their interaction with their ancestral land, including cultural, social and economic interaction with their ancestral territories. As noted by Mujah, an indigenous leader in Malaysia:

> Strategic litigation is also important to the communities, because it makes the community document their customary claims e.g. conduct community mapping, which is very good, because the community are (knowledgeable) about their communal boundary, land use, location of important landmarks e.g. burial grounds. Documentation is good for the community's future as it can be a tool for dispute resolution.[16]

Mapping is not without flaws and limitations. This "cartographic-legal strategy" also has some serious limitations as it "invariably reduce the complexity of the world to produce an effective

[16] Nicholas Mujah works for the Sarawak Dayak Iban Association, interview conducted by Nicholas Colin on the 11th of September 2016 – on file with author.

abstraction of some set of spaces and relations." (Wainwright and Bryan. 2009) Moreover, as noted by Vermeylen: "while participatory GIS/mapping may offer a tool for empowerment it can also have unintended effects on communities, such as increased conflict, increased privatization of land, loss of indigenous conceptions of space, increased regulation by the state, epistemic violence, and enforced representations of indigenous peoples as homogenous communities living in bounded and static spaces." (Vermeylen, 2012, at 122) Again, the whole process of gathering evidence is usually a long term process involving 'experts', and as captured by Sapignoli: "(…) the court proceedings produced narratives that involved experts and witnesses to create a body of evidence that formalizes the language, collective identities, and framing of rights in sometimes unexpected ways." (Sapignoli, 2018, at 31) Nonetheless, despite the inherent limitations of maps and cartography to capture the complexity of indigenous territorial rights, maps are also an important tool in the larger indigenous counter-narrative to the colonisation of indigenous territories.

2. Court's Hearings: Formalities & Externalities

Finally reaching the courts and attending the hearings creates a new form of pressure on the communities and their legal team. Suddenly, the experts have to be prepared for cross-examination, the lawyers be ready to plead, and the community organised to attend and participate in the hearings. Due to the technicality of the legal language used, the inextricable formality and complexity of the court proceedings, there is danger that once the court hearings start, the concerned communities and its representative members feel ostracised by the process. As aptly captured by Saugestad writing about the court case in Botswana: "once the case proper started, the formalities of the legal process took control, the lawyers took centre stage, and the applicants became spectators." (Saugestad, 2011, at 44) To address this danger, several key strategies need to be put in place to counter-act these formalistic and adversarial dynamics of the courtroom and ensure that indigenous communities are still the main actors of the application.

2.1. *'The day in Court': Participation & Interactions*

The direct participation of indigenous communities in the court's proceeding itself is extremely important. Carrasco notes that, "[W]hen it comes to human rights violations, the 'day in Court' matters the most because it is a form of compensation and relief for these stories to be heard." (Carrasco, 2015, at 215). There are several challenges to participation and attendance to the 'day in court'. Most of these cases concerning serious indigenous rights' violations are usually addressed in higher courts, located in capital cities, or even further afield when these are reaching regional or international human rights mechanisms. The transportation, accommodation and other logistics necessary to ensure that as many of the communities' member can attend is financially demanding. Most courts and legal systems have not allocated specific funds for communities to attend their own court hearings. In cases of regional human rights system, this could sometimes be facilitated, as for example in the case of the Sarayaku when the Legal Assistance Fund of the Inter-American Human Rights System was used to ensure the participation of victims before the oral hearings. But this is a rare exception rather than the rule as in most cases there is no specific legal assistance fund to enable communities' attendance at court hearings. Lomax, a lawyer for the Forest Peoples Programme, explains as follows:

> Normally there are a number of interim hearings and case-management conferences prior to the final hearing – sometimes a great many. While some lawyers will seek to save resources for the final hearing, this can be a mistake, since although these interim hearings are often quite short and procedural, participation by representatives of the indigenous claimants can be enormously powerful and encouraging – indicating progress in what can otherwise be a protracted and distant process. It can also help demystify the court environment such that when the final hearing does take place, indigenous representatives are not going to find the court proceedings and environment as alien as if it had been their first time in that setting, thus helping them to feel more comfortable when it comes to giving evidence and being cross-examined.[17]

The importance of participation to the court's hearings is not only important for the communities' sense of justice, it also enhances the judges' perception and understanding of indigenous claims. For many of the judges it might the first time they have even heard about the concerned communities let alone been in the presence of a member of that community. As noted by a member of a Maasai community in Tanzania who is currently involved in

[17] Tom Lomax, E-mail message to the author, 3 August 2019

litigation: “since none of the judges are themselves Maasai or from another indigenous group, it is not to be expected that they would have an instinctive understanding of indigenous peoples’ conditions and way of life and in general, they felt that the national legal institutions have very little awareness and understanding of their culture and what it is to be a pastoralist.” (MRG, 2017)

To address this challenge, regional human rights institutions have started to engage in different methods of conducting their hearings. For example in the Sarayaku case the Inter-American Court organised an *in situ-visit*. With such a visit the representatives of the court “heard numerous statements from members of the Sarayaku, including young people, women, men, the elderly and children from the community, who shared their experiences, views and expectations about their way of life, their worldview and their experience in relation to the facts of the case.”.[18] This represents an important process as it allows a proper inter-cultural exchange between the judiciary (here the IACtHR judges) and the concerned communities, resulting in a better understanding of the issues faced by indigenous communities by the judges. As noted by Carrasco “this is one of the major breakthroughs of this case, because it established a multicultural and multilingual approach (...). In dealing with cases referring to the advancement of rights by disenfranchised groups, narratives matter and are seminal to the breakdown of taboos, prejudice and misconceptions.” (Carrasco, 2015, at 215). However, this is an exception as not many courts will conduct such *in situ* visits.
Another way to enhance judges’ understandings of indigenous realities has been to use video evidence. For example, this was used in the case of the Mau Forest Ogiek who submitted a video illustrating their cultural practices. This video allowed the judges to get a better grasp and understanding of the issues faced by the community on the ground. Yet direct participation of the concerned communities and interaction with the judges (and more generally the justice system) are rare and exceptional. In most situations, apart from the few indigenous representatives going to court hearings as witnesses, the communities have very little direct exposure to the courts, and the judges will also have very little direct interaction with the concerned communities.

[18] Kichwa Indigenous Community of Sarayaku v. Ecuador, Inter-Am. Ct. H.R. (ser. C) No. 245 (June 27, 2012), at para 21. See also Inter-American Court of Human Rights, “Video-documento ilustrativo sobre la diligencia in situ de una delegación de la Corte al territorio del Pueblo Sarayaku”, (24 September 2012),

2.2. *'The Court's Theatre': Legal Jargon & Cross-Examination*

For the few members of the communities who might make it to the court room, they are then faced with the challenge of the formalistic 'theatre' of the court. As noted by Vermeleyen, a legal anthropologist participating to court hearings in Namibia:

> Sitting next to the main claimants in the public gallery in the Hai||om class action case, felt like being in a play, where we had the cheap tickets in the parterre. 'Curtains up' and judges appeared and I was instructed to make a deep courtesy, we could barely hear the lawyers and the judges, the acoustics were so bad in court that it didn't even matter what language was spoken. I tried to imagine what it was like to face for four days the backsides of the lawyers who seem to have control over your destiny. It felt like we were sitting back stage, as if we were the curtain 'boys'.[19]

The technical jargon and legal language used in court proceedings is daunting. The language used by the courts is often obscure, not only because it is technical and procedural but also because it is relying on old legal concepts (overuse of Latin sentences for examples). Even though regional human rights courts tend to use a more direct and accessible langue in their proceedings, there is still technical language which makes it obscure not only to indigenous communities but to most human rights victims. This heavy jargonised legal language can be an obstacle to the effective participation and understanding of the legal proceedings. Apart from the issue technical legal jargon, there is a much larger issue of the formality of the language used by courts, and the fact that very often this is expressed in a language foreign to indigenous communities. Interpretation and translation are often inadequate which means that the proceedings are unintelligible to the members of indigenous communities in attendance. The problem goes beyond translation as interpretations of indigenous concepts are often inaccurate. As captured by Brinks, the whole process of interpretation "is more likely to emphasise their subordinate, not-quite-citizen status than to put them on an equal footing." (Brinks, 2019- 354).

The issues of translation, legal interpretations, and adversarial formalities are particularly acute during cross-examination. The adversarial process of cross-examination as it deeply embedded in most legal systems. One way to alleviate the experience is to ensure

[19] Saskia Vermeylen, personal communication with the author, 14 August 2019

good preparation of the witness beforehand. For example, MacKay, the lead legal representatives of the Kaliña and Lokono communities spent time with the community members who were going to be called as witness to prepare them for what was to come. Such familiarisation proved to be crucial to support the community members to face the formality and adversarial nature of the cross-examination process, of course mindful of counsels' professional duty not to 'coach' witnesses. Odendaal, a legal counsel in the case in Namibia, also notes that a good practice is to take the community members to the court beforehand so they can see where the hearing is going to take place, to explain to them that the defendant lawyer is going to try and intimidate them in the hearing.[20] These practical steps for the preparation to the court's proceedings and formalities are important to support the participation of the concerned members of the communities, ensuring that they can understand and follow what is happening in the 'theatre' of their own court case, but also contributing to their legal empowerment.

3. Post-Ruling Strategies: Fighting for Implementation & Promoting Legal Empowerment

Getting to court and securing a positive ruling is only one part of the legal battle. Indeed, the court decision is often 'the end of the beginning' rather than the closure of the struggle for justice. The lawyers may go home but the campaign to implement and support legal empowerment goes on. Since, many decisions do not get implemented, key strategic issues need to be addressed to support a potential implementation. This includes engaging with available remedies and reparations, lobbying the strategic and relevant administrative and political institutions, and continuing to support the communities to develop advocacy strategies and media campaigns.

3.1. *Remedies, Reparations & Implementation Strategies*

Defining remedies and reparations in land rights cases involves addressing historical wrongs, embedded forms of discrimination, and challenging conventional tenets of property and land law. The mistake is to leave the issue of remedies unaddressed. It is difficult to predict the

[20] Willem Odendaal, E-mail message to the author, 27 July 2019

court's decisions before even engaging in litigation. But early planning on potential reparation is often key to be able to claim meaningful remedies for the concerned communities. Human rights institutions have mainly relied on three main types of remedies, including (1) legal recognition of indigenous rights to land; (2) physical delimitation, demarcation and titling to give effect to those rights to land; (3) material and non-material damages for past harms. Justice Mansfield in Australia notes that the task is to "determine the essentially spiritual relationship which the [Ngaliwurru and Nungali Peoples] have with their country and to translate the spiritual hurt from the compensable acts into compensation."[21] There are no ready-made applicable principles on what forms remedies should take. But participatory, rights-based deliberation with and within the communities on what remedies might look like is an important element of the process. This should not be left to after the court's decision, and indeed is an essential part of case preparation before the claim is even filed. Communities must have a clear idea of what they want and to put this forward in submissions to the court at a very early stage to avoid the court (or other external actors) dictating their own views on the issue.

Courts have also awarded remedies to ensure basic services and goods, community development programs, and monetary compensation.[22] These require the direct and active participation of the communities. Titling and demarcation include the "full participation by the Community and taking into account its customary law, values, customs."[23] Monetary compensation or damages need to be allocated in a development fund for the benefit of the community as a whole, requiring the communities to set up community funds and governance systems for managing those funds. All these require preparation and capacity support with the communities, even before the court case is ruled by the courts. For example, in Namibia, the Hai||om applicants have clearly set out the principles that would govern the management of any compensation, indicating that it will be based on fair and inclusive decision-making processes; equal membership for all Hai||om; democratic and transparent processes, including audited and publicly available financial statements; managed for the benefit of the members of the Hai||om; and established accountability mechanisms for leadership

[21] Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples [2019] HCA 7

[22] See Yake Axa Indigenous Community v Paraguay, IACtHR, Judgment of 17 June, 2005 (Merits, Reparations and Costs), para 149.

[23] The Mayagna (Sumo) Awas Tingni Community v Nicaragua, para. 164

structures. They have also highlighted that they do not ask for indirect distribution of damages, but for communal management of communal compensation. Not preparing and addressing how remedies might work and be used might later undermine the community's readiness and cohesiveness once the awards are ruled on.

One commonality shared in most indigenous cases of litigation is the extremely poor level of implementation of courts' decisions. Most of the international decisions which have been lauded as significant legal victories have not been implemented. There is no magic wand to tackle this dominant lack of implementation, but early engagement and indigenous led implementation plans could play a positive role. Most post-ruling processes involve the establishment of administrative 'task force' or equivalent political institution to 'examine' the consequences of the judgement and potential avenues for implementation (OSJI, 2017). For example, the two cases of litigation concerning Kenya, the Ogiek and Endorois cases, have both led to the establishment of a 'task force' established to 'study the political, security and economic implications of the decisions'. The concerned communities were not even consulted or approached, and had to work hard to lobby and engage with these task forces. This is a common scenario. It is important for the communities to be ready to engage and challenge these bodies. Hale described the "nightmare that settles in as indigenous organisations win important battles of cultural rights only to find themselves mired in the painstaking, technical, administrative, and highly inequitable negotiations for resources and political power [necessary to realise those rights] that follow." (Hale, 2005- 13) Early anticipation and preparation to engage with this administrative and political nightmare could alleviate some of the intrinsic complexity and frustration attached to the process.

Many communities have developed their own implementation plans, or strategies to support an eventual implementation. Indigenous led implementation plans maintain and perpetuate community's mobilisation but also put pressure on public authorities to implement the court's decision. As an example the Ogiek Peoples' Development Program (OPDP) has organised meetings and workshops with leaders of the community on different options of land restitution and compensation, conducting surveys on immaterial losses, analysing data on material losses, building the capacity of representative institutions to seek implementation, organising paralegal trainings, and supporting community outreach. They have also developed and adopted their own biocultural protocols, highlighting how their land and natural resources could be managed when it is returned to them. There is no guarantee

that this will lead to implementation, but as noted by Kobei the director of OPDP, this supports community empowerment, collective advocacy and a collective hope that implementation might be coming.[24] This point highlights how the process of post-ruling implementation strategies can also be used as a platform to support legal empowerment and advocacy, but this requires significant resources and time that should be catered and strategized for before engaging in litigation.

3.2. *Litigation as a tool for Legal Empowerment and Advocacy*

One danger of the litigation process is the long-term 'fatigue' and sense of disempowerment which can come when a legal decision is not implemented. Non-implementation following years of complex litigation can cause the communities to lose faith in justice. It is within this context that two recent studies conducted by the author have examined the impact of litigation going beyond the pure point of implementation (MRG 2017 & OSJI 2017). The studies uncover whether the communities felt that the years of complex litigation and the lack of implementation was worth the effort.[25] The interviews conducted show that litigation has become an important element of the indigenous campaigns for justice, but also that it is only one element of the larger struggle. For example, community members interviewed in Paraguay and Kenya, indicated that litigation had allowed them to learn a great deal about laws and legal institutions of their country and international human rights law. The engagement in the litigation created a strong sense of unity, notably between the different members of the communities. Some of the leaders highlighted that litigation played an important role in collective mobilisation, as it unified them against common threats. It also allowed communities to use empowering legal language in their relationship with public authorities. As noted by a participant "before the case they were never listened to by the authorities whereas now after the court ruling the authorities are starting to listen to them." (MRG, 2017, p. 21) Many community members have also highlighted that the process of litigation was important as it contributed to register and record the truth about their situation. As stated by Serafin Lopez, a member of Xákmok Kásek community in Paraguay:

[24] Daniel Kobei, Personal notes taken during a meeting held in Amnesty International headquarters on strategic litigation, 9 July 2019

[25] Cases concerned communities in Kenya, Tanzania, Paraguay, and Malaysia.

"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."[26] (OSF, 2017). Another participant highlighted that "even though litigation might not bring justice it is nonetheless an important process to tell truth." (MRG, 2017 – p. 22).

Another significant element was the sense that litigation was a significant step to support future protests and advocacy. As stated by Charles Kamuren a member of the Endorois Welfare Council in Kenya: "The community now believes they exist and they have a future. The case gave them psychological healing." Likewise, Ilam Senin a member of an Orang Asli village in Malaysia stated: "We now have confidence that we have control over our land and that we have the right to fight for our rights." In Tanzania, a group of interviewed women indicated they had learnt a great deal about their fundamental human rights and noted that "the court process gives us entitlement for other forms of protests." (MRG, 2017). These are important lessons: litigation is not only means to an end but is in some senses an end in itself, as part of a larger fight for social justice. In this context litigation has to be seen for what it is: a process in the strategic toolkit for justice. As noted by Sieder "new forms of social protest and resistance combine local customs and communal authority structures (customary law) with global rights discourses, as well as international instruments and institutions." (Sieder, 2010 - 163) Indigenous peoples are frequently considered socially and politically subordinate to 'majority' groups, and generally have low levels of political participation and influence. In this regard, litigation may also be considered a form of participation, and as "an alternative to 'orthodox' political participation." (Grossman, 1975) Although litigation is usually not a choice but rather a last option when all other forms of negotiations, political demonstrations and other forms of protests have failed, it has become a significant part of indigenous struggles.

Conclusion

[26] Interviewed conducted by Joel Correia in July 2016

Litigation has considerable potential as a tool for legal empowerment, but this requires the communities and their supportive organisations to manage attempts and adopt strategies to ensure direct participation and legal empowerment. Due to its technical, adversarial and convoluted process, the danger is that indigenous communities become passive spectator to their own quest for justice, with external actors, lawyers, legal representatives, anthropologists, translators, and other 'experts' taking the centre stage. In an overall context where litigation is lengthy, costly, technical, and implementation rare, it is especially important to ensure that the process supports their empowerment.

Although litigation is often a last resort, it must be approached strategically to ensure the community's central participation in the court's proceedings. This article examined how these strategies for legal empowerment need to be integrated in all three phases of the process. As noted in the pre-trial section, even before the court cases have started important decisions need to be undertaken by the communities. They must decide who might be the named victims, what evidence might be used, and choose long term trusted legal representatives. These decisions will have a long-term impact, not only on the decision of the court but also in the way the court proceedings will affect the community members. The trial period could be extremely disempowering for the communities, as lawyers and judges preform legal formalities which could leave the communities on the side. The preparation and jargon breakers before for the trial and their physical access to the courts are important elements to ensure a better sense of empowerment. The post-ruling period is equally demanding as implementation needs to be approached as a proactive and long term process, not having post-ruling implementation strategies might undermine the whole litigation effort. It also must prepare them for the long term struggle so as not to lose faith in the justice system. Apart from the direct results of court decisions, the impact of litigation can be measured by how it contributes to strengthening indigenous organisations and contributes to the wider fight for justice. Many community members have mentioned that litigation has supported them to feel legally empowered, in their words giving the sense of having 'the right to have rights'.

Equally important is the fact that litigation is only one chapter of a much larger struggle for justice. It should not become the only vehicle to seek justice. It must be part of a broader campaign that includes parallel processes of social mobilization. In these broader campaigns, litigation can be an important tool for indigenous communities who are politically,

economically and legally marginalised and discriminated. When used as part of a successful campaign, litigation challenges the perception that law and legal institutions are on the side of the powerful against indigenous peoples, and can constitute a significant empowering tool. To be empowering, litigation has to be placed in the larger struggle of indigenous peoples against encroachment on their lands and territories by corporations and investors having an interest in exploiting their territories. This is an important element to bear in mind, as one obvious limitation of human rights litigation is the fact that corporations, investors and other private actors involved in violations of indigenous rights are largely not directly concerned. Although human rights litigation is important to challenge public authorities' lack of respect and enforcement of indigenous rights, it has not yet become a strong platform to challenge the acts of private actors on indigenous territories. There is change on its way with increased focus on the responsibilities of private actors for human rights violations, and there are no doubt that litigation on indigenous rights will push the agenda even further. Until human rights law becomes able to also address these violations, it will remain a very limited platform of action for addressing this significant and growing threat to the realisation of indigenous peoples' rights.

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