

Access to Justice Scholars' Group

***COMPARATIVE ANALYSIS**

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Yash Ghai and Jill Cottrell will prepare an introduction elaborating the overall framework of the project by analyzing the existing experience and literature. On the completion of the case studies, a comparative analysis will be prepared by Yash Ghai to determine what kind of strategies succeed in what kind of circumstances. The analysis will increase our understanding of the dynamics of litigation and the usefulness of resort to the legal process of disadvantaged communities — and lead to more effective strategies, encompassing a mix of the legal and the socio-political approaches.

RIGHTS OF PEASANTS IN CHINA

Eva Pils, The Chinese University of Hong Kong School of Law

Eva Pils' study will focus on the struggles of peasants in China to protect their land rights. These struggles provide a major challenge to the hegemony and legitimacy of the Chinese communist regime. The government's taking of land and houses from citizens is a major cause of grievances and social unrest in China.

Under current Chinese law, urban property development is in most cases premised on an administrative decision: residents on state-owned urban land are evicted, and in rural areas, the land is taken from its rural collective owners and given to local government, which can sell land use rights to developers at a profit (the latter is the central case for peasants.) Compensation sums for former occupants are effectively decided by government. Grievances in this context abound; they include low compensation, corrupt self-enrichment of officials, the use of violence to evict citizens, and – perhaps most importantly – the lack of access to courts or other avenues of redress. In many such cases, the state uses a language of state-defined legal authority to take land, whereas citizens are increasingly using a language of human rights and moral wrongs to express their grievances, more often than not outside court litigation, in petitioning offices, in front of government buildings, and in the streets. An incipient land rights movement, in which individual peasant communities declare land ownership rights inconsistent with their status under the constitution and current law, indicates that these conflicts are becoming more and more intense.

Pils will concentrate on the avenues of redress which peasants attempt to use in representative actual takings cases; the major avenues to be studied are (1) the court system, in particular civil and administrative litigation, and (2) the petitioning or Letters and Visits (*xinfang*) system. Her research is expected to enable us to understand how citizens view their legitimate claims toward government in takings cases, how their understanding differs from that of government officials

making administrative decisions to take land, how the new law has changed the status quo, and how law can be used in the future to address wrongs suffered by citizens in takings contexts.

LAND CLAIMS OF THE MAORI AND THE WAITANGI TRIBUNAL IN AOTEAROA, NEW ZEALAND

DAVID WILLIAMS, UNIVERSITY OF AUCKLAND

Land is of particular importance to indigenous peoples (as is now acknowledged by the General Assembly of the United Nations in its Declaration of the Rights of Indigenous Peoples 2007). Two specific studies will focus on this topic (David Williams and Claire Charters on the rights of the Maori people of New Zealand and Julio Faundez on indigenous peoples of Latin America), while the topic is addressed in some other papers which have a general focus on the working of legal systems (Boa Santos on Brazilian land issues and Yash Ghai on Cambodia).

Williams and Charters examine the working of the Waitangi Tribunal in dealing with the land claims of the Maori. The study will discuss the role of the courts (whose record in protecting indigenous rights has until recently been dismal) in the formation of the Tribunal, established in 1975. Particularly in the last 15 years, the Tribunal has provided an access to justice for indigenous people who were denied that access in the colonial past and who were severely prejudiced as a result, particularly in the loss of lands and resources, and also in the loss of self-determination and political autonomy. The Tribunal makes recommendations (rather than adjudications) that have provided Maori tribes in the contemporary era with some political leverage in achieving economic and cultural redress packages from the Government. The study will focus on two well known and controversial reports of the Tribunal, and through their vicissitudes in providing redress for the Maoris, will examine the effectiveness of the Tribunal in restoring their land rights.

EQUALITY FOR THE ROMA IN EASTERN EUROPE

JAMES GOLDSTON, EXECUTIVE DIRECTOR, OPEN SOCIETY JUSTICE INITIATIVE

MIRNA ADJAMI, OPEN SOCIETY INSTITUTE

Mirna Adjami and James Goldston examine attempts to use litigation to secure equal rights for the Roma community in Europe. They consider that the transformation of law, legal culture and judicial systems wrought by the fall of Communism opened the way for, and was in part fuelled by, public interest litigation (PIL). While over the past fifteen years, independent-minded lawyers, advocacy-oriented NGOs and concerned individuals have sought to use PIL to address many problems created by, or left over from, Communist policies, Goldston and Adjami argue that PIL has had the greatest impact in the field of racial discrimination and minority protection, particularly concerning the rights of the Roma minority across Central and Eastern Europe. The use of PIL to defend and promote Roma rights has played a signal role in raising awareness of the obstacles that Roma minorities systematically confront. As such, it has directly led to the creation of initiatives among European regional institutions and complementary broad-based grassroots efforts to forge community alliances, promote rights education, and intensify political engagement to address Roma rights in a way unimaginable ten years ago.

If PIL has helped push Roma rights onto the political agenda, its impact on the actual conditions of Roma are less certain. On the one hand, it would be hard to conclude that instances of police abuse against Roma have declined, or that broad patterns of discrimination and segregation in schools have ended. Among other things, most countries in the region resist collecting the ethnic data that would be needed to document conclusively such trends.

But on the other hand, Roma rights and PIL's effects on the public discourse and attitudes of non-Roma and Roma alike – even if measured only anecdotally – cannot be ignored. Even where litigation fails to achieve victory in the courts, it has already generated substantial debate in different parts of the region about the merits and legality of deeply entrenched practices of racial discrimination and exclusion. It has helped make visible the Roma as a group and the problems they face.

PROTECTION OF MUSLIM WOMEN'S RIGHTS IN SOUTH ASIA

HANNAH IRFAN, LEGAL CONSULTANT, LAHORE, PAKISTAN

Women victims or targets of honor killings in Pakistan are the subject of Hannah Irfan's study. Honor Killings and crimes associated with honor were a traditional practice that were associated with specific regions of Pakistan and did not receive any religious sanction or blessing (in fact most religious scholars of repute and authority condemn this practice openly). However, certain elements within the Muslim clergy, at the municipality or community level, have sought to give these practices a religious cover, which has contributed to its further spread into those elements of society that now see transgressions by women (particularly in matters of marriage) as anti Islamic and hence within the realm of religious sanctioning and condemnable by death. Honor killings have proliferated and are now increasingly becoming an urban practice that has seeped into parts of Pakistan where they unknown until recently. The difficulty of punishing the perpetrators of honor killings is aggravated by the fact that it is socially acceptable, and indeed demanded in certain circumstances. It has the tacit approval not only of local police and administrators but also the superior judiciary. So honor killings become the cover for other crimes, particularly involving women. Irfan's research demonstrates the impunity that this practice offers to criminals and the difficulties of securing conviction in the courts.

INDIGENOUS RIGHTS IN LATIN AMERICA—ACCESS TO COURTS OR ACCESS TO JUSTICE?

JULIO FAUNDEZ, WARWICK SCHOOL OF LAW, UNIVERSITY OF WARWICK

States in Latin America have consistently excluded and marginalized indigenous people. In recent years, however, the constitutions and laws of most countries in the region have embraced the principle of multiculturalism and have extended some political and social rights to indigenous communities. Also, in many cases comprehensive processes of judicial reform have sought to reinforce these policies by expanding the reach of judicial institutions to indigenous groups and to the poor generally. Along with this significant shift in state policy, indigenous groups have become increasingly more effective in their political and legal struggles, resorting to a variety of means, including the establishment of legal and illegal political movements to

influence state policies and forging international alliances to protect their land and other assets from transnational oil companies.

The official recognition of multiculturalism combined with the growing political and legal awareness among indigenous communities has, inevitably, resulted in numerous court decisions, as legal activists have increasingly resorted to the judiciary in their efforts to vindicate their rights. This paper offers an overview of the most significant national and international cases involving indigenous communities in the region. Its objective is to assess whether the increased access to courts enjoyed by most indigenous communities in the region has resulted in a fair and equitable resolution of their claims.

RIGHTS OF THE LANDLESS IN BRAZIL

BOAVENTURA DE SOUSA SANTOS, UNIVERSITY OF COIMBRA (PORTUGAL)

Boaventura de Sousa Santos' study is on the land issues in Brazil, which he considers the most critical issue in that country. By defining the general profile of access to courts, he will analyze the legal strategy of the landless movement to secure the mobilization of the courts that furthers the interests of poor peasants. He will concentrate on the role played by "popular lawyers", trained lawyers, most of them young, who are politically committed to the cause of the landless and manage to combine political mobilization with legal mobilization.

SACRIFICING JUSTICE AT THE ALTAR OF PEACE: CONFLICT MANAGEMENT AMONG THE PASTORALISTS OF KENYA

TANJA CHOPRA, COORDINATOR, JUSTICE FOR THE POOR PROGRAM IN KENYA, WORLD BANK

Enforcing a rule of law in post-conflict environments often faces a dilemma when prosecution of serious crimes is at odds with calming passions after fighting has stopped. This problem has been a frequent cause for debate in the field of transitional justice. It reflects a similar, less obvious, problem that occurs in the context of developing countries, where the formal justice system can be at odds with conflict management initiatives.

Often, due to inaccessibility or incompatibility with local socio-cultural values, official justice institutions in developing countries do not fully pervade society. Therefore, the formal system may be insufficient to re-establish peaceful relations in communities following conflicts or disputes. In response, national and international actors have increasingly turned to the conflict management and peace building fields, which are more likely to integrate local structures and realities, and may have a higher rate of success in settling disputes and creating lasting peace. Though both have the potential to be mutually informative, in practice, conflict management initiatives are often severed from justice sector work. For policy makers and practitioners this often means a stark choice between the implementation of official justice, which may be inefficient in settling disputes, or the application of conflict management techniques, which can run counter to the official law.

Current policy efforts and practices in the arid and semi arid (ASAL) regions of Kenya are a good example of this. Both streams of activities, justice sector reform and conflict management, have been pursued by different institutions in order to respond to persistent conflicts at the

grassroots level. While Kenya's Ministry of Justice aims at strengthening the implementation of official law at the local level, the National Steering Committee for Peace Building and Conflict Management (a subset of the Office of the President) is developing a national framework for conflict management, drawing from informal conflict resolution methods.

This paper will elaborate on the development and the effects of conflict management initiatives in the ASAL regions of Kenya, which have started in response to the weakness of Kenya's rule of law institutions. It will describe their effects on allowing or hindering access to justice for the poor and marginalized. Furthermore, it shall discuss the ongoing institutionalization of the conflict management approaches with particular focus on the dilemma this poses: What of the rule of law should be sacrificed for keeping the peace?

RIGHTS OF THE LANDLESS IN SOUTH AFRICA

GEOFF BUDLENDER, UNIVERSITY OF CAPE TOWN

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 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. Budlender's study will describe the reforms and the impact they have had, focussing on the political and legal processes involved, and draw lessons on the prospects for the rights of the disadvantaged through improvements in the access to justice.

RIGHTS OF LABOR IN INDIA

RAJEEV DHAVAN

Several studies look at the encounters of specific communities with the law. Rajeev Dhavan looks at the efforts in India, in the context of public interest litigation, to secure the rights of workers. Litigation is often undertaken by trade unions on behalf of workers, which facilitates the accumulation of experience and the provision of resources. In that sense the workers are often better organized than other disadvantaged communities, and for this reason have a better chance of success through litigation than other communities.

RULE OF LAW IN CAMBODIA

YASH GHAI, CONSTITUTION ADVISORY UNIT, NEPAL, UNITED NATIONS DEVELOPMENT PROGRAM

In a broader study on the Rule of Law in Cambodia, Yash Ghai examines the legal and illegal appropriations and confiscations of land of indigenous peoples, among other communities. His particular focus is on the attitude of the government towards the law and human rights, and

particularly the independence of institutions of justice. He argues that there is a systematic denial of that independence, and how that denial results in numerous violations of the law and of people's human rights. He argues that the denial of the ROL is not merely incidental or a result of the lack of understanding of its importance, but due to the fact that the denial is basic to the way that the state dominates and controls politics, economy and civil society.