The Rule of Law and Access to Justice:
Findings of an ABA Project on Access to Justice[1]

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The project on the Access to Justice (A2J) is a component of the ABA's bigger project on the Rule of Law (ROL). A central feature of the ROL is the equality of all before the law. As part of this equality, all persons have the right to the protection of their rights by the state, particularly the judiciary. Therefore equal access to the courts and other organs of the state concerned with the enforcement of the law is central to the ROL. The concept of A2J captures this requirement of the ROL. As with the concept of the ROL, there is a narrow and a broad meaning of A2J. The narrow concept focuses on the courts and other institutions of administering justice, and with the process whereby a person presents her case for adjudication. The broader concept addresses, additionally, the process of law making, the contents of the law, the legitimacy of the courts, alternative modes of legal representation and dispute settlement. An intermediate concept would focus on dispute resolution, whether by

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official or unofficial mechanisms, but not include law making or content of the law (although adjudication often involves interpretation, and thus the broadening or narrowing of the law).

I. Definition of 'access to justice'

Access means approach, entry into; accessible includes the idea of being able to influence. So access to justice means more than being able to raise one's case in a court or other relevant institution of justice.

Justice is defined as fairness; in the legal and political sphere, it usually means 'exercise of authority in maintenance of rights'. Fairness covers both the procedures of access and the substantive rules that determine the exercise of authority.

Access to justice therefore means the ability to approach and influence decisions of those organs which exercise the authority of the state to make laws and to adjudicate on rights and obligations.

Defined in this way, A2J can be a very broad concept, covering the conduct of most organs of state and the processes of getting to the courts.

Many current projects on the A2J define the concept to include the entire machinery of law making, law interpretation and application, and law enforcement. So defined, it also covers the ways in which the law and its machinery are mobilised, and by whom or on whose behalf. Since justice is value laden, these projects also focus on the content of the law and the ways in which it can be reformed to reflect the concerns of the groups in whose name the projects are undertaken—the poor, the disadvantaged and the marginalised. UNDP, a key international player in this field, states, "Access to justice entails much more than improving an individual's access to courts or guaranteeing legal representation. It must be defined in terms of ensuring that legal and judicial outcomes are just and equitable." (UNDP, *Access to Justice: Practice Note* (Draft 1), 8/3/2004, at 3).

II. The scope of activities under the A2J projects

Two approaches can be detected in A2J projects. The first one is what may be called the 'supply side', that is the reform and strengthening of the machinery for the administration of justice and procedures for bringing disputes to courts. Typical activities are upgrading the skills of judges, improving their working conditions including remuneration, providing them with technology that can speed their work, building better court houses, digitalising legislation and law reports, assistance to bar associations for better and continuing training of their members, assistance to law schools to improve standards of legal education and grants for research and publications, and funds and technical assistance for law reform (often through law reform institutions), codification of law and better drafting. These measures enhance the capacity of the legal and judicial systems to cope with the demands that people make on them. To some extent this approach reflects and seeks to respond, to the wide perception of 'mess' in legal systems – backlogs, corruption, expense, alienating and obfuscating procedures, physical inaccessibility.

The other approach, the 'demand' side, is the facilitation of the use of the courts, ombudspersons and other complaints mechanisms by the people. Typical activities are the use of local languages in courts, rules of procedure, including the standing to start legal proceedings, special rules for public interest litigation, waiving costs for arguable public interest and human rights issues, various forms of legal advice and representation (citizens advisory centres, legal aid administered by the state or the legal profession, pro bono services by the legal profession, state financed or managed public defender or public solicitors offices), the role of paralegals, provision of popular legal information, human rights education, establishment of community or non-governmental organisations to raise public awareness of their rights and assist the people, particularly the poor and the disadvantaged, to get access to the courts and other complaints mechanisms. The more radical and political aspects of promoting 'demand' is said to involve the 'empowerment of the poor and the marginalised', so that they can overcome the sense of their own inferiority and the fear of the law and officials. Litigation is used in creative ways, not only to settle a particular dispute, but to promote a right or entitlement more generally, and even to instigate the process of law amendment or reform. The aim here is to overcome the obstacles to access posed by poverty, ignorance and fear.

Somewhere between the two approaches is the role of 'community justice' as opposed to justice provided through the state system. In Africa this takes the form of customary law and tribunals, in India people's courts like Lok Adalat, and various associations in Latin America especially among the indigenous peoples. 'Community justice' is supported because it is deemed to reflect more closely the cultures and mores of the community concerned, it is informal and non-technical so that the poor and uneducated feel comfortable, is quick and easy to access, and the primary focus is mediation and resolution through forms of restitution. It thus enjoys considerable legitimacy—and takes the load off the official system. Its critics say that these tribunals operate without any clear rules of procedure, local politics permeate the tribunals, rules are often discriminatory, especially against women and children, and at least some communities, punishments can be harsh, even cruel. Little regard is paid to human rights. There is no consistency in judgements.

The impetus for reforms directed to the access to justice has undoubtedly come from the international community (for which read "western governments", sometimes referred to, inaccurately, "donors", as for the most part they are lenders who determine when loans are given and for which purpose). There are a number of reasons why western governments put pressure for justice reform. The pressure is connected primarily with the project of globalisation and neo-liberalism. The reform of the legal system creates the framework for the operation of the market. It is also deemed to promote democracy and human rights. These objectives are not achieved in a politically or economically neutral set of laws and institutions; the market and democracy are embedded in very specific types of legal arrangements, central to which are rights of property and contact. There is now considerable doubt whether either the market (or at least economic growth) or democracy depend on justice reform—but this scepticism has not permeated western agencies which promote the rule of law. And it is interesting that the emphasis on customary or community justice has also come from some of these agencies (particularly the World Bank, as the Kenya study in the present project shows). Perhaps what seems to be a deviation from the normal tenants of the rule of law is the result of frustration with the ineffectiveness of state system in certain contexts or flexibility about achieving the goals of economic development and participation.

The recognition of normative orders, in addition to that the formal system of the state, raises difficult conceptual issues from the perspectives of the rule of law (which are discussed by Yash Ghai in another paper for the Vienna Forum). The existence of multiple normative orders has been examined by lawyers and sociologists under the rubric of legal pluralism. To some extend the relations between normative/legal orders is seen as a contestation over the nature and objectives of the state (or the "nation state"). Multiplicity of legal orders can be regarded as victory of groups who are marginalised by the state (or rather the social forces that dominate the state). Arrangements under colonialism promoted legal pluralism, carefully orchestrated to serve the colonial project; it feel into disfavour after the end of colonialism, being seen as incompatible with nation building. The universalization of human rights, another post-second world war project, was seriously challenged by the plurality of legal orders, particularly those based on ethnic affiliations. The revival, in some quarters, of legal pluralism, is therefore of particular academic interest, quite apart from its policy implications.

III. ABA project on A2J

If justice reforms are an aspect of the supply side of the rule of law, the way they are manifested and elaborated depends largely on the demand side, on how numerous individuals and organisations mobilise the possibilities opened up by new laws and access to courts and other bodies charged with receiving and dealing with public complaints. The primary focus of the ABA project on A2J is on the demand side. Here too one can see the influence of western organisations, for a great deal of activity is sponsored or funded by western agencies (as in the studies on Central and Eastern Europe and Cambodia in this project demonstrate. But for the most part the initiatives have come from local groups (sometimes supported by international NGOs). They provide the basis of community action, and thus community cohesion which gives a different coloration to social mobilisation and litigation than normally we associate with the processes of the rule of law. These initiatives are not merely the result of new possibilities. As Professor Susan Hirsch commented on drafts of studies undertaken in this project, they follow into decades of struggle for rights of various sorts, especially human rights and women's rights. "Many of us are ambivalent about what claims to rights have offered in the long run, but it is hard to deny that the infrastructure of claiming in the legal arena has been heavily influenced by these earlier movements. So how does that initiative shape the current claims around or the current desire to work on access to justice as a sort of new project?"

The focus of the ABA project is on strategies of access to the institutions of justice (primarily but not exclusively courts). These strategies raise broader questions about the commitment of the state to law and human rights as the principal framework for policy and executive authority, the impetus to law reform through litigation, and the twin tensions, of the empowerment and mobilisation of the disadvantaged on the one hand, and the management of legal suits by professionals on the other, and that between the immediate gains (mostly for the litigant) and the long term gains of legal reform or the political agenda (for the community). Public interest litigation is one of the key methods to secure the rights of the disadvantaged. Litigation is largely about the implementation or enforcement of the law. These studies will offer insights into the difficulties of enforcing, and indeed the will to enforce, the law. These strategies may also raise fundamental questions about value of the

engagement with the formal legal system. All these issues are fundamental to the Rule of Law.

This paper summarises a number of papers that were commissioned by the ABA to study the access to justice of members of marginalised communities. The focus is on the role of courts and similar bodies in administering the laws that pertain to the entitlements of these communities. The paper examines the barriers to the access to these institutions and the strategies to mobilise the communities to seek the enforcement of the general or special laws for the protection of their interests. The players in this project are the communities themselves, the institutions which, through legal representation, provide access for them to courts, and the judiciaries which adjudicate on their claims. Community based litigation for the promotion of the interests and rights of the marginalised people shared certain characteristics which distinguishes it from the traditional forms of litigation. The debate about the claims made in support or opposition to the ROL (for example, whether it is conservative or innovating, whether it entrenches the privileges of the establishment or liberates the oppressed) is wide ranging and has gone on for a long time. The papers which are summarised here do not deal directly with this debate. The intention was to enhance understanding of the role of the legal process in the Rule of Law by exploring critical dimensions of the adjudicatory process—and thus in this indirect way to contribute to the debates on the scope and utility of the ROL.

The project is based on 8 country studies, undertaken by the world's leading researchers in the field of law and justice. Consistent with the ABA's understanding of the Rule of Law as fundamentally concerned with human rights and social justice, all studies concern the attempts of the weak and disadvantaged communities to seek the enforcement of their rights or redress for injuries. We provide first a summary of the studies, and then a series of concluding remarks on them.

IV. Land and Justice post-apartheid: South Africa

A number of studies deal with the rights of the landless. Land is critical to the well being of individuals and communities: as means of habitation, livelihood and economic production, social cohesion and community life. With the search for and exploitation of natural resources and the new uses of land facilitated by national and global economic developments, land has become a major source of conflict in many countries. Geoff Budlender, who has played a critical role in the struggles for freedom in South Africa, explores the rights of farm-dwellers in South Africa to housing guaranteed under the post-apartheid constitution. Farm dwellers were among the poorest and most marginalised groups of South Africans. They had few rights and virtually no access to justice in either the procedural or the substantive sense. After 1994, the new democratic government instituted major reforms aimed at improving the position of people in these circumstances, including an ambitious suite of new laws, and other measures aimed at increasing access to justice.

Geoff Budlender discusses land reforms for the restoration of lands to Africans deprived of their titles and possession during the apartheid regime, and for safeguards against eviction of those on land to which they cannot establish a title. With the end of apartheid, land reforms became a political imperative. The African National Congress government was committed both to social justice for those deprived of their property and opportunities for advancement as well as the rule of law, which included socio-economic rights. Thus law,

based on the rights approach, became the principal means of re-distribution. Most of the remedial legislation was drafted by civil society actors who had been active in the cause of the disadvantaged communities, and appreciated the importance of both rights and judicial process (the latter assuming a special importance as assuring the white community that land would not be taken away arbitrarily). But they also recognised that access to courts might be problematic for these communities and built in provisions for legal assistance (although as it turned out, they were not sufficient). It is in this favourable context that Budlender considers the potential and constraints of change through law, and the appropriateness of different institutions and procedures.

He examines first the Restitution of Land Rights Act 1994, which provided for the restoration of land (or the provision of just and equitable compensation) to people and communities who had been dispossessed of land after 1913 as a result of racially discriminatory laws or practices. A judicial type mechanism was established to adjudicate claims for the restoration of land; a Land Claims Court was set up. Thousands of claims were made, but progress was slow—for which there were three reasons. A commission had first to investigate claims; many claimants did not have the means of legal representation; and the procedures of the law were slow.

It was soon realised that litigation model not suitable to situation where state was the holder of land and no real disputes about facts. Budlender says that perhaps the most important lesson of the restitution process was that it is a mistake to judicialize claims which can be effectively dealt with by administrative process. "Access to justice is not achieved only through the courts: it is also achieved in the daily encounters which people have with officials of the administration…It is administrative officials who make most of the decisions which have the sharpest impact on the lives of poor people."

However, in relation to evictions, the role of courts was critical. Legislation dealt with two kinds of evictions: that from farms of tenant farmers, and from slums and other urban settlements of Africans who were until shortly before not entitled to live in cities without a permit. The power to evict was restricted, and courts were given the power to restrain evictions. But the enforcement of the law proved difficult, particularly because of absence of legal aid; illegal evictions continued. On application of a community organisation, the Land Claims Court ordered provision of legal aid to ensure the effectiveness of the law. But legal aid did not prevent evictions, which increased over an earlier, comparable period. A survey found that one-third of the evictees had no knowledge of their rights. Two-thirds of those evicted had wanted some kind of assistance. Just under a third of the whole class wanted either legal representation or assistance with mediation in order to enable them to talk to the farmer. 75% of those who wanted assistance of one kind or another did not know where they could get it. In the event, only 7.5% of those evicted obtained any assistance at all. Officials of the Department of Labour were unhelpful. The police were not only unhelpful – in half of the cases, they actually assisted the person carrying out the eviction, as did some other government officials. This was despite the fact that only 1% of the evictions involved any legal process – the rest were outside the law.

However, significant progress was made after a landmark decision of the Constitutional Court in 2000, in the Grootboom case (which has received considerable attention internationally). It explained the nature of government's constitutional obligation to take "reasonable legislative and other measures", within its available resources, to achieve the progressive realisation of the right to adequate housing. The right to housing was not purely aspirational, but had real practical content. The judgment pointed explicitly to the existence of a negative obligation on the State and other entities to desist from preventing or impairing

the right of access to adequate housing. It made clear the link between that negative right and the constitutional prohibition of arbitrary evictions.

Budlender summarises, "As a result of that judgment, other courts became much less willing to grant an order for mass eviction simply as a matter of course, on the production of proof that the occupation of the land was unlawful for one reason or another. The courts made it clear that the availability of alternative accommodation was a relevant factor to be considered in deciding whether to grant an eviction order. The consequence of this, in turn, was that where the party seeking an eviction was a governmental body, which was often the case, it was obliged to consider and do something meaningful about the question of where the evictees would go once they had been evicted".

From this analysis, Budlender identifies factors that are likely to facilitate litigation to secure rights given under the constitution and legislation. One of them is access to lawyers (more likely in urban than rural areas). Legal aid which is based on organisations with an ongoing interest in advocacy and litigation on specific social issues is likely to make a major impact; repeated engagement builds up knowledge and strategies. Community action is more effective than individual efforts. The mobilisation of the community around their rights is critical. "People who are threatened with eviction are not isolated. They live together in large groups. It requires only one or two members of the group to be aware of their rights (if only vaguely) and to know where to find legal advice, for the whole group to be able to defend themselves".

There is a need for organisations which can mobilise people around their rights. They can be characterised as falling into two classes – community-based organisations, in which the membership consists of the people whose rights and interests are directly affected, and support organisations.

Government officials must be trained in the new laws which provide justice, and that they must be obliged to enforce them effectively. It is important not to neglect the key role of elected public representatives at national, provincial and local level, as they have a critical role to play in monitoring the impact of legislation, in ensuring that the officials responsible for implementing the legislation do their job properly, and in bringing back to the appropriate legislative body proposals for change which will enable the legislation to achieve its intended purpose.

V. Injustice in a lawless state: Cambodia

The approach in Cambodia may usefully be contrasted with that in South Africa. Ghai's paper examines the constitutional and legal protection of rights in land (particularly of indigenous peoples and other rural communities) and the reality of the exercise of those rights. He traces the development of land legislation after the ravages of the Khmer Rouge regime which destroyed all land records, expelled urban people to the country side, and nationalised land. The legislation provides a good framework for dealing with many economic, social and political problems connected to land. Much of the legislation to provide the infrastructure of the legal system was enacted with the help of outside experts—and under the pressure of the international community. The strengthening of the institutions and practice of the ROL has been a constant concern of the international community. Dependent as Cambodia is on financial and technical assistance of the international community, the government has had to accept legislative reforms. However, unlike the South African government, it has little commitment to constitutionalism and the rule of law. So it takes a

long time to make regulations which may be necessary to give effect to legislative provisions (as for example, the provisions on the land rights of indigenous peoples) or refuses to give effect to legislation directly binding (as with the law on the grant of land for economic concessions). In practice wide impunity is allowed members and friends of the regime for the violations of the law. But those who are opposed to the government are victimised, often through the use of legal institutions, and are found guilty of offences which they patently did not commitment.

The penalty provisions in the Land Law create offences for infringements of land ownership and other rights to land, and can provide protection for the rights of individuals and groups whose lawful ownership or possession has been infringed by other individuals, authorities or corporate entities. In practice, however, these provisions have not been used to protect the rights of communities, including indigenous communities, whose rights to land have been violated by influential individuals, companies or Government entities. Instead, the courts have pursued criminal charges against those victimized by land disputes, using these and other legal provisions; however corresponding action has not been taken against individuals or Government officials who have illegally sold or bought land occupied by others, infringed their rights to land and forest resources. According to both the previous Law on Criminal Procedure and the new Criminal Procedure Code, where criminal charges hinge upon a determination of the ownership of land, they should be suspended until this preliminary question is determined in civil proceedings. Yet charges of infringement of private property (under the Land Law) continue to be pursued against community members involved in land disputes over unregistered land even before the question of legal title is resolved. State officials enjoy wide impunities while their victims are severely oppressed by legal institutions.

Ghai shows how the lack of the ROL facilitates these violations of the law. The Cambodian legal profession is very small, and availability of services to the poor, who constitute the majority of the people, thus limited. The government does not have any scheme of legal aid. The principal source of legal advice and representation for the bulk of the people, especially in the rural areas, is a small number of NGOs. These NGOs have lawyers on their staff who represent the poor, and since the mid-1990s much of the work of representing the poor has been done by a handful of non-state organizations. But they face many obstacles, placed in their way by powerful members of the community, with assistance from the authorities and some members of the Cambodian Bar Association. There is a pattern of rich or well-connected litigants trying to get the lawyers of their less powerful opponents investigated for criminal offences – such as incitement to commit crimes – simply for performing their professional responsibilities of acting for the poor. In the oppressive political environment of Cambodia, it is exceedingly hard for civil society organizations to play the facilitative and mobilizing role for disadvantaged communities that so marked the access to justice in South Africa as demonstrated by Budlender.

Over several years the government has stripped the prosecution of its independence. Many prosecutors fail to meet national and international standards guaranteeing that investigations and prosecutions are pursued with impartiality and integrity, and in the public interest rather than partisan interests. Complaints filed by the wealthy and the well connected and senior government officials, even when based on weak or unsubstantiated evidence, are prosecuted with vigour, while the vast majority of the populace have little hope or expectation of having their grievances taken up by public prosecutors. There is a heavy reliance on forced confessions even when contrary evidence is available.

It is at the level of the judiciary that the most egregious violations of the ROL take place. The constitutionally guaranteed independence of the courts has been completely negated by the government. The judiciary is corrupt in two ways: its decisions are often made in favour of the party paying the highest bribe; and it regularly receives and follows instructions from the government in politically significant cases. There has been a general withdrawal from recourse to courts to seek justice. Of all state institutions, the judiciary enjoys the least respect from or legitimacy from the public.

Ghai concludes his study by the following statement, "The government is unperturbed by this image of the law and the courts. Its "legitimacy" comes from its monopoly of the use of force. It is well content that the courts are instruments of oppression. The government thrives on unpredictability—which keeps the people and political parties in a state of suspense. As Holmes and others have said, keeping things fluid can be an essentially appealing strategy for a certain type of rulers. The Prime Minister, Hun Sen, feels so much in control over politics, economy and military that he can dispense with laws and legality. Laws, prosecutors and judges are important for their selective use. This selective use means that the friends of the government are above the law (except when they are its beneficiaries) and that its opponents can be prevented from the protection of the law. There are serious doubts about the sustainability of such a strategy—as demonstrated by the experience of many states".

VI. An innovative and creative judiciary: Brazil

Professor Santos de Souza's paper deals with access to the regular courts, rather than to an alternative system of justice – though he also observes that the State has no monopoly of the "production and distribution of law", and that it may even be that the unofficial system is most important for citizens. The paper does not assume change in the route to those courts (as by providing lawyers to those who cannot afford them, building courts where they are accessible etc) so much as a change in the courts themselves, or in their personnel and their attitudes, and in what might be termed the attitude of law. So the central theme is that courts can be important, but that this be so only if political action of various sorts is used, in addition to legal action. Political action involves organization into movements and NGOs, on the part of the oppressed and political pressure, even upon the courts. Legal action has involved changes in the law, and in the interpretation of the law. The fact that getting into the courts is only part of the battle is underlined by a brief account of a major current Supreme Court case, which concerns the demarcation process in a large "indigenous Territory": the decision may be "historical and constitutional error for the indigenous and Brazilian communities", or, alternatively, an important endorsement of the new constitutional approaches.

The oppressed group, in Brazil, that is the main focus of the chapter is the Landless Rural Workers' Movement, though Santos observes that there are two other groups with particular issues of land - indigenous groups and the community originally formed by ex-slaves – and that all these various groups have different conceptions of land. Here is a link with other papers, such as Faundez and Williams, where the very conception of "justice" and "property" are contested.

Underlying the recent developments is the new Constitution of Brazil (1988?) which recognises a broader concept of land, embracing a more collective conception of rights, more attuned to indigenous people's conceptions. And the constitution has abandoned the integrationist approach to the place of those peoples in Brazilian society that was found in

earlier constitutions. The constitution and democratization have given greater credibility to the courts, though this can lead to great frustration as expectations are disappointed. One problem is the slow speed of the courts – but Santos makes the interesting point that one should not be too simplistic about this, because developing innovative interpretations of the law may take longer than their simply following old habits.

There are various land programmes for the different communities. But those who have held land in the past and are being asked to give land up do not give up without a fight, and that fight is very likely to end in the courts. Those who hold title deeds within indigenous areas try to hang on to their privileges, including trying to paralyze the demarcation process by litigation; almost every exercise in land demarcation ends in court. And political action too (such as collective occupation of land, marches, hunger strikes, vigils and demonstrations) may end up in the courts. Access to justice in these situations does not mean so much the oppressed going to court proactively to assert their rights, but their being taken to court by others and using innovative strategies by way of defence.

Some programmes involve educating intended beneficiaries – for example associations of workers are working with the authorities to give guidance on rights to ex-slaves who are the beneficiaries of recent legislative advances; actualising the rights may take years.

The Landless Rural Workers' Movement has developed a remarkable armoury of creative approaches, and has been both effective and efficient in the struggle for law and justice in land reform. This is shown empirically by a study of 23 cases in which the MST were defendants. Over time decisions have tended increasingly to favour the landless.

The strategy has been, therefore, not merely to get the oppressed into court (that has been all too easy) but to affect the way in which the courts decide the cases once they are there. The strategies have included new legal arguments, new approaches to the interpretation of the law. Some of these arguments have stimulated debate within the judiciary. And the strategies have involved using arguments based on the land law and on the constitution in cases that the judiciary would think of as "civil" cases, as Santo puts it – does this mean "civil code cases"?

A more proactive approach has also been taken, involving changing the judges by what is apparently "outside court" action. This needs some further exploration and explanation, but on the face of it may suggest an interesting line of inquiry for access to justice studies – namely whether the judiciary in some systems can be approached in ways that are not possible in other systems with more "aloof" judiciaries. Of course it also raises interesting questions about the "independence of the judiciary", including independence from what?

Study groups and associations have been held to educate the judiciary so that they understand what is essentially a new way of thinking about rights. Judges alone are not enough; and the MST strategies have included approaches to future and present practitioners. It organises technical and political training for lawyers, holding seminars, and working with the universities to influence the training of the future lawyers. There is a programme for law students to spend time with rural families – the sorts of families that they may represent, and also judge, in the future.

There is now a national network of people's lawyers. Interestingly the MST originally had no time for lawyers, preferring to work politically for its aims. But lawyers worked with the MST, and now MST lawyers have formed a network, which reaches out to the law students also. The lawyers also train the workers about their rights, and in this way the

workers see themselves more as citizens, for whom the Constitution and fundamental rights have some real meaning.

What has been happening in Brazil includes at least contributions to what Santos considers is needed, namely a revolution of justice which includes new legal and judicial paradigm, taking as its starting point a new conception of access to law and to justice, through procedural reforms and new mechanisms radical changes in judicial training, a legal culture that is democratic and non-corporative, and which is conscious of the injustices (socioeconomic, racial, sexual, ethno cultural, cognitive, environmental, historical, etc) in our society. Santos concludes that, in Brazil a creative combination of legal and political practices has enabled hegemonic institutions, especially the courts, to be used in a non-hegemonic way.

VII. Constitutionalizing indigenous peoples' rights: Colombia and Peru

Julio Faundez, like Santos, and indeed like Ghai and Williams, deals with the access to justice of indigenous peoples. He observes that armed conflict, and seizures of land by commercial interests, have had very serious impacts on indigenous peoples. He does not focus specifically on land, and, unlike the others he is looking not mainly at access to an official system of justice, but at what might be called indigenous alternatives. However, the need for such alternatives is at least in part a result of the people being denied access to justice through the official system, which ignores their languages, does not provide interpreters, and shows disrespect for their traditions. Indeed, he suggests state courts are guilty of more positive acts of injustice, including torture, excessive detention etc.

There are other important points of contact between the state system and the indigenous alternatives, including the use of the state system to undermine or bypass the indigenous systems, or attempts to do so. An honorable exception to this trend is the Constitutional Court of Colombia (see below).

Though we may use the expression "indigenous law and institutions" this does not necessarily mean that the institutions are traditional. Indigenous people, faced with the failures or outright hostility of the state system may not so much return to their own systems, as invent them, though they may draw on indigenous traditions (such as conciliation). Faundez takes three specific institutions of which at least two seem to have begun as vigilante groups, one dealing with cattle rustling (in Peru) and the other with urban issues (in Mexico), both of which moved on to actually dealing with the disputes, because the state system failed to handle the cases even if suspects were handed over to it. The third, also in Peru, is perhaps more traditional as well as indigenous. It involves a rather isolated community which is allowed to use traditional justice so long as this does not threaten non-indigenous interests. And this system covers civil and domestic disputes, and also matters of criminal law, like rape, and issues about community obligations

These developments are somewhat new, though the access to justice problems of indigenous peoples are not. Indeed, Faundez says that there have been some improvements in their position in recent years, which he attributes to globalization and democratization – the latter bringing greater awareness of rights. Until recently Latin American countries tended to deny any discrimination or even the existence of indigenous peoples. There has been a definite change in this, and he points to the ILO Convention on Indigenous Peoples. The

Inter-American Court of Human Rights has also been an important influence, recognizing and helping to define rights. Changes are not only at the level of international law, but include many constitutional changes which recognize indigenous peoples, and even their rights to traditional justice institutions – though in a limited way. The constitutions themselves reflect international developments. Some constitutions, however, strictly limit this recognition by saying that the indigenous laws must be consistent not only with the constitution but also with the law. In the case of Peru, though the constitution does not say this, the lawyers effectively read these limitations into the constitution.

Faundez's assessment of these new constitutions is that though they are often programmatic and imprecise they have not been meaningless; in other words they do represent some gains, though politically weak groups are less likely to benefit, and powerful economic interests are often against indigenous peoples. Still constitutions are often ignored and Governments have been slow to pass laws.

In his discussion of a remote Peruvian community, Faundez does raise an interesting issue, when he comments that methods used for investigation in the criminal cases are ruthless and the objective is to extract a confession. One might ask whether what the communities are able to create access to is accurately described as "justice"! He does not address the issue of gender – when domestic disputes are conciliated or rape cases decided, for example, what sort of justice do women receive?

It is in this context that the Constitutional Court of Colombia is particularly interesting. When faced with an issue of the validity of indigenous law it does not – unlike the Peruvian courts - take an approach that strict compliance with the constitution must be shown. It is interested in compliance with the spirit of the constitution – such as satisfying minimum standards of due process. It has permitted corporal punishment, despite a general sentiment against it, but only because it was intended to "purify" the person, and they will allow indigenous peoples to impose punishments in excess of those under the national Criminal Code. Because these are in a sense concessions, they only allow them on a case by case basis, considering how far the indigenous law is integrated into the custom and culture of the community.

Overall this paper is concerned with access to another system of law, and with the articulation of that system with the national system. It does portray a situation in which there have been positive developments, in the sense that indigenous communities are exercising more autonomy, though this is against considerable odds. To the extent that access to some sort of justice is enhanced this is due in part to the efforts of the communities themselves, which should not be viewed as passive victims, as has often been the case in the past. International influences – through international law and generally international trends – have also been important, and constitutional developments not without significance. Although the principal focus is on the indigenous people's institutions themselves, rather than - in some papers - with getting access to the institutions of the state as they are, or even with changing those institutions, the state institutions have some capacity to obstruct or even frustrate the indigenous initiative, so in some ways getting access to those state institutions, even changing them, is an issue here. This shows that in reality there is no bright line between what might be called access through the state system, and access through non-state institutions.

VIII. Modern redress for historical injustice: New Zealand

David Williams is concerned with, as he says, a slightly different sort of justice from what tends to come immediately to mind: his concern is with modern redress for historical injustice to communities, and the redress is sought not in the ordinary courts, but through special proceedings and in special bodies. In fact his theme does have a good deal in common with some other contributors, such as Santos and Ghai, both concerned, in part at least, with indigenous peoples seeking some sort of security to their land, in a context in which they have been victims of, or are threatened with, similar injustice to that done to the Maoris. Budlender, too, deals with the repercussions of schemes for land allocation to a community historically deprived of land, identity and power. For the Maoris, demarcation of the land would have come too late – now they control, under any form of traditional system, less than 1%.

Williams' institutional focus is largely the Waitangi Tribunal, named for the treaty which marked the beginning of colonial rule over what had been the land of the Maoris. The remedies that the Maori seek are measured not only in money terms, but in terms of acknowledgement of past injustice and responsibility to rectify it. And the process involves a different sort of evidence - depending as it does on an investigation of the past, beyond the scope of the limited horizons of most judicial proceedings, and relying upon the skills of the historian as well as the lawyer. But courts are not irrelevant to this process.

Access to communities of justice for forms of rights that do not fit into "modern" individualistic conceptions depends not only upon an ability to enforce rules, but upon contextual changes. Some of that context may be international. Faundez identifies globalization as a relevant factor in access to justice of indigenous peoples. Williams traces changes in the legal climate - which made the Waitangi Tribunal process possible - in part to the international context, including the anti-apartheid movement. And we are not concerned here just with new processes to enforce existing laws, but also to changes in substantive laws, including constitutions in Latin America (see Santos and Faundez). New Zealand does not have a single constitutional document, but it took a step of constitutional dimensions when, in the new legal climate, it introduced the phrase "Principles of the Treaty of Waitangi" into some legislation, beginning in 1986.

Before moving on, it would be wrong not to include in the access factors the role of the oppressed peoples themselves. No-one gets what they do not demand, and greater awareness of rights, connected to democratization, is identified by Faundez and others. Williams observed that the Maori always resisted the colonization process, and the Maoris' own initiatives were critical in the 1970s and 1980s.

Like Santos, Williams identifies novel interpretation as a factor in the achievement of access to justice. The somewhat unexpected ability of the courts to give some content to the nebulous phrase "principles of the Treaty", and interpretation that then stood in the way of government efforts to thwart its own recent commitments to restore land to Maori by its enthusiastic embracing of privatization (a then fashionable, globalized trend, shows that not all globalization tends towards community rights – naturally enough). And a positive "flotilla" of other cases, to use Williams' word, led to the questioning of various other aspects of government policy, from the perspective of the Treaty, and to other interpretive innovations, including the re-opening of litigation – thus reducing the impact of one rule of a modern legal system that tends to stand in the way of historic claims. Williams insists that the original 1987 case marked a genuine change in the legal discourse in New Zealand. Again

one can perhaps link this to Santos who comments on the way in which the indigenous people's own vision of their land is now reflected in the constitution and laws of Brazil (as indeed also in Colombia).

Behind a court's decision will almost always lie a lawyer's argument, of course. While Santos devotes considerable attention to lawyers' strategies, Williams rather hints at possible sources of these in the Maori struggles, in explaining how until 1987 most legal input came from academic and practicing lawyers working on a mainly *pro bono* basis. But in the State Owned Enterprises Act there lurked a provision that has proved very significant for Maori access to justice – and to the development of what has become known in some quarters as the "treaty industry". The significance of the new provision (conceived as a concession to the Maori) lay in the departure from traditional "legal aid" criteria which related to the absence of means of individual litigants, and the use of the criteria of need of the group, and also of how far it was reasonable to expect individual members of the group to contribute to litigation expenses. Initially the significance of this did not seem to be realised but in 1996 a lawyer convinced a legal aid granting committee to use the new provisions, and many publicly funded cases followed. This has worked with the courts' decisions on re-opening cases to increase greatly the contribution of the formal system to the achievement of justice for Maori.

Williams, unlike some authors, specifically addresses the issue of access to justice of women. He observes that during the 1970s Maori women were in the forefront of the Maori movement, and indeed that Maori society has traditionally had women among its leaders. But colonial structures and values were less accommodating of women, and when access to justice strategies moved to the imported court system in the 1980s, women's leadership role diminished. And the Waitangi Tribunal has declined to hear claims about the status of women, though it has dealt with many other issues important to Maori society.

Though Williams suggests that more by accident than design a mechanism has developed that does provide reasonable access to justice through the Waitangi Tribunal process, he reports that some Maori argue for more recognition of Maori law, and of the concept of women's chiefly authority. So there remains a gap between Maori and *pakeha* ("western") conceptions of "justice" itself.

IX. Peasants and their land in late "capitalism": China

Eva Pils provides a rich and vivid analysis of the impact of the rise of capitalism on the law and practices of land holding in China in the late 20th and early 21st century. The starting point is less the decay of feudalism as the de-legitimisation of Marxist ideology and Stalinistic central planning. Nevertheless the process has been masterminded and administered by a communist government which continues to use the artefacts of a Leninist state (and with all the asymmetries and contradictions that the combination of the market and political authoritarianism produces). Pils shows how the regime of land law has changed under both the enactments of the administration and the initiatives of the people (albeit that these initiatives lie in a sort of "no man's land"). The latter shows (as Santos also does) that people can not only mobilise law but also "produce" it. The remnants of Communist Chinese government's policies and instruments of control over residence and people's movements (reflected to some extent in the, blurring, distinction between the rural and the urban) produces fragmentation of land policies and laws, a kind of mosaic of property relations that elsewhere gave way to uniform and abstract concepts of property with the advance of

capitalism. With the enormous weakness, lack of independence and the limited competence of the courts, the judiciary plays little role in the settlement of disputes that arise in the area of land—or in the momentous social issues connected to land. Thus the dynamics of "access to justice' are quite different from most other experiences studied in this ABA project.

Pils traces the underlying philosophy and assumptions of land regime from pre-communist to the present times. The communist regime replaced systems of private property by the state ownership of all land. Since Deng Xiaoping's reform of the late 1980s, there has been a gradual shift away from complete state ownership (without abandoning the communist rhetoric of "socialist public ownership"). In the struggles for power and affluence in the emerging state administered markets, it is the peasants who have fared the worst. According to Pils, many peasant grievances result from the wrongs done in the context of takings' processes. Peasants are denied equal status in the land law and wider legal system. Their individual legal rights in the land taken from them are weak, and there are virtually no legal protections against the state taking the land 'in the public interest.' In many cases, peasants fail to get (adequate) compensation. They are denied equal opportunities to participate in a growing Chinese market economy which is leaving many of them behind, and they are denied equal access to public services.

She summarises the issues thus, "Tens of millions of Chinese peasants have been affected by the loss of their land in the past two decades. This has given rise to disputes, which in many cases have culminated in physical resistance to land takings and evictions. Wrongful takings have been one of the factors preventing the development of a sound law on land tenure and property rights. To handle the land disputes in rural China is therefore an important challenge faced by Chinese society. If they are not handled well, the resulting protests may ultimately lead to major social and political upheaval". Pils outlines the various kinds of controls that the state exercises over land, at various levels of government. Order is also threatened by the uncertainty about titles and rules on land transactions, as well as the role of the Chinese Communist Party and bureaucratic control over land designation and transaction which opens up possibilities of corruption and favouritism. It is the fear of disorder rather than social justice that is the major concern of the authorities, which gives some leverage to people's protest and initiatives.

There are many difficulties with using the law to protect one's rights in takings cases. Ultimately, these issues are not doctrinal or technical issues of interpreting the law, as long as courts are not allowed to make decisions independently. Courts are dependent, primarily, on the Party. Its political and legal committee can determine how to decide individual cases deemed to be major cases. The Party also effectively controls the hiring process and promotion. In cases in which a Party member who is also an official is investigated for corruption, that process is always initiated by the Party Discipline and Inspection Committee which will hand the individual concerned over to the state prosecution authorities after conducting its own investigation. As judges especially in poorer areas are underpaid corruption is not infrequent, often rationalized by low pay, obligations toward one's family members, etc.

Financially courts are dependent directly on the local People's Congresses and governments, and responsible to the local People's Congresses. Part of their income may be withheld if they are considered not to have performed well. As a result, courts are in many cases highly unlikely to handle lawsuits against the interests of local government or party officials. From the perspective of potential citizen-litigants, administrative litigation is fraught with various risks, including retaliation by the authorities being sued.

One consequence is the use of a device (petitions and visits to ministries) sanctioned by the law. These in turn can lead to demonstrations and protests (petitions and visits often collective). Pils notes that due to a surge in petitioning in recent years, there have been attempts to restrict petitioning legally, e.g. by a rule in the State Council Regulation on Letters and Visits which restricts the number of petitioners allowed to visit government offices to five in any given case, and by a rule prohibiting the 'skipping' of hierarchical levels when petitioning: this is intended to prevent petitioners from seeking out provincial and central level authorities to inform them about corruption and similar problems existing at the lowest level of administration.

Pils points to two major ways in which peasants physically resist the takings processes and evictions. Typically, resistance occurs after the legal channels of administrative reconsideration, administrative litigation and of the 'letters and visits' system have been used unsuccessfully for some time; once a land taking or eviction process has involved violence, efforts to obtain legal redress may become more intense. The first method is to squat on the land and set up roadblocks. The second is to refuse to vacate houses affected by 'demolition and relocation.' However, holdouts are often not successful, as those who refuse to leave are swiftly evicted. It is thus evident that "access to justice" is not a matter of established laws and settled institutions and procedures, but of "politics"—which are unlikely to be sustainable in the long run.

X. Social mores and community values: Pakistan

Hannah Ifran discusses in the context of Pakistan the vulnerability, primarily of women, resulting from the pursuit of the practice of what is called "honour killings". This practice, which may take the form of other types of violence, revenge and compensation, entitles the relatives of a woman or man who is deemed to have offended against community values on marriage or sexuality to exact retribution from the offender or a close accomplice. Although often associated with Islam, there is no authority for it in Islam; and the practice is to be found among communities with no affiliation to Islam. As Ifran explains, the ideology of 'honor killings' lies in masculine control of female sexuality. She says, the honour of the male members of the family is understood to reside in the bodies of the women of the family, and in protecting this honour the men aim to regulate and direct women's sexuality and freedom to exercise any control over their own choices/lives. This gives rise to wide scale immunity for what in most countries are serious criminal acts.

Because the practice is so deeply embedded in (some) communities and is given quasi-religious and cultural justification, there are acute problems in securing justice against these acts of violence. Access to courts is exceedingly difficult, for social and technical reasons. In Pakistan, the politics of "Islamisation" compound problems of access. Another problem is the socially and often legally inferior status of women; and their reluctance to appear in public in contentious proceedings affecting morals of sexuality. Ironically in societies which applaud traditional female modesty, proceedings in the formal legal system forcing her in public position denying that "modesty" strips her of her dignity—and undermines her ability to defend herself. Court officials do little to accommodate women as litigants or witnesses. Women are discouraged from resort to courts, as that is deemed to bring disgrace to the family, even though women are generally victims rather than perpetrators of the breach of even these social norms. In a survey, the large majority (76%) of

women victims of violence who had taken their cases to court, when asked whether they would approach the courts again if the need arose, categorically stated that whatever the circumstances they would never approach the court again. One interviewee stated 'No, death is better.' Ifran shows how often the judiciary is influenced in its interpretations of the law or its verdict by the social mores that are deemed as the underlying values of the community. Some attempts have been made to reform the law to reduce impunities, but these are countered by the "Islamisation" of the law, and periodic outbursts of fundamentalism that put the judiciary under pressure—and reverses progressive jurisprudence that courts may have tried to establish.

In some countries the failure of the formal legal system has led to movements for an informal, community based system of justice. The informal system of local tribunals guided by local and customary law are increasingly being approached by those disappointed by the formal system, to settle a variety of disputes, including women rights issues, particularly in rural areas. However, the irony in the case of "honour killings" is that it is in these informal systems that the ideology of "honour killings" is most respected and cultivated, while, at least in its values, the formal, state legal system is opposed to that ideology and practice, rooted not only in procedures of due process, but also increasingly influenced by the idea and norm of human rights. Unfortunately, as Ifran emphasizes, the state judiciary has contributed to injustice to women by reflecting rather than fighting prejudices against them.

In the rural areas a parallel system of justice operates alongside the formal system, dominated by village elders, tribal chiefs or local religious leaders. Tribunals set up within this informal system have no legal recognition under statutory law and operate as quasi-judicial structures that have strong social legitimacy. All the participants in these tribunals are male and women in a majority of cases are not allowed to even appear before the tribunals (regardless of whether the subject matter of the case effects or involves them in any way). These tribunals are very influential within their communities; in fact most of the times they are more powerful than the local state administration, and exert informal control over women's lives and bear responsibility for violations of women's human rights. Sometimes they commit acts of violence against women; sometimes they encourage or permit such acts.

The legal difficulties that victims of "honour" crimes face are compounded by changes to the penal law that allow the heirs of a murder victim the right to "forgive" the accused completely or to reach a compromise whereby the accused is set free upon payment of compensation to the victim's heirs, known as "compounding the offence". The crime of murder thus becomes an offence against the victim's family rather than against the state and subject to social economic and cultural norms as opposed to legally enforceable rules.

Thus both the formal and informal legal orders celebrate or connive in "honour" crimes—and set define the limits of legal redress. The only possibility of redress lies in a fundamental change of social attitudes.

XI. Community pacts and justice: Kenya

Unlike the case in Pakistan, Tanja Chopra's study of communities living in the north of Kenya endorses communal values and procedures. She argues that often that due to inaccessibility or incompatibility with local socio-cultural values, official justice institutions in developing countries do not fully pervade society. The notion of 'justice' in the courts is at

variance with what local communities consider as 'just'. The formal system therefore often proves incapable of re-establishing peaceful relations in communities following conflict. This poses a dilemma for policy makers which she examines in the Kenyan context: the choice between applying official justice, which may be inefficient in settling disputes, or resorting to conflict management techniques, which can run counter to the official law. The focus of her paper is not so much claims against the state, nor directly against private parties, as methods for reconciling communities after conflict and even more importantly, preventing escalation of private disputes into communal conflicts. In this respect, the focus of the paper is somewhat different from the others.

The area which is the subject of Chopra's study and the communities who live there were never sufficiently integrated into Kenya's economy or politics, and so their life style, based on cattle herding and pastoralism, was largely unaffected by administration or developments elsewhere. The formal legal system has little resonance with these communities. Courts are far and few between; legal representation cannot easily be obtained; it is not easy to apprehend those suspected of a crime if the community is not co-operative; there are similar problems with securing the attendance of witnesses; and the delays in processing disputes not only increase costs and inconveniences to the parties but also aggravate tensions between parties and the communities they come from.

The isolation of these communities from mainstream economy and administration means that intra-communal conflicts continue to be handled within the community. Chopra says that property and domestic disputes, or livestock thefts are usually taken to the family elders, or, if they concern more than one family, to respected community elders or the assistant chief. Community management of disputes rests on common values that define 'wrongdoing' and provide for adequate punishment to allow for the re-establishment of peaceful relations among society. Chopra says that these local value systems are not relics from the past (and therefore not necessarily 'traditional'), but reflect the way a community perceives and orders their world in the present—and thus respond to change.

Inter-communal conflicts pose a greater threat to stability, not being susceptible to informal processes since values and procedures vary from one community to another. Disputes are more serious, often involving cattle rustling, and threatening livelihoods. Formal state processes, through the police and the courts, have proved unequal to the task of maintaining order when resort to self-help has been the usual response. Leaders from different communities have therefore negotiated arrangements to resolve disputes between a member of one community and another. Some of these arrangements, which take the form of declaration are complex (and are sometimes negotiated under the auspices or at the least the co-operation, of the administration). Chopra says that "they resemble a law with a penal code, which the parties in conflict have drafted themselves, and which was officially legitimated by the executive arm of the national government. Two analogies can be drawn. The declarations are like a miniature peace treaty between different communities. It is as if the two communities are countries and the overarching Kenyan law is like international law, which they may or may not use depending upon their interests. Second, the meeting of different groups and the negotiation over the definition of basic legal principles is similar to early statehood, where different actors would come together to define basic legal principles. Only that here it takes place inside an existing state".

According to her, the record of the success of the declarations is impressive, and has elicited the endorsement of the administration (despite their frail, if not doubtful, legal foundations). Some courts are not unhappy with them, for they turn matters of public law fit to be dealt with by courts, into matters of negotiations between communities, which pay little

regards to individual rights and obligations (which are defined in the national constitution and laws). The administration, while acknowledging the contribution of the declarations to public order, has yet to decide on their legal incorporation. The lack of a legal status sometimes poses problems, especially if a family does not want to submit to the procedures under the declaration. Ultimately, such devices ignore many essential foundations of the rule of law, which the government prides itself on adhering to. Yet its interest in public order sustains these arrangements.

XII. Public interest litigation: Central and Eastern Europe

Goldston and Adjami discuss a particular ethnic minority, disadvantaged in various ways, and a particular, very "legal", form of achieving access to justice. The community are the Roma (very loosely the "gypsies" of Europe – particularly Eastern and Central) and the legal mechanism "public interest litigation" (PIL), which involves the use of the ordinary courts, but in ways that are slightly different from the traditional two-dimensional court battle, which was a two-sided contest. PIL takes many forms but is used here with a focus on the use of law to achieve change for groups rather than individuals, and on the law as a way of changing attitudes to disadvantaged groups. PIL has perhaps been most dramatically used in India, where some of its critical components were established. Here the countries mainly studied are the Czech Republic, Hungary and Slovakia (EU members since 2004), Bulgaria (members since 2007) and the Russian Federation (not a member of the EU, but a member of the Council of Europe, and thus bound by the European Convention on Human Rights).

The Roma are a minority in many European countries. They suffer from systemic discrimination and their life chances are typically far inferior to those of the majority communities among whom they live and by whom they are ignored. In some ways their position resembles that of indigenous peoples in many countries – for example in terms of stigmatisation as lazy. But in some ways it is very different – particularly in terms, perhaps, of issues of land law. Indigenous communities, who are at least to some extent the topics of the papers of Faundez, Santos, Williams and Ghai, typically have, or have had and been deprived of, land which they have viewed as a community resource, though majority communities have not understood this conception of land. The Roma have no land. They are non-indigenous communities, though their presence goes back centuries, with a somewhat nomadic life-style.

In Latin America, globalisation was identified as a factor in changing attitudes to law and the rights of disadvantaged groups by Faundez. In Eastern Europe, an important tool of globalisation was the European Human Rights system, to which the countries of Eastern/Central Europe adhered after the collapse of communism. During the 1990s and since, the Council of Europe and the European Union in various ways strengthened their protection against racial discrimination. The role of the European Court of Human Rights has been significant.

Some communities abandon "official" state structures as routes to justice. Others may ultimately find some value in these structures despite earlier suspicion. Santos comments that the Landless Rural Workers' Movement of Brazil had little time for lawyers; similarly the Roma distrusted, for good reason, law and courts. Goldston and Adjami do not claim that this distrust has been completely overcome among the Roma, and emphasise the importance of engaging the community more in discussing the implication of litigation as a strategy.

The cost of litigation is a major issue, exacerbated by lack of a legal aid scheme, "loser pays" costs rules (found in the UK and Commonwealth systems, but here in civil law systems), and the lack of a *pro bono* tradition in the bars. PIL tends to involve particularly complex and therefore expensive cases. For these reasons the Roma cases share a characteristic with Cambodia: namely that the litigation requires the support of foreign donors. Interestingly, another parallel with Cambodia is the existence of limitations on salaried lawyers, which can mean that lawyers employed by NGOs formed for the very purpose of litigating for the poor can face restrictions.

Procedural and evidential rules may also stand in the way of effective litigation strategies: including reluctance to entertain class actions on behalf of large numbers who are not, as individuals, party to the litigation, or *action popularis* cases brought on behalf of the public, as well as hostility to statistical evidence often necessary to prove patterns of discrimination.

Finally hostility to the Roma community and their rights among the public service, police and judiciary is a factor, especially in countries where (to the eyes of lawyers from some systems) these agents of the law are very closely linked, thus mutually reinforcing traditional attitudes.

These various factors are not identical in all the countries studied, and legal provisions vary also: for example some countries have constitutional or legal prohibitions on discrimination while others do not.

The authors write from the perspective of the European Roma Rights Center (ERRC) which is foreign funded, and relies on interviews with lawyers and written reports of cases. The paper reviews a number of significant cases, many of which have culminated in litigation before the European Court of Human Rights, the European Committee of Social Rights (under the Social Charter), or the UN Committee on the Elimination of All Forms of Racial Discrimination (the monitoring body for the CERD Convention) in areas of police abuse and racial violence, discrimination in housing, access to education, briefly outlining the legal strategies used in bringing the cases, including the collection of masses of data about discriminatory practice, for example in assigning 27 times the number of Roma children as non-Roma to special schools (for educationally or physically challenged or disruptive children) in the Czech Republic..

The authors endeavour to assess the impact of these cases, many of which involve non-binding rulings. The record has been mixed. Following an ECHR case on police brutality the Government of Bulgaria created a committee within the police to raise awareness of rights. Cases before the CERD committee from Slovakia led to media pressure on local government to repeal discriminatory resolutions. During the special schools litigation the government introduced legislation to revamp the system. On the other hand, despite an EHRC ruling against Romania arising from mob attacks and murder, the perpetrators faced little in the way of criminal penalty. Even the 18 individual children who brought the litigation on special schools had benefited little – let alone the thousands of other Roma children facing the same problems. Media coverage may be limited – and not always favourable. Public servants may remain hostile and reluctant to take positive steps to change.

Overall the authors claim no credit for any radical change in the lives of the Roma (through PIL or any other strategy), but it is clear that a number of significant decisions have been made by the various bodies. The authors propose a number of conclusions for lawyers and the communities: these include the need for publicizing court decisions, and taking whatever steps are available to implement them, coupling litigation with political and social

action and pressure on authorities, involving Roma in the design and execution of litigation and creative approaches to overcome procedural hurdles. And they conclude with proposals for the authorities as well.

XIII. Conclusion

The revised version of this paper will discuss in detail the insights and recommendations that can be drawn from these case studies. Some obvious observations may be stated at once. Legal aid and the presence of legal representation are critical, when we consider communities who are already disadvantaged. Another is that collective action, combining the legal, political and communal strategies, is almost a necessity. Use of international or national norms of human rights increases the visibility of litigation and issues it raises. Most of these are linked to globalisation, which also promotes trade in precedents.

Several of the studies deal with situations of transition, from one regime to another, new forms of authority and legitimacy, with rapid changes in politics and economy. The necessity of the rule of law to manage these processes is frequently mentioned in international declarations (and the UN SG's statement on the rule of law, and the Paris Agreements on Cambodia). But it is also recognised that there are special problems of establishing the rule of law in these circumstances. South Africa is generally deemed to have made a successful transition through the rule of law, underpinned by an excellent constitution. However, Cambodia has failed, although its constitution is also impressive. A fundamental difference lies in the attitude of the government to human rights and the rule of law: Mandela's government had the commitment to those values and Hun Sen's did not. A critical lesson may be the commitment of the executive authorities. Passing of laws to strengthen the machinery of justice is often no indication of that commitment; as we have seen, they are generally introduced by external agencies. In fact, the more the machinery is 'reformed', the more it is corrupted by bribes or intimidation by the government (as can be seen in the fate of electoral commissions and judiciaries in Kenya and Cambodia).

A particular focus of the rule of law reforms in on the judiciary. This is understandable because of the emphasis on the judiciary as the ultimate custodian of the constitution and the law, and its adjudicative role. But the studies here show that many policies for the benefit of the marginalised communities are more dependent on bureaucracies than the judiciary. Administrative process, grounded in fundamental values of fairness, were seen as more efficient than the judicial in South Africa. In New Zealand the unusual features of the Waitangi Tribunal allowed forms of discourse and sources of evidence that would not have been possible in the judicial process—but it is also important to note that it was at the initiative of the courts than the executive that the Waitangi Tribunal system was set up in the first place. And of course the lobbying of legislative representatives can sometimes bring advantages to those hitherto excluded from the enjoyment of certain right.

A number of the studies show that the rule of law institutions can be captured by the culture or politics. The failure of the Pakistan judiciary to protect women and other victims of "honour killings" owed more to the influence of community ideology than to the law. For many the paradigm of the *jirgas* to deal with issues of "honour" had greater resonances than courts with its formal and stylised procedures. In Cambodia the dominance of one party politics, with a fair dose of violence, has distorted the essential functions of the courts. In China the formal role and powers of the communist party has a severely damaging effect on the jurisdiction of courts and their ability to promote social mobility. For justice reforms to

succeed, perhaps there needs to be an underlying culture of legality, of respect for the law. In a curious way, South Africa had that culture, albeit of a rather perverted legality, and that may have also accounted in part for its successful transition.

That culture of legality is critical to one of the key legal strategies for the advancement of the claims of marginalised communities—public interest litigation. The strategy assumes that there is a commitment to rights and law, that courts are impartial and competent and that the government will follow decisions of the court. Many of these assumptions hold for the contemporary states of Central and Eastern Europe, where this strategy has been followed with skill and diligence to enforce rights of Roma (as described in the study by Goldston and Adjami). And yet their conclusions show that the effective change for betterment of the Roma is limited, despite victories in the court. It is increasingly evident that the Achilles heal of PIL is the indifference of the government to judicial decisions. In India and Nepal, for example, a majority of decisions are not followed by the government, and even in South Africa, where the courts are more circumspect than in these other jurisdictions, the government is beginning to show decreasing commitment to this aspect of the rule of law.

Despite the discouraging record of respect for the PIL decisions, there is optimism that this strategy yields other gains. It raises issues of social justice in the public domain and often promotes public awareness and debates. It highlights the role of human rights norms (often through international treaties). It helps to organise the community concerned; to increase their participation through collective action; and generally to increase their knowledge of the legal framework for their rights and entitlements and facilitate networking. It may open up possibilities of other kinds of action. Pils' study of China shows that in certain circumstances communities can create their own forms of rights and legality (as when peasants make deals with developers on income sharing, contrary to the formal law). (But the mobilisation and consciousness raising aspects of PIL is often diminished by the dependence on external professional, moral and financial dependence; all too often these communities are reduced to the role of spectators).

These informal initiatives which lead to the production of a kind of legality (as considerable quantity of Santos work explores) are manifestations of a more general phenomenon of "legal pluralism". This term is used in a variety of contexts to describe a variety of systems—perhaps the most formal of these is a state sanctioned existence of other supplementary or parallel legal orders (such as regimes of personal law for religious or cultural communities, or broader regime for indigenous peoples, which includes a considerable degree of exemption from state laws applying to the rest of the country). Some times the regime is described as one of 'community' justice. Examples of these forms of legal pluralism are discussed in a number of papers (particularly by Santos, Faundez, Ifran, Williams and Chopra).

The World Bank claims its approach (Justice for the Poor) which underlies Chopra's paper, 'reflects an understanding of the need for demand-oriented, community-driven approach to justice and governance reform, which values the perspectives of the users, particularly the poor and marginalized such as women, youth and ethnic minorities. It does not intend to replace customary laws and institutions with which people are familiar and which constitute part of its culture and informs its ideas of justice. Any attempt at pro-poor justice reform, therefore, needs to commence with a detailed understanding of these structures and processes (both formal and informal) whereby the poor achieve or are denied justice. Further, J4P does not focus on trying to externally engineer greater "compatibility" between state and non-state systems, but rather on creating new mediating institutions

wherein actors from both realms can meet—following simple, transparent, mutually agreed-upon, legitimate, and accountable rules—to craft new arrangements that both sides can own and enforce. That is, J4P focuses more on the process of reform than on a premeditated end-state.'

The studies in the present project present different aspects of "community justice." Ifran's paper shows how it can aggravate injustices to women and other vulnerable groups. This conclusion is reinforced by the application of customary or religious laws in Africa and Asia. Santos, Faundez and Williams demonstrate the emancipatory potential of "community justice" and the forms of self-government it can sustain (particularly in respect of indigenous peoples). Perhaps the contrary aspects of community organisation are most clearly seen in relation to human rights—and whether they constitute a higher normative order. And community justice may not be able to deal with acute problems in the relationship between individuals/groups and the state, being more appropriate to deal with intra-community disputes. And yet some of the most acute problems that these papers deal with concern the relationship between community and the state. When among the northern clans of Kenya, peace is maintained through inter-community arrangements and negotiations, both individual rights are diminished and the support of the state is crucial. Several papers show that there are no sharp lines between state and community justice. And community values and institutions that are invoked do not necessarily have ancient lineages but are responses to contemporary contingencies.