

## Impact case study (REF3)

<b>Institution:</b> University of Roehampton		
<b>Unit of Assessment:</b> 21 - Sociology		
<b>Title of case study:</b> Litigation as tool to support social change? Indigenous Peoples, Human Rights and Legal Empowerment		
<b>Period when the underpinning research was undertaken:</b> June 2017-2020		
<b>Details of staff conducting the underpinning research from the submitting unit:</b>		
<b>Name(s):</b>	<b>Role(s) (e.g. job title):</b>	<b>Period(s) employed by submitting HEI:</b>
Jérémie Gilbert	Professor	June 2017 – present
<b>Period when the claimed impact occurred:</b> 2017-2020		
<b>Is this case study continued from a case study submitted in 2014?</b> N		
<b>1. Summary of the impact</b> (indicative maximum 100 words)		
<p>Across the globe indigenous peoples are increasingly using litigation to seek remedies for violation of their fundamental human rights, particularly the restitution of their ancestral lands. Gilbert's socio-legal research builds on this increase in litigation to provide a new focus on the role that litigation can play as a tool to support the empowerment of indigenous communities. Gilbert's research has:</p> <ol style="list-style-type: none"> <li>i. Informed the litigation strategy of a constitutional court case concerning the San-Hai  om communities of Namibia;</li> <li>ii. Led to institutional-level changes in the policy and litigation strategy of international organisations whose work supports the rights of indigenous peoples;</li> <li>iii. Contributed to the adoption of new norms and global standards by the United Nations.</li> </ol>		
<b>2. Underpinning research</b> (indicative maximum 500 words)		
<p>Since arriving at the University of Roehampton, Jérémie Gilbert (Professor of Human Rights Law (2017-present) has built on his professional practice and his body of research to develop and enhance understanding of the potential of the role that litigation can play as a tool to support the legal empowerment of indigenous communities (<b>R1-R5</b>). According to the United Nations, there are more than 476 million indigenous people spread across 90 countries worldwide, who generally face hardship, discrimination and non-recognition of their rights to lands and natural resources, as well as high levels of economic, social and cultural marginalisation. In recent years, indigenous peoples have increasingly used recourse to courts and tribunals to seek respect for their rights. Despite this increase in engagement with legal processes, their complexity can make legal redress an extremely hard path to pursue, with courts and tribunals usually imposing an onerous burden of proof on the indigenous plaintiffs to demonstrate their rights over their ancestral territories (<b>R1</b>).</p> <p>As a consequence, many indigenous communities have developed maps of their territories to prove their economic, cultural and spiritual connections to them. Through a multidisciplinary approach which connects sociology, anthropology, law and geography, Gilbert has developed an analysis of the role of this cartographical evidence in the legal process along with an examination of its impact on the social cohesion of communities which adopt it (<b>R4</b>). He has demonstrated that, in addition to mapping being important as an element in the adjudication effort, its impact extends well beyond the courtroom (<b>R1</b>). Evidence gathering and the documentation of customary land usage can create a powerful process through which communities improve their awareness of land and resource management, thereby supporting the transmission of traditional knowledge and increased social cohesion within indigenous communities (<b>R1, R2, R4</b>). Gilbert's research demonstrates that litigation should be approached not only as a legal mechanism but also as a wider campaigning and participatory tool to challenge embedded forms of discrimination (<b>R3, R4</b>). Through analysing how such participatory methodologies, including a community's evidence gathering, community mapping and capacity-building preparation, operate, Gilbert has demonstrated how the communities concerned can create a more participatory role for themselves, consequently supporting their empowerment (<b>R1, R2</b>).</p>		

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Gilbert's research has been deployed through his engagement with litigation, where it has been essential to the outcomes and strategies of the legal disputes of indigenous communities, particularly in Africa where litigation has been especially important for the empowerment of small, marginalised groups such as the Batwa, the Ogiek, or the Endorois, in Uganda and Kenya (R3), and the San in Namibia (R2, R6). In these countries, the communities concerned have come to rely upon and use international human rights law to redress the lack of a proper national legal recognition of their fundamental cultural rights over their land and natural resources. Gilbert has also examined the need to place litigation in a broader environmental context, particularly as a result of the increased exploitation of natural resources, and the consequences of environmental degradation and of climate change (R5), leading to the award of a AHRC grant in November 2020 (£70,391.62), which will finance research into the legal recognition of rivers and the role played by local indigenous communities in protecting local eco-systems (G1).

### 3. References to the research (indicative maximum of six references)

- R1** Gilbert, J. (2020) Indigenous Peoples and Litigation: Strategies for Legal Empowerment, *Journal of Human Rights Practice*, 12(2), pp.301–320, <https://doi.org/10.1093/jhuman/huaa028>
- R2** Gilbert, J. (2017) Litigating Indigenous Peoples' Rights in Africa: Potentials, challenges and limitations, *International and Comparative Law Quarterly*, 66(3), pp.657-686, <https://doi.org/10.1017/S0020589317000203>
- R3** Gilbert, J., Sena, K. (2018) Litigating indigenous peoples' cultural rights: Comparative analysis of Kenya and Uganda, *African Studies*, 77(2), pp.204-222, <https://doi.org/10.1080/00020184.2018.1452855>
- R4** Gilbert, J., Begbie-Clench, B. (2018) "Mapping for Rights": Indigenous Peoples, Litigation and Legal Empowerment, *Erasmus Law Review*, 1(1), pp.6-13, <http://dx.doi.org/10.5553/ELR.000092>.
- R5** Gilbert, J. (2018) *Natural Resources and Human Rights: An Appraisal*. Oxford: Oxford University Press. ISBN: 9780198795667. Listed in REF2.
- R6** Gilbert, J., Odendaal, W., Vermeylen, S. (2020) Recognition of ancestral land claims for indigenous peoples and marginalised communities in Namibia: A case study of the Hai||om litigation, W., Werner, W., (eds), *'Neither here nor there': Indigeneity, marginalisation and land rights in post-independence Namibia*, Legal Assistance Centre. Available on request.
- G1** AHRC. Guardians of the Rivers: towards a new Ecological & Participatory Model for Nature Rights? (PI; 11/12/ 2020 – 11/09/2021). £70,392.

### 4. Details of the impact (indicative maximum 750 words)

The impact of Gilbert's research focuses on three interrelated areas. Firstly, it has influenced the litigation strategy adopted by the claimants in a case concerning the rights of San communities in Namibia. Secondly, it has influenced the work and approaches of key international NGOs supporting and engaging in litigation, informing the main aims and litigation strategies adopted by these organisations, as well as the development of tools to support indigenous communities and practitioners across the globe. Thirdly, it has supported the development of international norms adopted by the United Nations, while also contributing to the composing of the **State of the World Indigenous Peoples** report, the main United Nations resource to raise awareness of the issues faced by indigenous communities.

#### i. Informing the litigation strategy of a constitutional court case in Namibia, and empowering the San-Hai||om community

Since 2017, Gilbert has been supporting a constitutional court case concerning the rights of San communities in Namibia who are seeking to reclaim part of their ancestral territory. The claim concerns eight members of the San-Hai||om community who are seeking to clear the way for legal action, asking the Namibian Supreme Court to confirm their right to act on behalf of all Hai||om members in asserting the group's ownership of the land comprising the Etosha National Park. This would enable the Hai||om to determine the use of the land and to receive a share of any profits

from economic activity, such as the significant income that the tourism industry already generates in the territory. Gilbert's research concerning the role of international and comparative law in supporting the right to restitution of ancestral territories (**R3**) was key to the development of the legal team's strategies in this case as well as to supporting the evidence gathering process. This was a particularly noteworthy case, as it was the first time in Namibia that an indigenous group had challenged the government through a representative class-action lawsuit (around 3000 Hai||om members have supported the action). Gilbert's research was crucial in the development of this process as well as in the preparation of the appeal after it was initially turned down in November 2019 (the appeal is ongoing at the time of writing). According to the lead lawyers from the Legal Assistance Centre in Namibia, this process was empowering for the community, particularly benefitting the *'claims of the concerned communities and Namibia's jurisprudence on land rights in general, but also more explicitly of marginalised landless communities in the country'* (**IMP1**). In April 2020 the head of the government's Wildlife and National Parks directorate stated that it is in the process of granting tourism rights to the Hai||om people so they can financially benefit from the park – one of the principal objectives of the suit (**IMP2**).

## ii. Institutional level changes in policy and litigation strategy

Gilbert's research and contribution to key indigenous peoples' land rights cases around the world has made his research a global reference point in the use of litigation as a tool for legal empowerment. This has been recognised by the Open Society Justice Initiative (OSJI), an NGO established in 2003 whose mission focuses on providing expert legal support through strategic human rights litigation. In collaboration with the OSJI, Gilbert coordinated one of the first cross-country analyses – across Paraguay, Kenya and Malaysia – of the impact of litigation, culminating in the publication of a strategic litigation impact report (**IMP3**), authored by Gilbert. This report, the first study to examine the use of the courts to advance indigenous peoples' rights, draws on Gilbert's unique research on the role of litigation as a tool to support social change (**R2, R4, R5**). The development of this document enhanced the communities' knowledge of their own rights and of the legal and political framework and processes for asserting them, empowering them to speak out. According to the Senior Officer who commissioned the research *'several community leaders gained even deeper knowledge of indigenous peoples' rights and became conversant with the international mechanisms that allowed them to raise their cases at the highest international levels. Indeed, in 2017 several community members were sponsored to present Professor Gilbert's report at the UN Permanent Forum on Indigenous Peoples in New York, and the UN Expert Mechanism of the rights of indigenous peoples in Geneva'* (**IMP4**). Another direct result of the report's release were the connections established between indigenous peoples who had lost their historic lands to predatory energy companies and domestic and international lawyers in New York and Geneva who have since taken their cases *pro bono*. In addition, the report influenced changes in OSJI's own strategic objectives and priorities, informing their work on climate justice and making it an institution-wide priority (**IMP4**).

The report was one in a series of four thematic studies from the OSJI on strategic human rights litigation, becoming the most widely read, and achieving greater reach than other of the group's publications. It was translated into Spanish and partially translated into Guaraní, a local language in Paraguay which is spoken by the majority of the country's population, consequently reaching audiences in Latin America. Hundreds of copies of the report have also been distributed at policy and academic venues and have since been included in the catalogues of law libraries around the world (**IMP4**).

The methodology and findings of this report, alongside Gilbert's published research – particularly his work on the impact of litigation in Africa (**R2**) – has influenced changes in the practice of institutions such as the Minority Rights Group International (MRG). In 2018, Gilbert was commissioned by the MRG to develop an evaluation of the institution's litigation and legal empowerment programmes implemented with minorities and indigenous peoples in East Africa over the last 15 years, with a view to identifying learning points useful for the orientation of future programmes (**IMP3**). This evaluation, which culminated in the publication of a report in 2019, concluded that MRG's activities are powerful tools that create spaces and opportunities for communities to unite around shared struggles and make decisions that can positively impact on

their rights (**IMP5**). The report produced a set of 11 recommendations, that have since been adopted by MRG and used in the strategy of the legal team to develop their approach to litigation as a tool to support indigenous peoples' legal empowerment. This includes shaping the litigation strategy in a case brought by the Batwa of Kahuzi-Biega National Park against the government in the Democratic Republic of the Congo, before the African Commission on Human and Peoples' Rights which is currently waiting for a hearing (**IMP6**).

### iii. Contribution to UN's norms and key reports

As a result of his high-profile research and expert knowledge on legal strategies and litigation, Gilbert was invited by the United Nations Permanent Forum on Indigenous Issues to present his work on litigation and strategies for legal empowerment in a meeting held in January 2018. The resulting UN report highlighted and endorsed Gilbert's analysis of the impact of land grabbing on indigenous peoples, and of how it has led to massive investments by private funds and banks in lands that often belong to such communities (**R2, R3, R4**) (**IMP7**). Gilbert was subsequently invited to attend high-level negotiations to support the adoption of the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas, which was adopted by the UN in December 2018. His research concerning the relationship between human rights and environmental governance (**R5**) was used to support the drafting of article 19 on the rights to land and natural resources (**IMP8**). This declaration aims to protect the rights of all rural populations, including indigenous peoples, improve their living conditions and strengthen the fight against climate change and the conservation of biodiversity. This the first ever international norm granting rights to small-scale farmers population, consequently safeguarding benefits for approximately one third of the world's population.

Following the adoption of this declaration, in 2020 Gilbert was invited to contribute to the UN's **State of the World Indigenous Peoples** report. This report series responds to the recommendation by the UN Permanent Forum on Indigenous Issues to periodically produce a UN publication that analyses indigenous peoples' issues and advocates for their rights. It is the main awareness tool for indigenous peoples' issues within the UN, States, academia and the broader public. Gilbert's contribution was based on his research (**R1, R2, R3**) and examines the implementation of indigenous peoples' rights to their ancestral lands and resources. As noted by the Senior Social Affairs Officer, Gilbert's research *'on litigation and indigenous peoples' rights was extremely valuable to the development of this report, notably on the chapter concerning the implementation of indigenous peoples' rights to lands, territories and resources. This chapter was particularly important in demonstrating in practical terms how legislation and other measures are being implemented in Member States'* (**IMP9**). Due to the COVID-19 pandemic, the launch of the 2020 report was postponed to 2021. Beyond raising awareness of indigenous people's struggles, this report is also aligned with the UN's adoption of the 2030 Agenda for Sustainable Development, which offers more opportunities to promote the rights of indigenous peoples to land and resources due to its integrated approach to economic, environment and social development within a human rights framework. This approach will provide space to demonstrate the value of indigenous stewardship of lands and resources in accelerating action towards the implementation of the Agenda's sustainable development goals (**IMP10**).

### 5. Sources to corroborate the impact (indicative maximum of 10 references)

**IMP1** Testimonial from the Legal Assistance Centre on the support provided by and influence of Gilbert's research on the development of the legal team's strategy. 19/02/2020.

**IMP2** Article published on Reuters, covering the events around the case and the current situation of the Hai||om community in Namibia.13/04/2020. <https://uk.reuters.com/article/us-namibia-land-indigenous/indigenous-namibians-fight-for-ancestral-land-in-national-park-idUSKCN21V0PI>

**IMP3** **Strategic Litigation Impacts: Indigenous People's Land Rights** report, written by Gilbert and published by the Open Society Justice Initiative. 2017.

**IMP4** Testimonial from the Open Society's Senior Officer for Research. 03/07/2020.

**IMP5** **Indigenous peoples' land rights in Tanzania and Kenya: the Impact of Strategic Litigation and Legal Empowerment** report, co-written by Gilbert for MRG. 2019.

- IMP6** Testimonial from the former Legal Director at MRG, focusing on the influence of Gilbert's research in the change of legal strategy within the institution. 06/07/2020.
- IMP7** United Nations Permanent Forum on Indigenous Issues, International expert group meeting on the theme "Sustainable Development in the Territories of Indigenous Peoples". 21/02/2018. <https://undocs.org/E/C.19/2018/7>.
- IMP8** United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas: resolution / adopted by the Human Rights Council on 28 September 2018. 08/10/2018. [https://digitallibrary.un.org/record/1650694/files/A\\_HRC\\_RES\\_39\\_12-EN.pdf](https://digitallibrary.un.org/record/1650694/files/A_HRC_RES_39_12-EN.pdf).
- IMP9** Testimonial from the Senior Social Affairs Officer at the Indigenous Peoples and Development Branch, Division for Inclusive Social Development of the United Nations' Department of Economic and Social Affairs. 11/11/2020.
- IMP10** *State of the World's Indigenous Peoples, Volume V - Rights to lands*. Press release.