1

Understanding and Comparing Access to Justice

Helena Whalen-Bridge

Abstract

Understanding access to justice in any jurisdiction requires identification of factors which create the dynamic in which access functions. Jurisdictions can have factors in common, but each jurisdiction has a dynamic of its own. Without an understanding of these factors and how they interact, proposed improvements in access may not accomplish much. Viewing access to justice in this way arguably allows for a clearer vision of positive change, because it acknowledges why particular changes may be difficult or unlikely. Establishing access to justice dynamics in sufficient complexity is also necessary for comparative understandings across jurisdictions, but comparative insight requires reference to an expanded set of jurisdictions, including Asia and beyond.

I. INTRODUCTION

We are to a disturbing degree at the mercy of our time and place. At the time of writing, a worldwide pandemic has served as a reminder of this. Resources such as money, education, and social capital can moderate some vagaries, but conditions such as political autocracy and instability, hatreds various and evergreen, and inequities of different sorts render us vulnerable.

Law may provide relief for some of life's troubles. In the resolution of legal disputes, law has the potential to provide justice,[1] if it is not derailed by corruption, undermined by systemic underfunding, or rendered inaccessible. People must have access to justice to get legal relief, but their access should be equal, 'so that the relative advantage or disadvantage of one citizen vis-à-vis another does not determine legal outcomes'.[2] Access to justice is therefore central to the rule of law.[3]

Accessibility is the focus of this volume. Simply stated, access to justice is the state's obligation to ensure that all members of a community can access law and dispute resolution equally and

[1] See Richard L. Abel, 'Epilogue: Just Law?' in Scott L. Cummings, *The Paradox of Professionalism: Lawyers and the Possibility of Justice* (Cambridge: Cambridge University Press, 2011) 296 [*Just Law?*] at 296, 309, and Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9:1 *Law & Society Review* 95.

[2] Tom Cornford, 'The Meaning of Access to Justice' in Ellie Palmer et al., *Access to Justice: Beyond the Policies and Politics of Austerity* (Oxford: Hart Publishing, 2016) 27 [*Meaning of Access*] at 29.

[3] See Yash Ghai and Jill Cottrell, 'The Rule of Law and Access to Justice' in Yash Ghai and Jill Cottrell, eds., *Marginalized Communities and Access to Justice* (Abingdon: Routledge, 2010) [*Marginalized Communities*] 1 at 3.

effectively.[4] But definitions of access to justice have varied over time.[5] Today access to justice emphasizes actual, effective access, and it can include legal advisors other than lawyers,[6] public legal education,[7] social services and political representation,[8] and informal legal resolution platforms,[9] all provided in a manner that respects human rights.[10] Critics of formal dispute resolution have pointed out that '[r]esolving justice problems lawfully does not always require lawyers' assistance',[11] and that alternatives to courts and lawyers are required.[12] However, Richard Abel has observed that while there have been historical examples of efforts to completely do away with legal rules and legal specialists, they re-emerge.[13] Civil or administrative matters may be amenable to different kinds of solutions, but disputes such as criminal matters normally end up in formal state-organized dispute systems such as courts.[14] In these forums, lawyers or suitably trained legal professionals[15] play a key role.[16] While it is possible in many countries to proceed without legal representation in venues that require legal and procedural knowledge, and unrepresented litigants are not uncommon, most unrepresented litigants encounter considerable difficulties.[17] Access to justice does encompass a wide variety of goals and strategies, but

[4] See European Union Agency for Fundamental Rights & Council of Europe, *Handbook on European Law Relating to Access to Justice* (Luxembourg: Publications Office of the European Union, 2016) at 16; and Daniel Bonilla Maldonado, 'The Right to Access to Justice: Its Conceptual Architecture' (2020) 27:1 *Indiana Journal of Global Legal Studies* 15 at 15.

[5] See Mauro Cappelletti and Bryant Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 *Buffalo Law Review* 181 [*The Newest Wave*] at 183–4.

[6] See Vivek Maru and Varun Gauri, eds., *Community Paralegals and the Pursuit of Justice* (Cambridge: Cambridge University Press, 2018).

[7] Christine Parker, *Just Lawyers: Regulation and Access to Justice* (Oxford: Oxford University Press, 1999) [*Just Lawyers*] at 30–1.

[8] Helen J. Ménard, *Accessing Justice through Mental Health Law Reform in the Pacific* (New York: Nova Science Publishers Inc., 2016) [*Mental Health Law Reform*] at 132.

[9] See Linn A. Hammergren, *Justice Reform and Development: Rethinking Donor Assistance to Developing and Transition Countries* (Abingdon: Routledge, 2015) [*Justice Reform*] at 129–30; and *Informal Justice Systems: Charting a Course for Human Rights-Based Engagement* (UNDP, 2012).

[10] See e.g. *Access to Justice for the Poor, Marginalised and Vulnerable People of Uganda* (Legal Aid Service Providers Network, 2015) at 18.

[11] Rebecca L. Sandefur, 'Access to What?' (2019) 148 *Dædalus* 49 at 51.

[12] In the US see Rebecca L. Sandefur, 'What We Know and Need to Know About the Legal Needs of the Public' (2016) 67 *South Carolina Law Review* 443 at 451; and Katherine S. Wallat, 'Reconceptualizing Access to Justice' (2019) 103 *Marquette Law Review* 581; but see Ugo Mattei, 'Access to Justice: A Renewed Global Issue?' (2007) 11:3 *Electronic Journal of Comparative Law* 1 [*Renewed Global Issue*] at 3 (the 'birth of the ADR industry . . . transformed *the issue of access to justice, by limiting as much as possible access to courts of law*' (emphasis in original)); and see *Justice Reform*, *supra* note 9, at 37 (those 'living in isolated, traditional communities typically have access to their own dispute system, albeit with its equally traditional biases') at 129–66.

[13] *Just Law?*, *supra* note 1, at 312–13.

[14] See *Justice Reform*, *supra* note 9, at 37; see generally, *Marginalized Communities*, *supra* note 3, at 6–7.

[15] This volume focuses on the lawyer's role in access to justice but is not meant to exclude other legally trained individuals who assist in court, as illustrated by the analysis of legal workers (and lay *litigants ad litem*) in the chapter on China. The chapter on Vietnam identifies the shift in defendant representation from civil servant to lawyer as an important development in effective representation.

[16] See e.g. *Meaning of Access*, *supra* note 2, at 28.

[17] See e.g. Liz Richardson, Genevieve Grant, and Janina Boughey, *The Impacts of Self-Represented Litigants on Civil and Administrative Justice: Environmental Scan of Research, Policy and Practice* (Sydney: Australasian Institute of Judicial Administration, 2018) 23–7; Bridgette Toy-Cronin, 'Keeping Up Appearances: Accessing New Zealand's Civil Courts as a Litigant in Person' (2015) (unpublished PhD dissertation, University of Otago, New Zealand); and Liz Trinder et al., *Litigants in Person in Private Family Law Cases* (UK: Ministry of Justice Analytical Series, 2014).

access to lawyers continues to be a 'central means to increase individuals' access to justice'.[18] This volume therefore focuses on the role of lawyers in making law and dispute resolution accessible, and, in this context, access to justice will refer to the ability of persons[19] to access fair, third-party dispute resolution processes, when they cannot afford a lawyer, or are vulnerable or marginalized from the law for other reasons.

II. EXPANDING ACCESS TO JUSTICE RESEARCH

Cappelletti and Garth famously described access to justice in three successive waves, a metaphor relevant at least in 'western-oriented countries':[20] legal aid for the poor; representation of group and collective interests rather than just individual rights; and a shift from access to lawyers to different mechanisms.[21] But the wave metaphor is not necessarily accurate in all western countries,[22] and in the comparative context it may send analysis in the wrong direction. When discussing comparative legal professions, Philip Lewis stated that discussion of '"waves" or "tendencies" is unsatisfactory', not just because comparative lawyers assume that similar kinds of changes fulfil similar needs, but because lawyers assume they have given 'a satisfactory account merely by showing the existence of apparently similar developments in different countries, whereas this only begins the inquiry into the circumstances underlying those similarities'.[23]

This volume starts from the position that understanding access to justice anywhere depends very much on the environment being studied.[24] In some ways, this approach is a continuation[25] of how Cappelletti, the quintessential comparative law scholar, initiated contemporary access to justice research in the 1970s,[26] when he 'launched a monumental comparative research project'

[18] Nourit Zimerman and Tom R. Tyler, 'Between Access to Counsel and Access to Justice: A Psychological Perspective' (2010) 37 *Fordham Urban Law Journal* 473 at 474; see also Tamara Goriely and Alan Paterson, 'Introduction: Resourcing Civil Justice' in Alan Paterson and Tamara Goriely, eds., *Resourcing Civil Justice* (Oxford: Oxford University Press, 1996) 1 at 1.

[19] The volume includes some discussion of collective actions: see Sarasu Thomas' chapter on India, Chapter 3. On representation of artificial persons such as corporations, associations, and governments, as opposed to natural persons, see Marc Galanter, 'More Lawyers than People: The Global Multiplication of Legal Professionals' in Scott L. Cummings, ed., *The Paradox of Professionalism: Lawyers and the Possibility of Justice* (Cambridge: Cambridge University Press, 2011) 68 at 80–2.

[20] *The Newest Wave*, *supra* note 5, at 196.

[21] *The Newest Wave*, *supra* note 5, at 197, 209, 222, and generally 196–289; there are different formulations, e.g. fives waves in Canada per Roderick Macdonald, 'Access to Justice in Canada Today: Scope, Scale and Ambitions' in Julia Bass, W. A. Bogart, and Frederick H. Zemans, eds., *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2005) 19, 20–3.

[22] *Just Lawyers*, *supra* note 7, at 32; in South and South East Asia, see Ross Cranston, 'Access to Justice in South and South-East Asia' in Julio Faundez, ed., *Good Government and Law: Legal and Institutional Reform in Developing Countries* (London: Palgrave Macmillan, 1997) 233 [*Access to Justice in South and South-East Asia*] at 233–4.

[23] Philip S. C. Lewis, 'Comparison and Change in the Study of Legal Professions' in Richard L. Abel and Philip S. C. Lewis, eds., *Lawyers in Society: Comparative Theories* (Berkeley: University of California Press, 1989) 27 at 59, and see 47.

[24] See *Renewed Global Issue*, *supra* note 12, at 4 (comparative scholarship in access to justice is needed because 'access to justice is so intimately connected to the role of law in society . . .').

[25] See Andrew Harding, ed., *Access to Environmental Justice: A Comparative Study* (Leiden: Martinus Nijhoff Publishers, 2007) [*Environmental Justice*] at 5.

[26] The work originated from the comparative research project entitled 'Florence Access-to-Justice Project' and was published by Sijthoff (Leiden and Boston) and Giuffrè (Milan) under the general editorship of Cappelletti. The work

on access to justice.[27] After a hiatus,[28] access to justice research continued, although works in English focused primarily on western countries. In the UK, Lord Woolf's 1995 Interim[29] and Final Reports[30] on Access to Justice reviewed the civil justice system and made recommendations for reform.[31] In 1999, Christine Parker's *Just Lawyers: Regulation and Access to Justice*[32] provided an overview of lawyers and justice in primarily common law jurisdictions. Deborah Rhode revitalized access to justice scholarship in the US with her 2004 monograph *Access to Justice*[33] and articles such as the pointed 'Whatever Happened to Access to Justice?'[34] In 2005, Rhode followed this book with *Pro Bono in Principle and in Practice: Public Service and the Professions*;[35] one chapter included comparative jurisdictional analysis, with countries limited to the UK, Australia, and China.[36] Also in the US, Rebecca Sandefur has been a central figure in empirical access to justice research;[37] her 2009 edited book focused on the US, Canada, and the UK, with one chapter on Japan.[38] Robert Granfield and Lynn Mather's *Private Lawyers and the Public Interest: The Evolving Role of Pro Bono in the Legal Profession*,[39] similar to Rhode's work, focused on the US or provided a more conceptual overview.[40] *Access to Justice for*

includes the General Report introducing the project's four-volume series, *The Newest Wave*, *supra* note 5; Bryant G. Garth and Mauro Cappelletti, eds., *Vol. I, Access to Justice: A World Survey* (Milan: Giuffrè Editore/Alphen aan den Rijn, Sijthoff/Noordhoff, 1978); Mauro Cappelletti and John Weisner, eds., *Vol. II, Access to Justice: Studies of Promising Institutions* (Milan: Giuffrè Editore/Alphen aan den Rijn, Sijthoff/Noordhoff, 1978); Bryant G. Garth and Mauro Cappelletti, eds., *Vol. III, Access to Justice: Emerging Perspectives and Issues* (Milan: Giuffrè Editore/Alphen aan den Rijn, Sijthoff/Noordhoff, 1979); Klaus-Friedrich Koch, ed., *Vol. IV, Patterns in Conflict Management: Essays in the Ethnography of Law* (Milan: Giuffrè Editore/Alphen aan den Rijn, Sijthoff/Noordhoff, 1979); Klaus-Friedrich Koch, ed., *Access to Justice in an Anthropological Perspective* (Milan: Giuffrè, 2008).

[27] *Renewed Global Issue*, *supra* note 12, at 1.

[28] *Renewed Global Issue*, *supra* note 12, at 2.

[29] Lord Woolf, 'Access to Justice – Interim Report' (*The National Archives*, 1995), online: webarchive.nationalarchives.gov.uk/20081106150907/www.dca.gov.uk//civil/interim/contents.htm.

[30] Lord Woolf, 'Access to Justice – Final Report' (*The National Archives*, 1995), online: webarchive.nationalarchives.gov.uk/20060213223540/www.dca.gov.uk/civil/final/contents.htm.

[31] Other jurisdictions also undertook comprehensive reviews; in Australia, see Access to Justice Advisory Committee, 'Access to Justice: An Action Plan' (Canberra, 1994).

[32] *Just Lawyers*, *supra* note 7.

[33] Deborah L. Rhode, *Access to Justice* (Oxford: Oxford University Press, 2004); and see Deborah L. Rhode, 'Colloquium: Deborah L. Rhode's Access to Justice' (2004) 73:3 *Fordham Law Review* 841; in addition to Rhode, see Earl Johnson Jr, 'Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies' (2000) 24 *Fordham International Law Journal* S83 (civil access to justice).

[34] Deborah L. Rhode, 'Whatever Happened to Access to Justice?' (2009) 42 *Loyola of Los Angeles Law Review* 869; see also Deborah L. Rhode and Scott L. Cummings, 'Access to Justice: Looking Back, Thinking Ahead' (2017) 30 *Georgetown Journal of Legal Ethics* 485.

[35] Deborah L. Rhode, *Pro Bono in Principle and in Practice: Public Service and the Professions* (Stanford: Stanford University Press, 2005) [*Pro Bono in Principle*].

[36] *Pro Bono in Principle*, *supra* note 35, at 100–24.

[37] See Rebecca L. Sandefur, 'Lawyers' Pro Bono Service and American-Style Civil Legal Assistance' (2007) 41:1 *Law & Society Review* 79 [*Civil Legal Assistance*]; Catherine R. Albiston and Rebecca L. Sandefur, 'Expanding the Empirical Study of Access to Justice' (2013) *Wisconsin Law Review* 101; and Scott L. Cummings and Rebecca L. Sandefur, 'Beyond the Numbers: What We Know – and Should Know – About American Pro Bono' (2013) 7 *Harvard Law and Policy Review* 83.

[38] Rebecca L. Sandefur, ed., *Access to Justice* (Bingley: Emerald JAI, 2009).

[39] Robert Granfield and Lynn Mather, eds., *Private Lawyers and the Public Interest: The Evolving Role of Pro Bono in the Legal Profession* (Oxford: Oxford University Press, 2009).

[40] The work of Cummings and Rhode that highlights problems resulting from pro bono dominance also focuses on the US: see Scott L. Cummings, 'The Politics of Pro Bono' (2004) 52 *UCLA Law Review* 1 [*Politics of Pro Bono*] at 106–44; and Scott L. Cummings and Deborah L. Rhode, 'Managing Pro Bono: Doing Well by Doing Better' (2010) 78 *Fordham Law Review* 2357; *cf.* the more recent Scott L. Cummings, Fabio de Sa e Silva, and Louise G. Trubek, eds.,

Disadvantaged Communities, by Marjorie Mayo et al.,[41] provided a conceptual overview of access to justice and then focused on Law Centres in the UK after large cuts in legal aid expenditures. *Access to Justice: Beyond the Policies and Politics of Austerity*[42] also addressed access to justice in the UK, including one chapter on legal aid in the EU and one on access to justice in France, while *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* focused on Australia and Great Britain.[43]

There has been research on access to justice in countries outside western jurisdictions, although it is less well known and occasionally difficult to obtain. In terms of book treatments, an edited volume in 1985 by Harry Scoble and Laurie Wiseberg addressed South East Asia although the focus was human rights.[44] In 2002, Christina Jones-Pauly and Stefanie Elbern edited *Access to Justice: The Role of Court Administrators and Lay Adjudicators in the African and Islamic Contexts*,[45] and in 2009, Ayesha Kadwani Dias and Gita Honwana Welch published *Justice for the Poor: Perspectives on Accelerating Access*.[46] More recently, Yash Ghai and Jill Cottrell published *Marginalized Communities and Access to Justice*, which explores the rule of law via access to justice and focuses on the rights of communities or groups,[47] and Vinícius da Silva edited *Access to Justice in the Americas*.[48] A portion of this research focuses on access to justice regarding particular subject matter,[49] or has a constitutional or human rights,[50] international,[51] or gender

Global Pro Bono: Causes, Context, and Contestation (Cambridge: Cambridge University Press, 2022) [*Global Pro Bono*].

[41] Marjorie Mayo et al., *Access to Justice for Disadvantaged Communities* (Bristol: The Policy Press, 2014) [*Disadvantaged Communities*].

[42] Ellie Palmer et al., eds., *Access to Justice: Beyond the Policies and Politics of Austerity* (Oxford: Hart Publishing, 2016).

[43] Asher Flynn and Jacqueline Hodgson, eds., *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (Oxford: Hart Publishing, 2017).

[44] Harry M. Scoble and Laurie S. Wiseberg, eds., *Access to Justice: Human Rights Struggles in South East Asia* (London: Zed Books, 1985).

[45] Christina Jones-Pauly and Stefanie Elbern, eds., *Access to Justice: The Role of Court Administrators and Lay Adjudicators in the African and Islamic Contexts* (The Hague: Kluwer Law International, 2002).

[46] Ayesha Kadwani Dias and Gita Honwana Welch, eds., *Justice for the Poor: Perspectives on Accelerating Access* (New Delhi: Oxford University Press, 2009).

[47] *Marginalized Communities*, *supra* note 3.

[48] Vinícius Alves Barreto da Silva, ed., *Access to Justice in the Americas* (Rio de Janeiro: Fórum Justiça, 2021) [*Access to Justice in the Americas*].

[49] Regarding access to mental health, see *Mental Health Law Reform*, *supra* note 8, at 132; regarding environmental justice, see Juan Miguel Picolotti and Kirstin L. Crane, 'Access to Justice Through the Central American Water Tribunal' in Carl Bruch et al., eds., *Public Participation in the Governance of International Freshwater Resources* (Tokyo: United Nations University Press, 2005) 460; *Environmental Justice*, *supra* note 25; and Engobo Emeseh, 'Environmental Victims, Access to Justice and the Sustainable Development Goals' in Chile Eboe-Osuji and Engobo Emeseh, eds., *Nigerian Yearbook of International Law 2017* (Cham: Springer, 2018) 291; regarding human rights in the Philippines, see Joselito S. Calivoso, Jr et al., *Access to Justice: Human Rights Abuses involving Corporations: Philippines* (Geneva: International Commission of Jurists, 2010); regarding microfinance in Peru, see Yasmine Olteanu, *Access to Justice in Microfinance: An Analytical Framework for Peru* (Cham: Palgrave Macmillan, 2018); and regarding Myanmar and democracy, see Helene M. Kyed and Aredth Maung Thawnghmung, *The Significance of Everyday Access to Justice in Myanmar's Transition to Democracy* (Singapore: ISEAS-Yusof Ishak Institute, 2019).

[50] See Kristina Bentley, 'Access to Justice: The Role of Legal Aid and Civil Society in Protecting the Poor' in Kristina Bentley, Laurie Nathan, and Richard Calland, eds., *Falls the Shadow: Between the Promise and the Reality of the South African Constitution* (Cape Town: University of Cape Town Press, 2013) 34; Chaloka Beyani, *Protection of the Right to Seek and Obtain Asylum under the African Human Rights System* (Leiden: M. Nijhoff, 2012); and Daniel Bonilla Maldonado, ed., *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (Cambridge: Cambridge University Press, 2013).

[51] See Gaetano Pentassuglia, *Minority Groups and Judicial Discourse in International Law: A Comparative Perspective* (Leiden; Boston: Martinus Nijhoff Publishers, 2009).

focus.[52] Some work uses a development lens,[53] while other work takes place in the context of comparative legal systems.[54]

The volume seeks to expand this scholarship by providing different perspectives on access to justice, primarily via a strong focus on Asia. Many countries in Asia are economically or politically important,[55] and the region presents the kind of legal and social diversity which is well suited to a comparative project. Jurisdictions in Asia also offer important comparisons with western countries, challenging truisms regarding matters such as mandatory pro bono, and the role of legal aid and pro bono.

Most chapters examine access to justice within the context of the nation-state, one of the most common geographical structures of comparison.[56] Use of the nation-state is appropriate given the volume's focus on lawyers because, globalization notwithstanding, the regulation of lawyers is still handled primarily at the country (or in federations, the state) level. Methods of expanding access to justice 'are usually framed by local legal approaches'.[57]

Part I (Chapters 2 to 12) presents jurisdictions in Asia. Eleven chapters analyse a variety of legal traditions, political structures, and stages of socio-economic development: China, India, Indonesia, Japan, Malaysia, Myanmar, the Philippines, Singapore, South Korea, Taiwan, and Vietnam. Volume coverage is however not limited to nation-states, or to Asia, and the chapters in Part II provide comparative perspectives on particular aspects of access to justice. Michal Ofer-Tsfoni and Limor Zer-Gutman's chapter on Israel[58] addresses the challenges posed by a strong version of lawyer self-regulation. Helen Kruuse's chapter on South Africa presents an

[52] See Amanda Ellis, Claire Manuel, and Mark Blackden, eds., *Gender and Economic Growth in Uganda: Unleashing the Power of Women* (World Bank Publications, 2006); Amanda Ellis et al., eds., *Gender and Economic Growth in Kenya: Unleashing the Power of Women* (World Bank Publications, 2007); *Women's Access to Justice: Identifying the Obstacles & Need for Change: Thailand* (Geneva: International Commission of Jurists, 2012); *Women's Access to Justice in Kazakhstan: Identifying the Obstacles & Need for Change* (Geneva: International Commission of Jurists, 2013); Rachel Sieder and John-Andrew McNeish, eds., *Gender Justice and Legal Pluralities: Latin American and African Perspectives* (Abingdon: Routledge, 2013); Tim Luccaro and Erica Gaston, *Women's Access to Justice in Afghanistan: Individual Versus Community Barriers to Justice* (United States Institute of Peace, 2014); Sahar Maranlou, *Access to Justice in Iran: Women, Perceptions, and Reality* (New York: Cambridge University Press, 2015); Paul Bukuluki et al., 'Negotiating Restorative and Retributive Justice in Access to Justice for Survivors of Sexual and Gender Based Violence in Post-conflict Northern Uganda' in David Kaawa-Mafigiri and Eddy Joshua Walakiri, eds., *Child Abuse and Neglect in Uganda* (Cham: Springer, 2017) 201; and Rachel Sieder, ed., *Demanding Justice and Security: Indigenous Women and Legal Pluralities in Latin America* (New Brunswick: Rutgers University Press, 2017).

[53] See *Justice Reform*, *supra* note 9; Keith Crane et al., *Building a More Resilient Haitian State* (Rand Corporation, 2010); and *Access to Justice in South and South-East Asia*, *supra* note 22; and in the context of judicial reform, see e.g. Asia Pacific Judicial Reform Forum, *Searching for Success in Judicial Reform: Voices from the Asia Pacific Experience* (New Delhi: Oxford University Press, 2009).

[54] See Michèle Schmiegelow and Henrik Schmiegelow, eds., *Institutional Competition between Common Law and Civil Law: Theory and Policy* (Berlin: Springer, 2014) at 211–96.

[55] Prema-chandra Athukorala, 'Introduction and Overview' in Prema-chandra Athukorala, ed., *The Rise of Asia: Trade and Investment in Global Perspective* (Abingdon: Routledge, 2010) 1 at 1–2 (the twenty-first century 'has now come to be labeled the "Asian Century"'); and see Gao Zugui, 'The Effects of Asia's Overall Rise' (2014) 46 *China International Studies* 102 at 102–3, and Dale W. Jorgenson and Khuong M. Vu, 'The Rise of Developing Asia and the New Economic Order' (2011) *Journal of Policy Modeling* 698 at 699.

[56] Mark Van Hoecke, 'Methodology of Comparative Legal Research' (2015) *Law and Method* 1 [*Comparative Legal Research*] at 3.

[57] See *Access to Justice in the Americas*, supra note 48, at 8.

[58] Geographically, Israel is in the western tip of Asia, but it is understood primarily as part of the Middle East in socio-legal studies: see e.g. Richard L. Abel and Ole Hammerslev, eds., *Lawyers in 21st-Century Societies* (Oxford: Hart Publishing, 2020). This volume therefore includes Israel with other comparative perspective chapters as opposed to the jurisdiction-specific chapters of Asia.

environment of extreme economic inequality, a history of apartheid, and attempts at regulating mandatory pro bono; the latter enables comparisons with the mandatory schemes addressed in chapters on Japan and South Korea, and with US scholarship.[59]

Part II also includes four chapters on Syariah[60] law and courts. Syariah is a significant aspect of access to justice, particularly in South and South East Asia, where Syariah law and courts are primarily responsible for the personal law matters of marriage, divorce, maintenance, custody, and inheritance for Muslims.[61] Arif Jamal's chapter, 'Access to Justice and an Islamic Ethic of Justice', introduces the reader to the concept of access to justice in Syariah law. The Syariah chapters on Indonesia, Malaysia, and Singapore wrestle with how access to justice functions in their jurisdictions, and they provide an opportunity to compare access in different Syariah court systems. The Syariah chapters offer theoretical as well as practical interest. Some issues flow from a comparison of access to justice in different Syariah courts, such as whether non-Muslim lawyers should be allowed to practise in these courts,[62] and other issues are raised by comparing a nation-state structure to a religious structure, e.g. are there different conceptions of how to resolve disputes that impact the perceived necessity of lawyers?[63]

III. METHODOLOGY

Edited books that structure chapters via jurisdictional boundaries raise the question of how to engage in coherent comparison. The literature of comparative methodology is long and controversial,[64] and there is no agreement 'on the kind of methodology to be followed, nor even on the methodologies that could be followed'.[65] Maurice Adams, Jaakko Husa, and Marieke Oderkerk suggest that comparative law can be seen as a 'collection of methods that may be helpful in seeking answers to a variety of sorts of questions or problems about law', and that the method to use in any situation 'depends on the question one seeks to answer and the purpose one wants to achieve by doing a specific research project'.[66]

Access to justice can be understood as a right in itself or a means of accessing other rights,[67] and the volume focuses on the latter. This focus raised the following research questions for individual chapters: what needs to be known about the jurisdiction to grasp how access to justice is understood, how does access work or not work there, and based on this understanding how should the jurisdiction improve? With reference to Mark Van Hoecke's framework of compara-

[59] See *Pro Bono in Principle*, *supra* note 35, at 37–45; Kendra Emi Nitta, 'An Ethical Evaluation of Mandatory Pro Bono' (1996) 29 *Loyola of Los Angeles Law Review* 909; and Rima Sirota, 'Making CLE Voluntary and Pro Bono Mandatory: A Law Faculty Test Case' (2017) 78 *Louisiana Law Review* 547 [*Making Pro Bono Mandatory*].

[60] Per author preference, spellings of this word in the chapters include 'Shari'a', 'Sharia', 'Shariah', and 'Syariah'. In the Introduction and book headings, 'Syariah' is used as it is the usual transliteration in South East Asia.

[61] See M. B. Hooker, *Islamic Law in South-East Asia* (Singapore: Oxford University Press, 1984); and Gregory C. Kozlowski, 'Islamic Law in Contemporary South Asia' (1997) 87:3–4 *The Muslim World* 221.

[62] See Chapters 14, 15, and 16, and in Chapter 16, see Abbas' discussion of lawyer proficiency.

[63] See Chapter 13.

[64] See e.g. the research review by Maurice Adams, Jaakko Husa, and Marieke Oderkerk, 'Method and Methodology of Comparative Law: Introductory Remarks' in Maurice Adams, Jaakko Husa, and Marieke Oderkerk, eds., *Comparative Law Methodology* (Cheltenham: Edward Elgar, 2017) 1 [*Method and Methodology*].

[65] *Comparative Legal Research*, *supra* note 56, at 1.

[66] *Method and Methodology*, *supra* note 64, at 1.

[67] *Disadvantaged Communities*, *supra* note 41, at 2.

tive law methodologies,[68] chapters in this volume use a combined functional and law-in-context approach. In terms of functionality,[69] all authors were asked to consider how their jurisdiction achieved or did not achieve access to justice. Chapters therefore prioritized how access to justice works in practice.[70] The contextualized aspect of this research prompted a number of chapters to include empirical research;[71] most chapters include existing quantitative data, and some chapters include qualitative data, pre-exising or produced for this volume.[72] Appendices include matters such as survey questions, as well as English translations of key legislative provisions related to access to justice, such as mandatory public interest regulations.[73]

The volume takes the view that access to justice can best be understood as a dynamic. Dynamics are produced by factors at work in particular jurisdictions, and while some factors are shared among certain jurisdictions, individual jurisdictions have a dynamic of their own.[74] Without an understanding of these factors and how they interact, proposed improvements in access may not accomplish much. Viewing access to justice in this way arguably allows for a clearer vision of positive change, because it acknowledges why and how certain change may be difficult or even unlikely.[75]

To respect the dynamics of individual jurisdictions as well as generate portraits that could offer some comparability,[76] authors were provided with categories of potentially relevant factors in their jurisdiction, including:

- Language: what words are used to discuss lawyers and access to justice, in English and in languages other than English? Why are the words used, and what connotations do they carry?
- Broader Currents: economy, history, legal system?
- Lawyers: conceptualization and types of lawyers, number of lawyers per capita, role of lawyers in society and law. Are lawyers required to contribute to access to justice, e.g. via legal services or monetary contributions, and what is the source of the requirement?
- Drivers: are there any legal guarantees of legal representation, e.g. right to counsel, right to legal aid? Are there key actors, such as non-governmental organizations ('NGOs'), or bar associations?
- Approach: what is the current approach to access to justice, and have there been major changes or shifts over time? What are the key institutions, who are the participants, and what are the sources of funding?
- Critique: what are the accomplishments and shortcomings, and how can shortcomings be improved?

[68] *Comparative Legal Research*, *supra* note 56, at 9–11, 16–19, and see 20 (the common-core method is 'largely based on the functional method, to some extent combined with the law-in-context method').
[69] *Comparative Legal Research*, *supra* note 56, at 9.
[70] *Comparative Legal Research*, *supra* note 56, at 16.
[71] *Comparative Legal Research*, *supra* note 56, at 17 ('[p]utting law in context aims at *understanding* the law, as a foreigner to that legal system and . . . *explaining* why the law is as it is. Inevitably, this implies empirical observation' (emphasis in original)).
[72] See chapters on Japan (Chapter 5), Malaysia (Chapter 6), and Myanmar (Chapter 7).
[73] See chapters on Japan (Chapter 5) and South Korea (Chapter 10).
[74] In the context of legal rules, see the discussion of legal formants in Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)' (1991) 39:1 *American Journal of Comparative Law* 1 at 21–34.
[75] *Cf. Meaning of Access*, *supra* note 2, at 31–6.
[76] *Method and Methodology*, *supra* note 64, at 3.

Authors were thus provided with an outline of potential factors, but they determined what aspects of access to justice were important. This approach led Ching-Fang Hsu and Yong-Ching Tsai's chapter on Taiwan to focus exclusively on the Legal Aid Foundation, and Sarasu Thomas' chapter on India to include the role played by alternative methods of dispute resolution such as *lok adalats*. In characterizing access to justice in their jurisdiction, chapters intend to go beyond country reports that answer the same series of questions.[77] Reports are extremely important sources of information and data, but the volume seeks to move further into the heart of access, by characterizing the relationship of lawyers and access to justice in that jurisdiction.

IV. POINTS OF COMPARISON

In addition to expanding our understanding of access to justice beyond the usual suspects, the volume suggests some potential relationships between the factors identified in the chapters. A few chapters, such as Hualing Fu's chapter on China and Hsu and Tsai's chapter on Taiwan, explicitly compare understandings of access to justice, legal aid, and pro bono to those of western democracies, and analyse how and why they are different. Alice Dawkins' and Nick Cheesman's Myanmar chapter characterizes lawyers as a 'legal occupation', not a legal profession, and the chapter acts as a point of comparison for any jurisdiction with a more developed legal profession. These non-western points of comparison, as well as inter-chapter comparisons, offer important diversity, because of a characteristic of comparison generally: the points chosen for comparison provide the structure of any resulting insight.[78] When read together the chapters raise an impressive array of comparative points, of which the main ones are highlighted here.

Language and Conception

One potential factor in the analysis of access to justice is language, and the interaction of English and other languages. English is not the dominant language in most of the jurisdictions covered in this volume, and because the language of the volume is English, authors were required to translate concepts and issues from other languages into English.[79] The volume though does not merely translate other languages into English, as differences between languages also contain the potential for conceptual insight.[80]

[77] See e.g. the International Legal Aid Group, online: www.internationallegalaidgroup.org/; *Thematic Study on Legal Aid* (ASEAN Intergovernmental Commission on Human Rights, 2019), online: https://aichr.org/wp-content/uploads/2019/09/AICHR-Thematic-Study-on-Legal-Aid-for-web.pdf; TrustLaw Index of Pro Bono 2020, 'Introduction', online: pbi.trust.org/introduction/?year=2020; and Presidents of Law Associations in Asia (POLA), online: www.polanet.org/main/main.php.

[78] See Esin Örücü, 'Developing Comparative Law', in Esin Örücü and David Nelken, eds., *Comparative Law: A Handbook* (Oxford: Hart, 2007) 43 at 62; regarding skills in comparative thinking, see Helena Whalen-Bridge, 'We Don't Need Another IRAC: Identifying Global Legal Skills' (2014) 10 *International Journal of Law in Context* 315 at 323–4.

[79] Managing different languages raised some citation issues. The volume's approach is to translate all article and book titles into English, but also provide some citation information in the original language to make chapters more accessible to readers fluent in that language. The authors' determinations are based on whether readers would need original language information to definitively locate a source.

[80] See e.g. Gerard-René de Groot, 'Legal Translation' in Jan M. Smits, ed., *Elgar Encyclopedia of Comparative Law*, 2nd edn (Cheltenham: Edward Elgar Publishing, 2012) 538.

Chapters discuss access to justice concepts and related usage in English and other languages in China, Indonesia, Japan, Malaysia, Myanmar, South Korea, Taiwan, Vietnam, and South Africa. This research constitutes initial steps toward the language of comparative access to justice. For example, many western countries define legal aid as government-funded legal services for deserving parties, while pro bono is understood as lawyer or law firm-funded legal services for deserving parties. Some chapters adopt this understanding, but not all the jurisdictions in the volume make this distinction; some use 'legal aid' as a catch-all phrase for any kind of legal assistance to low-income individuals. The latter usage could create confusion regarding contributions from different actors such as the government and lawyers, perhaps leading to less pro bono awareness among lawyers. This appears to be the case in Indonesia, where Yunita and Linda Yanti Sulistiawati note that there is widespread confusion among lawyers regarding the difference between legal aid and pro bono, and that lawyers do not agree that they have an obligation to serve low-income or vulnerable persons. This confusion continued after the passage of state-funded legal aid, when lawyers used legal aid funds to establish a 'pro bono' centre. In Malaysia, legal aid also applies to legal services from multiple sources, but Seh Lih Long observes a relatively clear understanding of lawyer obligations to provide access to justice and pro bono, even if it is not always carried out. One explanation for the difference is that Indonesia has multiple bar associations that compete for members and this leads to a lowering of standards generally, while Malaysia has one national bar association that has shown strong pro bono leadership.

Legal Aid and Pro Bono

Lord Denning observed in 1982 that the 'greatest revolution in the law' since World War II was 'the system of legal aid',[81] and governments now have a widely acknowledged obligation to provide some level of legal aid.[82] After recognizing the astronomical growth of legal aid in the US, Richard Abel suggested in 2009 that the 'most stunning contemporary development … is the concomitant rise of pro bono legal services',[83] i.e. law firm or lawyer-funded legal assistance. Today discussions of legal services and access to justice normally include both government-funded legal aid and pro bono.[84] What is the relationship between government-funded legal aid and pro bono? For example, does less legal aid generate more pro bono? There is some support for this equation, for example in the UK's historic development of expansive legal aid and a subsequent decline in voluntary associations providing free legal services.[85] The US suffered from cuts to legal aid that negatively impacted access to justice,[86] which in part gave rise to

[81] Lord Denning, *What Next in the Law* (London: Butterworths, 1982) at 81.
[82] See *Global Study on Legal Aid: Global Report* (United Nations Office of Drug and Crime, 2016) [*Global Report*] at 23.
[83] Richard L. Abel, 'State, Market, Philanthropy, and Self-Help as Legal Services Delivery Mechanisms' in Robert Granfield and Lynn Mather, eds., *Private Lawyers and the Public Interest: The Evolving Role of Pro Bono in the Legal Profession* (Oxford: Oxford University Press, 2009) 295 at 296.
[84] See *Global Pro Bono*, *supra* note 40.
[85] See Andrew Boon and Avis Whyte, '"Charity and Beating Begins at Home": The Aetiology of the New Culture of Pro Bono Publico' (1999) 2:2 *Legal Ethics* 169 at 175.
[86] See John Kilwein, 'The Decline of the Legal Services Corporation: "It's Ideological, Stupid!"' in Francis Regan et al., eds., *The Transformation of Legal Aid: Comparative and Historical Studies* (Oxford: Oxford University Press, 1999) 41 at 56–9.