ABF American Bar Foundation
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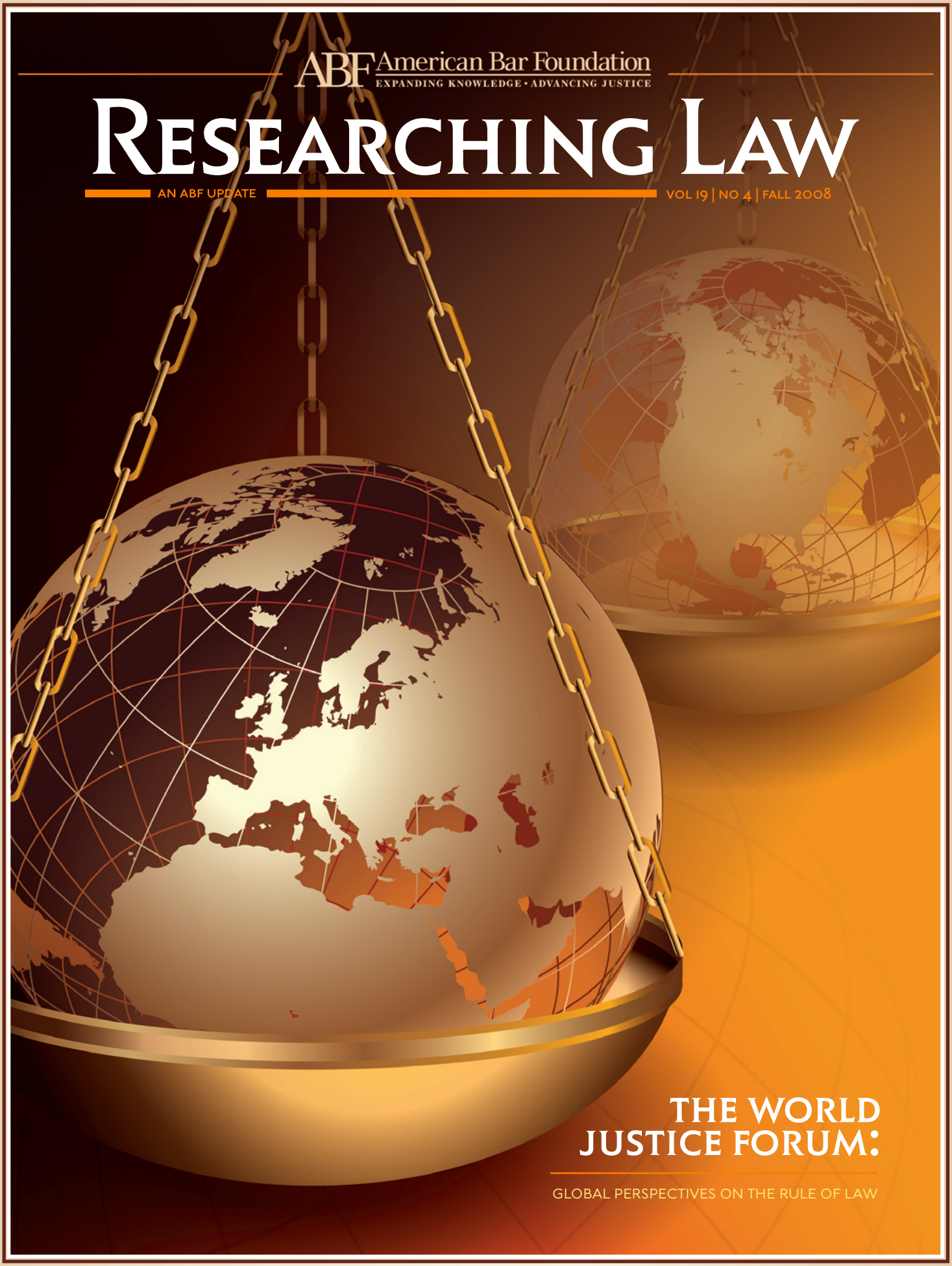
RESEARCHING LAW

AN ABF UPDATE
VOL 19 | NO 4 | FALL 2008



THE WORLD JUSTICE FORUM:

GLOBAL PERSPECTIVES ON THE RULE OF LAW

World Justice Forum Scholars

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Open Society Justice Initiative, Open Society Institute

Franklin Allen,
University of Pennsylvania

Amrit Amirapu,
Columbia University

Geoff Budlender,
High Court of South Africa

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The World Justice Forum

GLOBAL PERSPECTIVES ON THE RULE OF LAW

In July of 2008 over 400 attorneys, statesmen, human rights activists, artists and scholars convened in Vienna, Austria as invited participants to the World Justice Forum, the inaugural meeting of the World Justice Project, a multinational, multidisciplinary effort co-sponsored by the American Bar Association, whose purpose is to strengthen and promote the rule of law throughout the world.

ABF Research Professor and Nobel Laureate **James Heckman** and ABF Director **Robert Nelson** attended the meeting as members of one of two Scholars' Groups, commissioned by the World Justice Project to present papers outlining the best current research on the rule of law and to stimulate the next wave of research on this important and timely topic.

Heckman and Nelson's group focused on the relationship of the rule of law to economic and political development, while the second group, led by Yash Ghai of the Nepal Constitutional Advisory Unit, United Nations Development Program (who also was a member of the first group) focused on issues relating to access to justice. Both groups met before the Vienna meeting—the Heckman/Nelson group in November 2007 in Chicago at the ABF—to discuss and refine their preliminary findings. More recent versions of some of the participants' papers were presented at the Vienna meeting.

Both groups' draft papers were published by the ABA under the

title "Rule of Law Scholars Series, Parts I and II," for which Nelson and Ghai wrote introductory essays. The papers are scheduled for publication as books by Routledge-Cavendish in 2009. Extended excerpts from Nelson's introductory essay on the first Scholar's Group, "New Research on the Rule of Law" (co-authored by Lee Cabatingan) and Ghai's introductory essay on the second Scholar's Group, "The Rule of Law and Access to Justice: Findings of an ABA Project on Access to Justice" (co-authored by Jill Cottrell) are reprinted here to give the reader an overview of the research leading up to and presented at the World Justice Forum.[1] First, however, a few general remarks about the rule of law as well as the conceptual frameworks that underlie many of the collected scholars' writings will help present their work in a broader context.

CONCEPTUAL FRAMEWORKS

As a starting point for the Vienna meeting the World Justice Project published a working definition of the rule of law:

1. the government and its officials and agents are accountable under the law;
2. the laws are clear, publicized, stable and fair, and protect fundamental rights, including the security of persons and property;
3. the process by which the laws are enacted, administered and enforced is accessible, fair and efficient; and
4. the laws are upheld, and access to justice is provided, by competent, independent, and ethical law enforcement officials, attorneys or representatives, and judges who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve. [2]

While acknowledging these basic principles, the first Scholar's Group was mindful that among the world's nations the rule of law has been defined in many ways, and has been invoked by actors of various stripes from social democrats to authoritarian rulers. At the same time, the group was aware that the rule of law may be perceived to be an agent for imposing

[1] Reprinted by permission of the American Bar Association and Mirna Adjami, Franklin Allen, Amrit Amirapu, Geoff Budlender, Lee Cabatingan, Flavia Carlet, Thomas Carothers, Tanja Chopra, Jill Cottrell, Zachary Elkins, Brad Epperly, Julio Faundez, Yash Ghai, Thomas Ginsburg, James A. Goldston, James J. Heckman, Antara Haldar, Terence C. Halliday, Ron Harris, Hannah Irfan, Daniel Kaufmann, Margaret Levi, James Melton, Robert L. Nelson, Eva Pils, Katharina Pistor, Jun Qian, Amartya Sen, Boaventura de Sousa Santos, Barry R. Weingast, and David V. Williams. Originally published by the ABA. Previously published in electronic format by the ABA with the generous support of LexisNexis, a division of Reed Elsevier, Inc. The draft papers cited and quoted in this article are available at http://www.worldjusticeproject.org/scholarship. Papers excerpted here have been edited for clarity. Papers in volumes to be published by Routledge-Cavendish in 2009 will be revised. Additional papers not cited here may be included in these volumes.

[2] http://www.worldjusticeproject.org/rule-of-law-index/

World Justice Forum Scholars

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Stanford University

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western practices and values on non-western societies. With these caveats in mind, the group did not attempt to arrive at a single definition of the rule of law, letting individual scholars define the term in ways that made sense for their research projects.

Another word of caution was brought to the group by Thomas Carothers, of the Carnegie Endowment for International Peace. As Nelson and Cabatingan summarized in their introductory essay, Carothers analyzes currents trends in rule-of-law development in his essay "Rule of Law Temptations." The widespread enthusiasm for rule of law initiatives among policy makers is not always accompanied by critical analysis of the concept, resulting in "temptations to believe certain things about the rule of law and its place on the international stage that are misleading and possibly unhelpful." These include a tendency toward reductionism in rule of law development, which allows authoritarian governments to pick and choose which elements of a rule of law system they will adopt, rather than using a system thoroughly imbued with deep principles of justice and access, the notion that the rule of law must always precede steps toward democratization, and the idea that the development of the rule of law will be an easy, tidy task. All these widely prevalent erroneous notions and tendencies argue for the importance of analytic scholarship on rule of law issues.

Nobel Laureate economist Amartya Sen, another member of the first scholars group, provided a broad theoretical framework within which to analyze rule of law developments. The framework hangs on two concepts developed by Sen in his economic research over many years: "human capability" and "plural affiliation." Human capability theory argues that "rights" are insufficient if they are not accompanied by the actual capability to exercise them. A major factor inhibiting the exercise of rights is poverty, which, in Sen's view, should not be understood narrowly as deprivation of income, but also of capability.

Sen's concept of "plural affiliation" provides a pathway to a conception of justice particularly appropriate for the global age. As Nelson and Cabatingan quote Sen, plural affiliation recognizes "the fact that we all have multiple identities, and that each of these identities can yield concerns and demands that can significantly supplement, or seriously compete with, other concerns and demands arising from other identities." According to Nelson and Cabatingan, Sen specifically envisions the plural affiliations approach to global justice as instrumental to transnational agencies and organizations. Sen's contributions go to the heart of an effort to advance global justice through an international effort to strengthen the rule of law. The capability perspective calls attention to the impact that law and other systems of justice can have on the actual situation of different groups in society. The concept of plural affiliation supports the idea of a multi-disciplinary effort to advance the rule of law, an effort that cannot rely simply on lawyers or the legal status of citizens, but which recognizes the importance of involving other professions and group leaders in the support of social justice.

THE RULE OF LAW AND ECONOMIC DEVELOPMENT

The role of the rule of law in economic development has become a subject of central importance in modern economics. There is consensus that levels of economic development are positively correlated with more robust legal systems. Although our scholars use different methods, examine different empirical cases, and reach different conclusions, there is agreement that "institutions matter" to economic development. Legal institutions and their alternatives are at the heart of these analyses.

Daniel Kaufmann's paper "Misrule of Law in Numbers: Worldwide Empirics and its Implications for Law and Economic Development Orthodoxy," reported on the World Bank's Worldwide Governance Indicators Project. The Governance Indicators Project measures several aspects

of governance, including the rule of law, over time and across more than 200 countries. Based on these indicators, Kaufmann and colleagues report a strong relationship between the rule of law and per capita GDP. Though they have not yet established a causal connection, they assert that "by moving one standard deviation ahead on the rule of law index, GDP increases by 300%."

Perhaps the most important set of institutions relating to equity and opportunity within developed nations is the welfare state. Nobel Laureate economist **James Heckman** examines variations among modern welfare states and their effects on economic performance from the 1980's through 2006. Heckman raises several cautions about embracing the welfare policies of European states. After noting that common typologies of European nation states are too broad, he reviews evidence on employment indicators across Europe, the U.K., and the United States. He asserts that the Nordic miracle states, typified by Sweden, are not achieving the employment successes that some indicators suggest. When employment rates are corrected for certain public employment programs, which Heckman argues artificially raise the employment rate, Sweden's employment rates are significantly lower. Heckman concludes that welfare state policies that undercut incentives to work and which do not invest in higher education at the same levels as the United States, Ireland, and Japan, will achieve lower levels of economic growth.

> "By moving one standard deviation ahead on the rule of law index, GDP increases by 300%."

Franklin Allen and Jun Qian examine the role of law (or the avoidance of law) in two of the world's fastest growing economies, China and India. China and India often are cited as examples of rapidly developing economies which do not rely on strong property rights or contract enforcement systems. In the Chinese case, these institutions remain underdeveloped formally. In India, despite a fully developed formal system of laws that follows the British Commonwealth tradition, the effective capacity of the legal system is quite limited. Thus most business actors do not rely on the law to make and enforce contracts and property claims. Allen and Qian argue that the use of alternatives to the legal system in both societies is in fact an advantage, because it allows for quick adaptation to changing circumstances and avoids the rent-seeking behavior and barriers to competition that sometimes accompanies more fully developed legal systems. They cite intellectual property law and slowness to move away from paper checking transactions in the United States as examples of when formal law can slow economic development. However, as Nelson and Cabatingan note, Allen and Qian's argument will provoke further debate about the rule of law in China and India. Eva Pils' work on the property rights of Chinese peasants, which is contained in the companion collection of scholarship on access to justice, offers a very different view of the need for law in the Chinese context. Without legal protection, peasants will suffer serious harms to their livelihood. And China may experience more widespread civil unrest.

Ron Harris, a leading economic historian of the industrial revolution in England and the role that law played in that pivotal transformation, adds a theoretically significant case study of the relationship betwen law, finance, and economic growth. By comparing the history of two corporations that were by far and away the largest business enterprises for more than a century in the 17th and early 18th centuries, the Dutch East India Company and the

> The challenge for scholarship is not just to note the positive relationship between rule of law and economic growth, but to develop better theories of what kinds of rule of law systems better promote development.

English East India Company, Harris provides an important test of leading theories about law and development. Contrary to the predictions of the legal origins theory, which holds that common law legal systems facilitated economic development, Harris establishes that the Dutch, working in a continental legal system, successfully established a large private corporation almost a century before the English did the same. Moreover, both the Dutch and the English markets grew up on the margins of the legal system, in merchant and maritime law, not within the core province of judge-made law. The relative weakness of the English state, compared to the Dutch state, forced the development of a more innovative and cooperative market that proved more effective at long term growth.

Harris draws out the contemporary policy implications of his analysis. While he cautions that the political and economic environment of the 17th century is very different from the challenges that lesser developed countries face today, he suggests that law matters to the development of business organizations and stock markets. But law reform is contingent on other social and political conditions. When designing business institutions there often are tradeoffs between long term and short term growth, smaller scale voluntary cooperation and large scale coerced investment, and so forth. It is wise to recognize that conditions are different and that preferences in tradeoffs are different in different localities and accordingly there should be plurality in policy recommendations.

These papers suggest the importance of ongoing research on the relationship between institutions and economic growth. While the research suggests that stronger rule of law institutions will promote economic growth in most contexts, if legal institutions become captured by special interests, law can discourage growth and innovation. It is critical to appreciate that variations in legal forms, all of which fall within a definition of rule of law systems, can affect economic development. The challenge for scholarship is not just to note the positive relationship between the rule of law and economic growth, but to develop better theories of what kinds of rule of law systems better promote development.

RULE OF LAW AND POLITICAL DEVELOPMENT

The papers summarized in this section examine the relationship between the rule of law and political development, with several scholars focusing on the role of institutions and others offering a broader exploration of this relationship. Timur Kuran is a leading scholar on Islamic law, economy, and culture. Much of Kuran's published work examines questions about the origins and character of legal institutions in Islamic society.

ISLAM AND INSTITUTIONS

In his paper "The Provision of Public Goods under Islamic Law: Origins, Impact, and Limitations of the Waqf System," published in 2001, Kuran

focuses on the Islamic waqf, a deeply historic institution that he traces back to at least 750 C.E. Summarized roughly here what Kuran discusses in fascinating detail, "[a] waqf is an unincorporated trust established under Islamic law by a living man or woman for the provision of a designated social service in perpetuity." To the founder of a waqf, a waqf provided an opportunity to protect wealth from state confiscation and avoid various taxes by converting all or some of his personal property into traditionally immovable assets such as land. In return, the state, who stood to lose out on taxes in perpetuity, required a waqf to provide public goods, thereby alleviating the state's responsibility to provide these services to its citizens. In order to ensure continued wealth protection for the founder and provision of services for the state, the waqf system was remarkably inflexible and required strict interpretation of the founder's intentions. Though Kuran's paper primarily focuses on the historic growth and significance of the waqf system, he also suggests that these particular qualities of the waqf system—the decentralized delivery of public goods and the inflexibility of a waqf—led to the stunted political and economic development in Islamic states that we see today.

Kuran sees the Middle East's current political problems as closely linked to the stunted economic growth. The inability of the waqf system to pool resources and develop into larger corporate-type structures or even municipalities hampered economic growth as well as the development of "the intermediate social structures that we associate with 'civil society'." And without a civil society, there was little to challenge executive power or introduce democracy Kuran also points to clear evidence that even prior to the modern waqf reforms, waqf managers often attempted to circumvent or at least broadly interpret the founders' wishes. While this might have had some positive economic effects, it also meant regular lawbreaking without repercussions and sometimes *with* official complicity bought through bribes and other enticements. Under these conditions, Kuran argues, embezzlement and other corruption helped to de-legitimize the waqf system and undermine the rule of law. In turn, the corrupt waqfs provided a ready excuse for state confiscation, thereby enriching already powerful states. Again, it was not until the 20th century reforms of the waqf system, when the damage had already been done, that waqfs began to regain their legitimacy and reassert themselves as integral parts of Islamic society.

> "Seventeen years is the average lifespan of a national constitution since 1789."

INSTITUTIONS, MORE GENERALLY

Moving outside of the Islamic world, but retaining a focus on institutions is the work of Tom Ginsburg, Zachary Elkins, and James Melton who calculate that seventeen years is the average lifespan of a national constitution since 1789. The median is only eight years. Such statistics may lead to a great deal of hand-wringing in light of the commonly held assumption that longer lasting constitutions are more likely to result in effective, stable democracies. Ginsburg, Elkins, and Melton, however, are not ready to join in the handwringing without first exploring the underlying assumption. They also ask whether there is something in the design of the constitution itself that can create vulnerability or promote longevity. Their research on these questions is based on an impressive survey of every "replacement, amendment, or suspension" of a constitution "in every independent state since 1789," as well as the text

of every new constitution during that same time period.

Carefully weighing the evidence, the authors ultimately argue in favor of the assumption—that constitutional endurance is positive for multiple reasons. For example, the authors highlight evidence that suggests that an enduring constitution promotes both economic growth and democratic stability. The authors then investigate the factors that challenge the life of a constitution, as well as those that enhance it. They identify and discuss three broad risk factors to constitutional lifespan that constitute the bases for their study. Reviewing the constitutional histories of all countries, the authors first determine a handful of "precipitating causes of constitutional death," from military subjugation to regime change. They next recognize structural aspects of a constitution that lend themselves to longevity, looking at the specificity of the constitution, the inclusion of the public in the drafting and ratification of the constitution, and the adaptability of the constitution. Thirdly, Ginsburg, Elkins, and Melton examine whether attributes of the state contribute to constitutional resiliency. They distill three shared qualities of constitutions that have endured. They "emerge under conditions characterized by an open, participatory process." They "tend to be specific, inducing parties to reveal information and to invest in the negotiation process." And they "tend to be flexible, in that they provide reasonable mechanisms by which to amend and interpret the text to adjust to changing conditions."

Adding to the discussion on institutions, Margaret Levi and Brad Epperly argue that "[i]nstitutions are not sufficient on their own" to bring about rule of law. Levi and Epperly offer an analysis of the foundational moments of the rule of law, asking how, during these critical initial steps in state founding or refounding, can the building blocks for the development of the rule of law be best assembled? In answer to this question, they suggest a four-stage process, where each stage presents a path that may foster the growth of the rule of law and a path that does not. First, nature provides a leader who may be principled or not. If the leader is principled, she next faces the challenge of either being able or unable to garner the cooperation of powerful others. Third, with a cooperative bureaucracy, the leader creates an institutional design that may or may not provide "*credible constraints on both the leader and on others with power*" *(emphasis in the original)*. Lastly, only with all of the correct preceding pieces in place, the authors see public compliance and legitimating beliefs in the state.

Not unlike Levi and Epperly, Katharina Pistor, Antara Haldar, and Amrit Amirapu also argue that institutions alone do not necessarily lead to equality. In their paper, they take a straightforward approach in assessing whether rule of law is directly correlated to the improved status of women, something many quickly (or, as the authors show, *too* quickly) accept as a given. While there is evidence, albeit limited, that improvements in the socioeconomic status of women in the West over the last ten years coincide with notable legal changes, such evidence cannot explain the measurable variations in equality around the world and cannot generate any conclusive statements regarding the correlation between rule of law and gender equality. Thus, the authors systematically analyze the relation between already existing indices measuring the rule of law and those measuring gender equality. Their most general, and perhaps most startling, conclusion is the lack of "a strong positive correlation between the status of women and the level of the rule of law." They further suggest that "social norms as well as income levels are critical determinants for the status of women in society, and more important than what is captured by [rule of law]." The authors' work effectively illustrates the gap between "the law on the books and the law in action."

Pistor, et al.'s paper highlights many of the challenges facing rule of law development projects. While a growing consensus of the world community agree on the meaning

Participants from the World Justice Forum First Scholars Group. From left: Margaret Levi, Timur Kuran, Robert Nelson, and James Heckman.

of women's rights and the types of practices that should be condemned, this consensus does not translate into real change. In short, local contexts, social norms, and culture remain "powerful determinants of gender equality," more powerful, in fact, than legal-institutional reforms. In their closing sentence, the authors offer a modest suggestion on how to reconfigure the rule of law strategy as it relates to gender equality; "clearly spell out the desirable policy outcomes and…adjust the means for achieving these ends to local conditions"—something that sounds not unlike Sen's capability approach.

POLITICAL DEVELOPMENT BEYOND INSTITUTIONS

Several scholars broaden the analysis of the relationship between the rule of law and political development to beyond that of institutions. In a comprehensive analysis of the conditions that bring about the growth of political liberalism, ABF Research Professor **Terence Halliday** looks to existing studies for the conditions in which political liberalism has been obtained, maintained, or lost or suppressed. Political liberalism, Halliday explains, is a combination of three elements: (1) basic legal freedoms, also referred to as civil rights; (2) a moderate state; and (3) a civil society. To assist with his analysis, Halliday introduces a new concept—the "legal complex"—that "seeks to capture the set of relationships among all legally trained occupations that are practicing law." Thus, by analyzing the array of relationships between private lawyers, public lawyers, judges, prosecutors, and legal academics and the effect that the mobilization of these various configurations have on the growth of political liberalism, Halliday aims to provide a more complete understanding of how, when, and under what circumstances political liberalism takes root.

Halliday also turns his attention to the specific conditions and limitations on each aspect of the legal complex and the effect these have on the legal complex's ability to be in "the vanguard of the march towards political liberalism." Each group

within the legal profession faces complicated restrictions on action and organization, which leads Halliday to conclude that "actual patterns of alliance and division across the legal complex are far more complex than we originally envisaged." He also discusses the role of NGOs, the media, religious groups, political parties, and the market in the development of political liberalism. But, even more so than the legal complex, the complexity and variety of these entities around the world make generalizations difficult to formulate. Instead, Halliday ends with six broad conclusions "that may also serve as hypotheses for more refined and extensive empirical research." Without repeating his conclusions in full, Halliday stresses threats to security, the properties of the legal complex, the characteristics of the State, the development of the civil society, the state of politics, and the shape of the market.

Barry Weingast begins his paper by asking, "Why do developing countries prove so resistant to the rule of law?" He ends by acknowledging that the "tenor of this paper is a pessimistic one." Indeed, as Weingast progresses through his analysis of the difficulties faced in achieving rule of law in developing nations, the challenges are daunting. Adopting an approach that he developed with Douglass C. North and John Joseph Wallis (the NWW approach), Weingast provides a novel explanation for why it has been so difficult to successfully transplant various rule of law institutions from developed nations to developing nations. Unfortunately, as Weingast's conclusion suggests, this new understanding does not bring with it an easy solution.

The NWW approach divides the world's societies into two broad social orders based on their means for controlling violence. In the limited access order, or natural state, the political system explicitly manipulates the economic system in order to control violence. Natural states place power in the hands of a coalition of elites. "The coalition grants members privileges, creates rents through limited access to valuable resources and organizations, and then uses rents to sustain order." Members are dissuaded from violence because violence decreases their rents. Critical to the natural state, then, are personal relationships based on the individual personalities of the members — with more privileges granted to the more powerful.

> "The rule of law cannot be established by legal actors alone."

The second social order is the open access order that allows open entry to political and economic organizations. And it is the competition that this openness invites that supports order and controls violence. Open access orders are characterized by impersonal relationships, meaning that laws and privileges are not granted based on individual personalities, but, rather, are enforced impartially for all citizens. The result is greater long-term economic development driven by competition and "feedback mechanisms that limit the ability of political systems…to create too many rents." In contrast to natural states, an open access order offers a perpetual state in that the law under one ruler today will be the same law under another ruler tomorrow. As might be imagined, the transition from a natural state to an open access order is a tremendous feat, requiring three daunting "doorstep conditions" prior to the actual transition: (1) the establishment of the rule of law for elites; (2) the creation of the perpetual state; and (3) the consolidation of control over the military.

The NWW approach is useful to the discussion of the rule of law in its ability to highlight fundamental characteristics of natural states that make them particularly resistant to the rule of law. Focusing on the "impersonal aspects" of the rule of

law, including the predictability of law and the ability of the state to treat individuals equally before the law Weingast argues that natural states, "by definition…have substantial difficulties maintaining the rule of law." Moreover, Weingast argues, history also suggests that the rule of law emerges with the transition of a natural state to an open access order, a process, as noted earlier, that is particularly difficult to accomplish. Weingast bleakly points out that, "only a little over two dozen states have succeeded in this transformation, with most clustered in Europe."

CONCLUSION

The World Justice Project scholars program was intended to engage at the highest academic level serious questions about the meaning, sources, impediments to, and consequences of the rule of law. As the complexity of these papers show, we have made progress in advancing these inquiries, but the debates about these issues should and will continue. Much of our research has shown the positive contributions that law, and more broadly, institutions can make to the creation of societies that are less violent, better educated, healthier, more free, and more prosperous. A recurrent theme, though, is that the rule of law cannot be established by legal actors alone. It requires strong support from political leaders who are themselves willing to abide by the constraints that rules place on power, as well as the cooperation of other centers of power in society. And, developing the formal structures of the rule of law is no guarantee that a society will provide justice for all its members. Pistor, Haldar, and Amirapu's finding of a weak, indeed, a negative correlation between some measures of the rule of law and the welfare of women in society, is a sobering reminder that formal law cannot by itself deliver social justice. Yet in many contexts, the appeal to the principles of justice that underlie the rule of law may be an effective avenue in a campaign to improve the social conditions of marginalized members of society.

THE RULE OF LAW AND ACCESS TO JUSTICE

The scholar's group dedicated to access to justice issues was headed by Yash Ghai, a noted constitutional and human rights scholar. The group focused on the struggle of marginalized groups, ranging from Chinese peasants to Pakistani women, to the Roma in Eastern Europe, for access to justice. Ghai and Jill Cottrell, his collaborator at the Nepal Constitutional Advisory unit, summarized the group's research in an introductory essay entitled "The Rule of Law and Access to Justice: Findings of an ABA Project on Access to Justice," which is excerpted below:

Access to justice 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, access to justice can be a very broad concept, covering the conduct of most organs of state and the processes of getting into the courts. Two approaches can be detected in access to justice 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. The other approach, the "demand" side, is the facilitation of the use of the courts, ombudspersons and other complaints mechanisms by the people. 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 indigenous people.

The primary focus of the ABA project on access to justice is on the demand side, [particularly] to study the access to justice of members of marginalized communities. The project is based on eight 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 of redress for injuries.

LAND AND JUSTICE IN POST-APARTHEID: SOUTH AFRICA

Land is critical to the well being of individuals and communities: as a 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 the struggles for freedom 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. Budlender discusses land reforms for the restoration of land 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. Budlender says that perhaps the most important lesson of the restitution process is that it is a mistake to judicialize claims which can be effectively dealt with by administrative process. According to Budlender, "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."

INJUSTICE IN A LAWLESS STATE: CAMBODIA

The approach in Cambodia may usefully be contrasted with that in South Africa.

Yash 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 nationalized 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 rule of law has been a constant concern of the international community. Dependent as Cambodia is on financial and technical assistance from 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.

Ghai shows how the lack of the rule of law facilitates…violations of the law. There is a pattern of rich or well-connected litigants trying to get the lawyers of less powerful opponents investigated for criminal offenses — 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 access to justice in South Africa as demonstrated by Budlender.

It is at the level of the judiciary that the most egregious violations of the rule of law 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 favor 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 — or legitimacy — from the public.

Ghai concludes his study with 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."

AN INNOVATIVE AND CREATIVE JUDICIARY: BRAZIL

Boaventura de Sousa Santos and Flavia Carlet's paper deals with access to the regular courts, rather than to an alternative system of justice—though they also observe that the State has no monopoly on 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 can be so only if political action of various sorts is used, in addition to legal action. 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 an "historical and constitutional error for the indigenous and Brazilian communities," or, alternatively, an important endorsement of the new constitutional approaches.

> "[In Brazil] courts can be important, but… this can be so only if political action of various sorts is used, in addition to legal action..."

The oppressed group in Brazil that is the main focus of the chapter is the Landless Rural Workers' Movement, though de Sousa Santos and Carlet observe 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. Underlying the recent developments is the new Constitution of Brazil, which recognizes 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 de Sousa Santos and Carlet make 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.

What has been happening in Brazil includes at least contributions to what de Sousa Santos and Carlet consider is needed, namely a revolution of justice which includes a 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, ethnocultural, cognitive, environmental, historical, etc.) in Brazilian society.

De Sousa Santos and Carlet conclude 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.

CONSTITUTIONALIZING INDIGENOUS PEOPLES' RIGHTS: COLUMBIA AND PERU

Julio Faundez also (like de Sousa Santos and Carlet, and indeed like Ghai and Williams) deals with access to justice for 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 other contributors 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 that 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, discussed 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 considers three specific institutions. 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 groups 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 institution, 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.

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.

MODERN REDRESS FOR HISTORICAL INJUSTICE: NEW ZEALAND

David Williams is concerned 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. Williams' institutional focus is largely the Waitangi Tribunal, named for the treaty that marked the beginning of colonial rule [in New Zealand] over what had been the land of the Maoris. The remedies that the Maoris seek are measured not only in money terms, but in terms of

acknowledgement of past injustice and the 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.

Williams, unlike some authors, specifically addresses the issue of access to justice of women. He observes that during the 1970s Maori women were at 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 to 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 Maoris 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.

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-legitimization of Marxist ideology and Stalinistic central

planning. Nevertheless the process has been masterminded and administered by a communist government that continues to use the artifacts 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 de Sousa Santos and Carlet also do) that people can not only mobilize 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 blurring the 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 summarizes 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.

> "Often… 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'."

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." 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.

Pils points to two major ways in which peasants physically resist the takings process and evictions. Typically, resistance occurs after the legal channels of administrative reconsideration, administrative litigation and 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.

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 "honor 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 honor of the male members of the family is understood to reside in the bodies of the women of the family, and in protecting this honor 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.

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 law, and periodic outbursts of fundamentalism that put the judiciary under pressure—and reverses progressive jurisprudence that courts may have tried to establish. The legal difficulties that victims of "honor" 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 offense." 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 "honor" crimes – and define the limits of legal redress. The only possibility of redress lies in a fundamental change of social attitudes.

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, 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 Chopra 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 Chopra's paper is not so much claims against the state, nor directly against private parties, as methods for reconciling communities after conflict. Even more importantly in her analysis are methods for preventing escalation of private disputes into communal conflicts.

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.

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 Chopra, 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 regard 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.

PUBLIC INTEREST LITIGATION: CENTRAL AND EASTERN EUROPE

James A. Goldston and Mirna 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). The legal mechanism is "public interest litigation" (PIL), which involves the use of the ordinary courts. But courts are used in ways that are slightly different from the traditional two-dimensional court battle, which is 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. It also entails using law to change attitudes toward 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 (a member 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 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). These cases dealt with police abuse and racial violence, discrimination in housing, and access to education. Goldston and Adjami briefly outline the legal strategies used in bringing the cases, including the collection of masses of data about a discriminatory practice, for example, in the Czech Republic, the assignment of 27 times the number of Roma children as non-Roma children to special schools (for educationally or physically challenged or disruptive children).

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. Additionally, litigation must be coupled with political and social action and pressure on authorities. Finally, the Roma should be included in the design and execution of litigation and in creative approaches to overcome procedural hurdles.

CONCLUSION

The revised, published versions of these papers will discuss in greater detail the conclusions and recommendations that can be drawn from the case studies presented here. However, some obvious observations may be stated. First, legal aid and the presence of legal representation are critical, when we consider communities who are already disadvantaged. Second, collective action, which combines legal, political and communal strategies, is almost a necessity for meaningful change. Third, use of international and national norms of human rights increases the visibility of litigation and issues it raises. Fourth, most of these processes are linked to globalization. Globalization may, therefore, promote trade in precedents that courts in diverse contexts will apply to public action litigation on behalf of marginalized groups.

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Researching Law

AN ABF UPDATE

RESEARCHING LAW
An ABF Update
Quarterly Publication
Volume 19, Number 4
Fall 2008

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