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FOREWORD

This research study is part of the United Nations Development Program's commitment to the legal and judicial reform of Cambodia, in partnership with the Ministry of Justice (MoJ) and the Council for Legal and Judicial Reform (CLJR). It was conducted by independent experts hired by UNDP. As a result, its conclusions do not necessarily reflect the official position of the national institutions nor UNDP. It is, however, a significant contribution to co-operation between development partners in this area, the Ministry of Justice and the Council for Legal and Judicial Reform (CLJR).

Legal and judicial reform is central to the process of democratisation, poverty reduction, and achieving the Cambodian Millennium Development Goals. It is in line with the 2002 National Poverty Reduction Strategy of Cambodia, the Government's 2004 Rectangular Strategy and the forthcoming National Strategic Development Plan (2006-2010).

In 2003, the Council of Ministers adopted a Legal and Judicial Reform Strategy (LJRS) with the ultimate goal of providing "justice for all Cambodians". One objective of the LJRS was to introduce alternative dispute resolution mechanisms that take into account the obstacles Cambodians face in accessing formal justice. In December 2003, participants at the National Workshop on Implementation of the Legal and Judicial Reform Strategy recommended a study on alternative and traditional methods of dispute resolution.

UNDP accepted the challenge and launched a research project on alternative dispute resolution in coordination with the Ministry of Justice, the CLJR and other development partners. During the design process of the research, UNDP adopted a broader framework than just the study of alternative dispute resolution. This was to get a better understanding of the demand for justice and the avenues people use to access justice. This study focuses on the needs of target groups such as the rural poor, women, and indigenous peoples. Since this study adopts a human rights definition of access to justice, it is not limited to conflicts and disputes, but includes other areas where rights may be violated and where power may be abused. The recommendations refer to both alternative dispute resolution mechanisms, as well as to the providers of justice services in Cambodia.

The report takes into account the participatory nature of democratic reform. It was designed as both research and action to help empower people to take part in the process of improving access to justice. Participation and consultation were taken as the core of its research method. In this way, the original research concept was developed and refined and the many people who took part have a better understanding of justice issues.

With this study, Cambodia now has a body of knowledge on the social demand for justice in Cambodia, an assessment on the supply of justice services, and recommendations for policy to enable the rural poor, women, and indigenous people to better access justice. The study's recommendations are extensive. They will be useful for government, other institutions and donors to set up possible actions to improve access to justice in Cambodia. We also hope that the approach used in this study might be useful for additional studies in Cambodia or the region.

UNDP and its partners in Government and the donor community will now initiate a follow-up program on local justice.

We acknowledge the many people, communities and organizations that contributed selflessly of their ideas, reflections and time, which were so essential for this work.

Phnom Penh, September 2005



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The Ministry of Justice participated in the entire research process. The Minister of Justice, H.E. Ang Vong Vathana, and the Secretary of State, H.E. Neou Kassie, led this participation and took part in the activities throughout the consultation and validation process.

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UNDP Cambodia had overall responsibility for the research project and provided the financial resources for the research team and the study activities. Beate Trankmann was the general supervisor of the research project. Sara Ferrer Olivella, Program Manager, was responsible for the overall coordination, with support from Program Manager, Narin Sok. Additional support was extended by UNDP Regional Centre in Bangkok.

UNDP hired a research team to take charge of the research, including the desk and field studies, consultation workshops, the validation process, and to produce the final report. Raquel Z. Yrigoyen Fajardo, international consultant and team leader, was responsible for the design of the theoretical and methodological framework, the development of the tools for the research, the overall coordination of the research activities, and for drafting the final report. Kong Rady, national consultant, was responsible for the desk study, legal research, coordination of workshops and field studies, and assisted in drafting the report. Phan Sin, translator and researcher, was responsible for interpreting, translating and transcribing all interviews and documents, processing legal information and data, as well as supporting the research in general. Additionally, Mr. Da Raseng, Mrs. Ouch Bo, Mrs. Puth Theavy and Mr. Em Veasna and two volunteers, Mr. Pen Sy, from VIGILANCE, and Mr. An Phin, from ADHOC, helped to coordinate the field studies, organise the local workshops in three provinces, Kampong Speu, Kampong Chhnang, and Mondulhiri; and provided different kinds of support.

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Community authorities and local non-governmental organisations collaborated to organise the local workshops, and field studies in the provinces. Participants throughout the consultation, validation and general research included: village chiefs; commune council members; authorities and members of indigenous communities; district and provincial governors; police officers, judges, prosecutors; court clerks; prison officers; Cadastral Commission officers; arbitrators of the labour Arbitration Council; litigants; prisoners; clients of justice services; lawyers; members of non governmental organisations; academics; national institutions; international organisations; donors; staff members and consultants of other UN branches; and other stakeholders. This research would not have been possible without the active participation, information, and proposals provided by all of these groups and individuals.

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ABBREVIATIONS AND ACRONYMS

ADB	Asian Development Bank
ADHOC	Cambodian Human Rights and Development Association
ADR	Alternative Dispute Resolution mechanisms
BFD	Buddhist for Development
Cambodia	Kingdom of Cambodia
CAS	Center for Advance Study
CC	Commune Council
CCo	Cadastral Commission or Cadastral Office
CoM	Council of Ministers
CDP	Cambodian Defender Project
CDRI	Cambodia Development Resource Institute
CLEC	Community Legal Education Center
CJS	Community based Justice Systems
CLJR	Council for Legal and Judicial Reform
Constitution	Constitution of the Kingdom of Cambodia
CSD	Center for Social Development
CWCC	Cambodian Women Crisis Center
CWP	Court Watch Project
GAP	Governance Action Plan
GTZ	German Technical Cooperation
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
IHL	International Humanitarian Law
ILO	International Labour Organisation
IRL	Indochina Research Ltd.
KR	Khmer Rouge
KCW	Kingdom of Cambodia Website
LAC	Legal Aid of Cambodia
LACo	Labour Arbitration Council
LICADHO	Cambodian League for the Promotion and Defence of Human Rights
LJR	Legal and Judicial Reform
LJRS	Legal and Judicial Reform Strategy
LJTWG	Legal and Judicial Technical Working Group
MoI	Ministry of Interior
MoJ	Ministry of Justice
MLMUPC	Ministry of Land Management, Urban Planning, and Construction
NCC	National Cadastral Commission
MEF	Ministry of Economy and Finance
NGO	Non Governmental Organization
NCOCI	National Committee on Culture and Information
NPRS	National Poverty Reduction Strategy
PCB	Permanent Coordination Body
PDV	Peace and Development Volunteer
PMU	Project Management Unit (of the Council for the Legal and Judicial Reform)
PPJJ	Protection and Provision of Juvenile Justice
RGC	Royal Government of Cambodia

TAF	The Asia Foundation
UN	United Nations Organization
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNICEF	United Nations Children’s Fund
UNDP	United Nations Development Programme
UNHCHR	United Nations High Commissioner for Human Rights
VC	Village Chief
VIGILANCE	Human Rights Vigilance of Cambodia
WB	World Bank
WB-RILGP	World Bank Rural Investment and Local Governance Project

EXECUTIVE SUMMARY

Conceptual framework

This study defines the right to *access to justice* as “a persons’ ability to seek and obtain fair and effective responses for the resolution of conflicts, control of abuse of power, and protection of rights, through transparent processes, and affordable and accountable mechanisms.” These mechanisms must be responsive to social needs, and must be sensitive to cultural, linguistic, and gender issues.

This study analyses both the social demand for justice and the supply of justice services. The social demand for justice arises from three social needs: (1) conflict resolution, (2) control of the abuse of power, and (3) protection of individual and social rights. From any of these needs arise *justiciable events*, events that can be presented to a third party for resolution according to the law, customary law, equity, or negotiation of interests. Justice services are supplied by individuals or organisations to resolve issues arising from the social demand for justice. These justice services may or may not be regulated by law.

Respect for the right to access to justice requires democratic institutions, good governance and social accountability of justice institutions. This is the basis used to evaluate whether the supply of justice services satisfies the social demand for justice under human rights standards. Recommendations for improving access to justice are obtained from assessing the areas that fail to satisfy the social demand for justice. Better access to justice, as part of a democratic reform, requires the participation of citizens.

Objectives and methodology

The main objectives of the research were (1) to identify the nature and extent of the social demand for justice (2) to evaluate the supply of justice services (3) to empower target groups by providing information and building capacities for participation, and (4) to recommend better policy development on access to justice, especially local justice.

Consultation and participation were the core methodology of this research. Consultations and field studies were undertaken in eight of Cambodia’s twenty-four provinces. The main tools used in this research study were a desk study of all relevant information, a survey of approximately 2000 people in 4 provinces, field studies in 8 provinces, in-depth interviews of more than 150 people in the same 8 provinces, case-study and case-observation in 7 provinces, plus 3 local consultation workshops and one national forum involving about 400 people. There was also revision sessions with research partners and one national validation session in Phnom Penh.

Findings – main conflicts

Everyday disputes between neighbours and family members occur frequently, but are not usually serious and are manageable locally. However, major land disputes where the parties have an unbalanced bargaining power are quite different. These include forced evictions due to concessions or land encroachment by corporations, army members and powerful people; as well as indigenous land alienation through brokers. This kind of conflict is one of the country’s most serious problems. Most of the major land conflicts are not resolved, and often generate other social problems including violence.

Domestic violence is one of the most serious and frequently occurring social problems. Most domestic violence, separation, alimony, and even rape cases are managed locally, using local policy, by village or commune authorities. However these authorities are more concerned with resolving the conflict than in promoting rights. Criminal matters that affect target groups consist of minor offences, some serious crimes, and juvenile gang activity. Lack of employment opportunities and alcohol and drug consumption are often part of the background factors of the juvenile gang criminal activity. Ethnic discrimination that affects some minority groups as well as indigenous peoples.

Findings - rights violations

The different forms of abuses of power that result in the violation of individual rights include abuse of power by the police in the context of the repression of social protests. They also include violation of the due process of law by the police, justice officers, and prison officers. This can result in mistreatment upon arrest, lack of defence during trial, excessive pre-trial detention and poor prison conditions. These are often caused by lack of human capacity and material resources of the criminal justice system, lack of legal defenders, and lack of accountability of the justice system in general. Corruption in the delivery of the justice services also results in bias and violation of rights. Corruption affects the very concept of *justice*, as the resolution of issues may be dependant on the money or power of the disputants.

Findings - corruption

The main forms of corruption that affect the poor, women and indigenous peoples are lack of transparency and corruption in the management of public resources such as land concessions, natural resources, business licensing; infrastructure assignments and other political decisions on public resources, services and taxes.

Low salaries is one of the explanations for the illegal fees charged by teachers and other public servants as a condition for the provision of the public services. These illegal fees eventually hinder children attending schools; the poor from accessing health services; and victims of crimes from having forensic examinations. Public servants often view public positions as a source of income in itself, beyond the actual salary. The majority of people consider this type of corruption as part of poverty. They do not regard this corruption as a violation of social rights that they can legally claim.

Findings -supply of justice services

Village chiefs and elders manage most of the everyday conflicts at this level. Commune councils hear different kinds of disputes, such as local conflicts, land disputes, gender-based violence, and criminal matters. On average this is about 25 cases per year for each of the 1621 communes. This totals more than 40,000 cases each year across the country. This figure is higher than the number of cases resolved by the courts. Commune councils resolve conflicts mostly through conciliation, but it is difficult for the councils to resolve disputes where one party is more powerful than the other. While many cases heard by the councils should be legally heard by the court, people prefer to go to the local authorities. The reasons for this include easier access due to location and costs, and that individuals are able to negotiate themselves and have a better understanding of the proceedings. However, criticisms of the councils include prejudice, bias, fees, lack of legal knowledge and lack of accountability.

The district governor acts as judicial police and has conciliatory functions. Currently the checks and balances on these functions are negligible. Some complainants take disputes to the district level if the dispute is not resolved by the commune council. However, the district authority does not have the jurisdiction to resolve them by decision. The provincial governor is the chairman of the provincial Cadastral Commission, which resolves land disputes. Currently the checks and balances on these functions are also negligible. Commune and district police receive criminal cases, but are not allowed to send them directly to the prosecutor. They must send a criminal matter to the provincial police who may send the case to the prosecutor. According to workshop participants, there are opportunities at each level for an informal arrangement to be made before the police between the victim and the perpetrator. In addition, the police informally manage some civil cases. In these informal arrangements, a perpetrator does not face criminal charges, and the victim may receive some form of compensation, which they may not have received if the matter had been heard before the court. This shows the need for jurisdictional control over the local police and the need for better forms of reparation than are provided by the courts.

Courts and prosecutors are located in the cities whereas more than 80% of the people live in the countryside. The judiciary decided approximately 12,000 cases in 2003. Almost half of the civil cases heard by the judiciary are related to issues of divorce, and 80% of the plaintiffs are women. According

to the judges interviewed, most of the divorce cases are caused by domestic violence and lack of parental responsibility by the husband. In cases of rape, or injuries caused by domestic violence, victims must be examined by a doctor. The cost of this forensic examination is borne by the victim.

From 2003 until 2004, the Cadastral Commission received more than 2000 cases. At the beginning of 2005, only 26% of these cases were resolved (10% rejected and 2/3 pending). The Commission is part of the Ministry of Land Management and works at the district, provincial, and national level, and lacks material and human resources. While it can effectively resolve simple conflicts between villagers, large land disputes that involve villagers and a powerful party are much more difficult. The National Cadastral Commission has been unable to provide a single decision since its creation until July 2005. The law does not establish time limits for providing decisions. The Commission functions less efficiently in the provinces inhabited by indigenous peoples.

The Arbitration Council, which deals with labour disputes, received 182 cases from May 2003 until June 2005. In total 2/3 of these were resolved. The Arbitration Council has very clear procedures and time limits, and receives ILO support. The arbitrators are independent, have a high level of professional training, and enjoy prestige among the legal community. None of the workers interviewed complained of corruption in the Arbitration Council. One problem is that it has just one office, located in Phnom Penh. There are also concerns about its sustainability if the ILO retires its support.

Elders resolve many of the conflicts that arise within the indigenous communities. Indigenous participants demanded stronger recognition of their authorities and conflict resolution mechanisms. The most serious conflict that indigenous peoples face outside their communities is the dispossession of common lands due to lack of demarcation and titles. The Cadastral Commission is not yet working efficiently in the provinces which contain the majority of indigenous population. Another issue is the lack of legal defence and translators for indigenous languages in legal proceedings.

Recommendations

More accessible justice for the poor, women and indigenous peoples

Strengthen and improve the local mechanisms for conflict resolution, through mediation, conciliation and arbitration, at village and commune level through training in alternative dispute resolution, human rights, and relevant legal bodies (land law, domestic violence, etc.).

Allocate jurisdictional powers at district level to make decisions in disputes on local issues, some civil cases and minor criminal matters. This authority would apply local customs as well as grant rights. The authority should also have powers to deal with domestic violence, conflicts related to *de facto* conjugal unions and traditional marriages such as separation and the division of shared property. This authority could be a council formed of three members (one woman at least), and relevant training should be provided.

In consultation with indigenous peoples, strengthen and recognise indigenous law and conflict resolution mechanisms for conflicts that arise inside and among indigenous communities, and for individuals outside their communities. Establish mechanisms to improve the internal legitimacy and accountability of indigenous authorities, as well as coordination with the judiciary and government authorities.

Improve alternative disputes resolution options

After a process of consultation, enact a law on alternative dispute resolution (ADR) that recognises the different forms of ADR at local and national level and regulates how the courts enforce or question awards and ADR decisions.

Improve the ability of the Cadastral Commission to resolve conflicts when there is an unbalanced bargaining power between the parties. Establish a time limit for the Cadastral Commission to decide a case. Pass pending sub-decrees relating to economic land concessions, and indigenous community land demarcation. Accelerate demarcation and titling of lands.

Improve access to the Arbitration Council by establishing offices outside Phnom Penh. Promote awareness of labour rights among workers in plantations.

A judiciary more responsive to social needs

Implement the law on domestic violence. Pay attention to the needs and rights of the victims of domestic violence and sexual abuse. Assure reparation for the victims. Do not charge judicial fees in alimony cases.

Incorporate plea-bargaining in the criminal process and different regulation for minor crimes. So the perpetrator of minor crimes, or when their involvement in the crime was minimal, may pay the victim some type of reparation and compensation under the control of a jurisdictional authority in order to avoid the court process. Provide alternative sentences to prison, such as community work. Reduce the length of terms of imprisonment in exchange for study and labour activities. Establish a separate juvenile system.

Strengthen the independence and the professional capacity of the Judiciary to deal with serious criminal matters, specialized civil issues, protection of human rights, and control the abuse of power to control abuse of power by the Executive branch, and combat corruption in general.

Strengthen judicial and legal services

Strengthen legal defence services, in particular for the poor, women, and indigenous peoples. Allocate funds for the establishment of legal aid offices, and support different initiatives for hiring public defenders, especially in remote areas. Increase transparency in the admittance of lawyers to the bar.

Guarantee translators for indigenous languages in legal proceedings, especially in criminal cases and land claims.

Guarantee free forensic fees for the victims of crimes, through proper coordination with hospitals or allocation of funds.

Empower people to improve the access to justice

Empower the poor, women, and indigenous peoples through rights and legal awareness, and by building capacities. Guarantee the ability of these groups to present their demands directly to the different levels.

Establish specific mechanisms to assure the transparency and accountability in the delivery of justice services.

Promote citizen participation and inter-institutional cooperation for the improvement of access to justice at different levels (local, district, provincial and national).

Strengthen leadership for justice reform. Promote building capacities and continuing legal education and training, in particular in women's rights and indigenous rights, for those involved in the justice system: including, judges, prosecutors, clerks, defender lawyers, legal translators for indigenous and minority languages, forensic experts, and policemen.

INTRODUCTION

Access to justice for all is one of the main goals of legal and judicial reform, and it is part of a wider reform process concerned with poverty reduction, state reform, peace building and democratisation in Cambodia. The stakeholders of the ongoing legal and judicial reform in Cambodia begin with certain assumptions with respect to the scope and purpose of this study. Some premises are factual, descriptive, and other conceptual and prescriptive.

Assumptions related to local justice and alternative dispute resolution (ADR)

One premise is that the poor and other vulnerable groups face geographical, economic, social, and cultural barriers to access the formal justice system (the courts are distant, the proceedings are expensive and difficult to understand). A second premise is that the courts are overloaded, short of human and material resources, and this situation is difficult to remedy and therefore will be present for some time to come. A third premise is that, in practice, the courts do not deal with all the conflicts that arise in society. A significant number of conflicts are resolved or managed outside the courts by traditional and informal mechanisms, especially in rural and remote areas. Historically, rural areas have resolved their conflicts according to traditional mechanisms and local culture. These descriptive assumptions are accompanied by some prescriptive premises. A fourth (and prescriptive) premise is that it is desirable that most conflicts in society be resolved in an amicable manner, using procedures in which both parties may win, rather than through court-based adjudication that necessarily produces a winner and a loser. In this sense, stakeholders believe that it is a good thing that the courts do not deal with every conflict. Conversely, stakeholders favour institutionalising alternative dispute resolution mechanisms (ADR). Finally, a fifth and equally prescriptive premise is that it is good and necessary to find local solutions for local conflicts. Thus, as part of the decentralization process, local rather than centralized conflict resolution mechanisms should be strengthened to help the local level deal with local problems. It is also part of conventional wisdom that if more cases were settled through ADR, then the courts would be relieved of some of their current burden. Unsurprisingly, some donors propose investing more heavily in ADR.

Under these assumptions, justice reform stakeholders expressed the view that it is necessary to research and promote the use of ADR, which constitutes the 6th strategic objective of the “Legal and Judicial Reform Strategy” (LJRS) drafted by the Council for Legal and Judicial Reform (CLJR) and approved by the Council of Ministers in 2003. So, one of the expected results of this study was to develop an assessment of ADR as it is currently practised in Cambodia (ADR regulated by the law, and the traditional or community-based conflict resolution) and the interfaces between formal and informal conflict resolution mechanisms. Another expected result was the elaboration of proposals and recommendations to institutionalise and strengthen conflict resolution mechanisms that operate at the local level outside the formal justice system.

Chart 1 Assumptions with respect to local justice and ADR

Facts	Principles	Propositions
1. There are geographical, economic and socio-cultural barriers for the poor to access the formal justice system (courts).	Easy conflict resolution contributes to poverty reduction	Strengthen local and informal mechanisms for conflict resolution: they are closer, more economical, and culturally easier to understand.
2. The courts are overloaded, and short of resources.	Opportunity to maximise social investment	Instead of investing more resources in the formal justice system, dedcate more money to ADR.
3. The courts do not deal with every conflict that arise in society. Rural areas have traditional mechanisms for conflict resolution.	Functional specialization	The courts should not deal with every conflict. Some of those should be resolved outside the courts, as in fact they are.
4. The courts use adjudicatory proceedings (winners and losers).	Amicable resolution: social peace	It is desirable that most conflicts be resolved in an amicable manner. ADR should be strengthened.
5. A significant number of conflicts arise at the local level	Decentralization and democracy	Local solutions for local conflicts. Move resources to local solutions.

This study confirms but also questions some of the assumptions with which it began. The study has also served to show the limits of some categories and classifications that are frequently taken for granted, such as the distinction between formal and informal justice systems. The results obtained are valid for this study, and they may also provide useful guidance for other research projects in the same field. The following is a brief comment on the premises underlying this study and the questions our findings have raised.

First factual premise: the poor and other vulnerable groups face geographical, economic, and cultural barriers to access the formal justice system.

Several studies, as well as this one, confirm that, in fact, the courts are only installed at the provincial and municipal level, while around 84% of the population live in rural areas, in villages and communes far from the cities.¹ To pursue a judicial proceeding is very expensive, considering legal and illegal fees, the cost of transportation and legal representation, and other costs. Usually, the processes are long and imply the loss of several working days for the disputants. Most rural people are unfamiliar with the formal proceedings and the law, and do not participate in the cultural background of the formal legal system. In addition, legal defence is not accessible for the poor, and lawyers are seldom available in the more remote areas.

Second factual premise: the courts are overloaded, and short of human and material resources

The figure of cases leftover each year is similar to the figure of new cases. So, there is a chronic delay in the courts' case management. And this situation probably will continue for some time to come, as the process of institutional strengthening of the formal system of justice will take years to complete.

¹ Rural population is estimated at 84.3%, and Urban population at 15.7% of the total population of Cambodia. National Institute of Statistics of Cambodia (NIS), at <http://www.nis.gov.kh/SURVEYS/CDHS2000/AboutCDHS2001.htm> (visited April 2005).

Third factual premise: in practice, the courts deal with a small proportion of the justiciable events that arise in society.

A significant number of the conflicts are resolved or managed outside the courts by different kinds of mechanisms, especially in remote areas. This is due to the above-mentioned premises, historical reasons, and also the nature and quantity of the conflicts. There is a long practice of conflict resolution outside the formal system of justice, especially in rural areas. Since the establishment of the western justice system (i.e., courts) during the French protectorate in the nineteenth century, there were simultaneously two legal cultures precariously coordinated. There were local legal practices, managed by local authorities according to local culture and customs, and there was the formal legal system, composed of the courts, and run by lawyers trained under the French legal culture. The formal legal system covered just the cities and urban areas of the country. Later on, during the Pol Pot regime (1975-1979), the entire judicial system was destroyed, as was the local capacity to resolve conflicts. After the end of that period, new legal cultures were imported from Russia and Vietnam, introducing important modifications to the formal system, but without re-establishing in full the judicial system. After the Paris Peace Accord (1991) and under the United Nations Transitional Authority in Cambodia-UNTAC, (especially during the last decade), there has been an important effort underway to rebuild the judicial system. Nevertheless, there is still much to be done in terms of (i) law reform to establish a comprehensive legal framework, (ii) institutional development, (iii) and capacity-building. In rural areas, at village and commune levels, there is also an ongoing process of reconstruction of conflict resolution mechanisms. People go to local authorities to help them conciliate and resolve all kinds of conflicts, including those that require judicial determination, such as divorce and some criminal issues. Local authorities resolve based on local culture and customs, as well as on new rules and values. In addition to local authorities, the police play an important role in local conflict resolution. A significant number of criminal cases, and even civil matters (such as debts), are managed and settled by the police at commune, district, and provincial levels, in an informal way. In indigenous areas, indigenous peoples have a long tradition of dealing with conflicts within their communities, through their council of elders, and according to their customary rules; in some cases through conciliation and in others through adjudication.

These descriptive premises have been corroborated by this study. Nevertheless, there are other prescriptive premises that require some clarification.

Fourth premise: it is necessary and desirable to strengthen ADR

One prescriptive assumption is that it is good to settle disputes through amicable, non-adjudicatory mechanisms for conflict resolution, and this assumption leads almost inexorably to the idea that it is necessary and desirable to strengthen ADR. ADR is seen as one of the principal mechanisms to promote access to justice for the poor. However, although strengthening ADR as a form of conflict resolution is necessary, strengthening ADR by itself is not enough to satisfy the poor's social demand for justice. This study has brought to the surface several reasons which suggest that ADR should not be seen as a "panacea" for access to justice for the poor. While ADR is well suited to deal with local and minor conflicts between neighbours and relatives, it is important to point out that the most relevant conflicts the poor encounter are associated with major lands conflicts and gender violence, and in these contexts the effectiveness of ADR is limited.

Major land conflicts between the poor or indigenous peoples and a powerful party (wealthy people, high-ranking officers, the military, corporations, concession beneficiaries, etc.) are difficult to resolve through ADR. ADR is based on the capacity of the parties to negotiate with each other on relatively equal terms, and without necessarily considering the respective rights involved. If the powerful party does not want to recognise the rights of the weaker party, it is unlikely that they will arrive at a fair agreement. Existing ADR, such as the Cadastral Commission and local authorities, are not able to

conciliate fairly the majority of the cases where the parties have unequal bargaining power, leaving the social problem and the conflict it has generated unresolved. Unequal bargaining power between parties in conflict is a significant political and social problem in Cambodia, and a potential source of ongoing conflictivity and violence.

ADR also seem to be insufficient to serve the social demand for justice in conflicts associated with gender violence and children's rights, especially in cases in which men refuse to respect women's and children's rights or refrain from violence. So long as local authorities are merely able to act as conciliators and do not have legal competence to adjudicate or enforce rights, respect for children's and women's rights is precarious because in effect such respect relies exclusively on the willingness of men to fulfil their responsibilities. Local authorities are often more concerned with settling a case through a compromise than ensuring respect for the rights of women and children. However, it is important to note that unequal relationships between men and women are more likely to produce unfair outcomes under the formal justice system as well as through ADR. The weakness with ADR is that if there is a right at stake, and one party does not wish to respect it, ADR lacks the capacity to recognise and enforce respect of the right. In this context what is required is a competent legal authority with jurisdictional powers to adjudicate and enforce rights. The same is true of some matters that require judicial determination, such as divorce and serious crimes. Currently, local authorities are dealing with these matters, but without legal competence. Legally, ADR mechanisms do not have legal authority to grant divorces or deal with crimes.

ADR is also limited in its capacity to deal with other important demands for justice, such as violations of rights (illegal detention, mistreatment in prison) and the abuse of power committed by public servants (illegal fees for the delivery of some public services). The establishment of an effective system of checks and balances is required to control the abuse of power. In synthesis, even though it is very important to strengthen ADR to resolve some kinds of conflicts, ADR can only respond to part of the social demand for justice of the poor.

Fifth premise: local solutions for local conflicts

The fifth premise presupposes that access to justice for the poor would improve with the strengthening of local capacity for conflict resolution. In principle, this assumption is correct. Generally, local conflicts are best resolved with local solutions. Building local capacity for conflict resolution should be part of the decentralization process. Nevertheless, not all conflicts and problems that affect the poor originate at the local level, and so the solution has to take account of the non-local origin and nature of the conflict. For instance, land and natural resource concessions produce forced evictions that may affect hundreds of families and dozens of villages. In this case, the solution is not local but national. So, just strengthening local mechanisms for conflict resolution might fail to respond to a range of very important social demands for justice.

Another important factor that justice reform must take account of is that some local authorities must have jurisdictional powers to resolve some local conflicts. Local solutions for local conflicts cannot all be achieved through ADR because not all conflicts can be resolved voluntarily by negotiation and conciliation. Allocation of jurisdictional power at the local or district level is necessary to recognise and enforce children's and women's rights, to prevent local criminality, and to check local forms of abuse of power. Thus, strengthening local capacity for conflict resolution also implies decentralization and de-concentration of jurisdictional powers at the district or local levels.

A further assumption that requires some clarification is the idea that strengthening ADR will automatically lessen the courts' caseload. There are some subject matters that by law are of the exclusive competence of the courts, such as divorce and criminal matters. Divorce cases constitute around 40% of the civil cases in the courts, and criminal cases are more than 50% of the total cases.

It is worth recalling, however, that although the courts are overloaded, they still do not cover the current demand for justice in the fields of family and criminal law; many cases in these fields are settled by local authorities and the police, notwithstanding that neither have legal competence to resolve these matters.

In addition, the courts do not review exercises of public power that constitute abuses. Until 2003 there was not a single case of corruption before the courts, despite the presence of widespread corruption in the delivery of public services (education, health, and justice) and the lack of transparency in the management of public resources (concessions, public tenders, development projects, etc.).² Similarly, it seems that there is insufficient jurisdictional control of due process, and this results in the mistreatment of prisoners and other violations of due process. The courts are overloaded with cases, but there are still many urgent issues that require judicial intervention. It seems that the formal justice system still does not direct its efforts to the protection of rights and control of the abuse of power, functions that ADR cannot assume.

In order to reduce the burden on courts and to transfer cases to ADR and other local mechanisms, the courts (and the formal justice system generally) need to give priority to these sorts of cases (protection of human rights, control of the abuse of power, and matters that require judicial determination), cases that ADR is not suited to resolve. By the same token, ADR must be strengthened and provided an appropriate legal and regulatory framework within which to operate, so more civil cases may be settled without going to the courts. A local system of justice should be granted legal authority to apply local customs, and it should have jurisdictional powers to settle disputes and recognise rights in cases involving *de facto* conjugal unions (including customary marriages), domestic violence, and petty crime. It is also necessary to recognise and strengthen indigenous customary law and indigenous authorities that deal with conflicts that occur within indigenous communities and between them, or that involve indigenous persons who may or may not happen to be in their communities when they are accused of committing a crime or some variety of civil wrong-doing.

In the past, almost all efforts of the legal and judicial reform were oriented to the formal system. Now, some stakeholders propose to move resources to the “local”, “alternative” or “informal” mechanisms in order to assure the justice for all, especially the poor. This is a false dilemma. An integral and pluralistic vision of all the justice services could help overcome the traditional dichotomy between formal/informal systems of justice. The objective of a pluralistic reform is the recognition of all these mechanisms. If all mechanisms (the courts, ADR, local justice, and indigenous law) are legally recognised and coordinated in a democratic form, they could respond better to the social demand for justice. The key issue is the function that they play for responding the social needs. In this way, the courts could have a more specific function related to the resolution of more specialized conflicts, protect human rights and control the abuse of power. ADR should resolve conflicts when it is not necessary to grant rights. Local justice may include both functions: ADR and adjudication when necessary, but considering local customs. And indigenous law should be recognised in indigenous areas, contemplating adjudicatory functions according to their norms, authorities and proceedings. All these mechanisms should be accountable and legitimate, and there must be proper proceedings to control the abuse of power, and resolve conflicts of competence among these mechanisms.

After clarifying these issues, this study tries to precise some questions. For instance, in what levels and up to what extent ADR must be strengthened? In what levels is it necessary to allocate jurisdictional powers in order to have meaningful and lasting solutions for local conflicts? How to accommodate and coordinate indigenous law and their conflict resolution mechanisms with the other justice services in the country? How to divide functions among the different justice services? What kinds of alternatives

² Workshop participants and interviewees explain they experienced that corruption is widespread and deeply embedded in the fabric of Cambodia's public administration. This is corroborated by CSD's surveys 1998 and 2005.

could be introduced to deal with criminal issues? How to control better the transparency in the delivery of justice? How to empower the poor, women, and indigenous peoples to participate in the access to justice reform process?

This report is composed of four chapters. The first provides the theoretical and methodological framework on which this study is based. The second analyses the social demand for justice. The third makes an assessment of the supply of justice services. And finally, the fourth chapter contains the conclusions and recommendations that emerge from the study to inform policy development with respect to access to justice, with a particular focus on local justice.

CHAPTER I

THEORETICAL AND METHODOLOGICAL FRAMEWORK

This chapter contains the conceptual and methodological framework, the main objectives, and the methodological tools used during the research process.

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1. Theoretical framework

We will make explicit the theoretical and methodological framework, from which this research study departs. As this research study is human rights based in its conceptual and methodological approach, we will explain the concept of human rights this study assumes. We see also necessary to clarify the very concept of access to justice, as it is frequently reduced with conflict resolution. Several dichotomies need also an explanation, such as legal monism/ legal pluralism, formal/ informal justice, ADR/formal justice, and customary law/indigenous law. This theoretical framework will be followed by the methodological one, where we apply the concepts explained here.

1.1. Human rights concept

This study takes as its starting point the fact that Cambodia has adopted human rights in its Constitution and has ratified most of the core international human rights treaties.³ The Cambodian Constitution of 1993, amended in 1999, incorporates widespread recognition of human rights in its Article 31: "The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women's and children's rights. (...)" The Cambodian constitution has also adopted a model of liberal democracy with a separation of powers. Therefore, Cambodian citizens may demand respect for their human rights in a democratic context. Now, what are the specific contents of human rights and the criteria for their interpretation and enforcement?

Definitions of human rights

There is much scholarly discussion about the definition and content of human rights. This study does not pretend to reproduce this long academic debate, but to clarify which concepts it uses and relies upon. In modern western thought, there are three currents that try to define human rights: the so-called iusnaturalist approach, the positivist understanding, and historic account of human rights.⁴ The iusnaturalist approach, adopted by the Charter of the United Nations itself, defines human rights as "inherent" or immanent to the very nature of human beings and, in this sense, prior to their recognition by law. The iusnaturalist position affirms that justified moral claims constitute rights regardless of the State's recognition. The positivist understanding of human rights, on the other hand, maintains that only the justified moral claims recognised by law (national, international or customary) can form the basis of human rights. For the positivist view, there must be mediation provided by legal institutions (e.g., the state, the international community) that converts moral claims into rights, and it is this mediation that makes them enforceable.⁵ And, for the historic approach, "human rights are the normative projection, in terms of what ought to be, of those needs considered as potentials for the human development of individuals, groups and peoples".⁶ For the historic approach, human rights would be the legal recognition of what is required to satisfy people's "real needs". The terms *real needs*,

³ See Annex 1.1. *Legal framework on the Right to Access to Justice and Human Rights in Cambodia*. See in this Annex the full text of the articles mentioned in this chapter.

⁴ For an explanation of the iusnaturalist and positivist approach see, among others: Rey Pérez: José (2004): "A Legal view on basic income". Barcelona: Universal Forum of Cultures, 2004. (Available at: <http://www.etes.ucl.ac.be/BIEN/Files/Papers/2004ReyPerez2.pdf>); Dworkin, Ronald (1997): *Taking Rights Seriously*. London: Duckwoth; Peces-Barba Martínez, G. (1995): *Curso de Derechos Fundamentales. Teoría General*. Madrid: Universidad Carlos III. For an explanation of the historic approach, which argues for human rights based on needs, see: Baratta, Alessandro (1991): "Requisitos Mínimos para el Respeto de los Derechos Humanos en la Ley Penal", In *Justicia y Derechos Humanos*. Lima: CEAS, and (1992) "Derechos Humanos: Entre violencia estructural y violencia penal. Por la pacificación de los conflictos violentos", in: *Justicia y derechos Humanos*. Lima: CEAS; García-Mendez (1990), Emilio: *Ser niño en América Latina. De las necesidades a los derechos*. Argentina: UNICRI, Nr. 42, p. 11-26.

⁵ "We can define rights as those justified moral claims that are recognized by the positive law and constitute a system inside the positive law (Peces-Barba, 1995). (...) When we follow the ideas of the methodological positivism, as I will do here, the step from the moral values to the institutions is not automatic. Although we can justify some moral claims, those moral claims are not rights yet. It is necessary that some positive laws include them. The mediation of institutions is needed. Moral claims can exist without being included in the law. In that case, we would have moral claims that try to be legal rights, but they are not that yet. They are incomplete rights." Rey Pérez, 2004.

⁶ Free translation from: "[L]os derechos humanos son la proyección normativa, en términos de deber ser, de aquellas necesidades que son potencialidades de desarrollo de los individuos, de los grupos, de los pueblos". Baratta Alessandro (1995): "Democracia y Derechos del Niño" in Bianchi, C. (comp.): *El derecho y los chicos*. Buenos Aires: Espacio Editorial, p. 39-40. Baratta's theory connects human rights, social needs, development, and democracy.

social needs, or just *needs* refer to the gap between the current situation of individuals and groups that limits their human development, and the possibilities for individual or collective development in each historic moment. That gap is seen as a “potential”, and it takes into account the available conditions for development. In this sense, the term “needs” comprises the notion of “potentials”. Human rights are defined as the legal guarantee capable of converting the “potential for human development” into “actual development”. We find this philosophy behind by the “Millennium Development Goals” adopted by the United Nations in 2000. These goals represent the potential for human development at this moment in history, a potential that takes account of the world’s available resources and (therefore) a potential that takes account of the world’s capacity to satisfy the most urgent social needs of the humanity.⁷

This research study assumes that all of the mentioned approaches contribute to a comprehensive definition of human rights, so they may be seen as complementary. Each approach underscores an important facet of human rights. The historic perspective highlights *social needs* -as potentials for human development- that constitute the substantive or material content of human rights in each historic moment. The iusnaturalist approach provides a *moral justification* of rights. And positivism speaks to the *legal recognition* of human rights by the law that converts some moral claims and social needs into legal rights, and therefore makes them enforceable.⁸

A comprehensive definition of human rights

A comprehensive definition of human rights takes into account the three following components or aspects: a) legal recognition (positivist approach), b) moral justification (iusnaturalist approach), and c) social needs (historic approach). For this study, human rights are those rights recognised by national and international law, and which are therefore enforceable. They consist of justified moral claims and seek the satisfaction of social needs, considering the potential for human development in each social context and historic moment.

Chart 1: Components of a comprehensive definition of human rights

Approach	Historic	Iusnaturalist	Positivist
Definition of human rights	Human rights are normative projections (things that ought to be) of social needs understood as potentials for human development, in each context and historic moment.	Human rights consist of moral claims rationally justified. Human rights are inherent to human beings and prior to law.	Human rights are those claims recognised by the law, and therefore enforceable. The state is obliged to enforce them.
Component of human rights underscored by each approach	Social needs Material basis that constitute the substantive content of human rights in each moment.	Moral justification Moral basis that makes claims justified	Legal recognition Institutional basis that makes rights enforceable.
Contribution of each approach to a comprehensive vision of human rights	Human rights should try to guarantee the satisfaction of social needs. Human rights should be enforced considering historic possibilities to satisfy those needs.	Human rights should reflect cultural values. Moral justification serves to interpret and recognise more rights.	Legal recognition converts a moral claim and a social need into an enforceable right. Legal standards offer a minimum basis for a claim.

⁷ We will come back on this topic later.

⁸ There is of course a long-standing controversy between positivists and iusnaturalist theorists concerning the issue of whether formal recognition of human rights in positive law is necessary for courts to enforce them. We need not concern ourselves with this debate, however, because, as noted in the text above, Cambodia’s Constitution formally recognises the validity of a wide range of human rights, and thus Cambodia’s courts are formally empowered to enforce those rights. They are formally part of Cambodia’s supreme law.

Legal recognition

Legal recognition of human rights provides an indisputable basis for legal claims based on those rights. The sources of the international law of human rights are conventional law, international customary law, the decisions of international jurisdictional organs, and general principles of human rights. Conventional law is formed by all the international instruments of human rights such as declarations, conventions, treaties and protocols. International customary law consists in the international practices that after repetition become mandatory rules for everybody (*erga omnes*), and then, enforceable. General principles constitute the common understanding of human rights according to international standards, which evolve continuously. As Cambodia has committed itself to the international law on human rights, the State is obliged to enforce the international human rights treaties it has ratified, international customary law, and the international standards established by the general principles of human rights.

Moral justification

The moral justification is composed of cultural values that may have many sources, such as religious values, an instrumental justification, or social needs. In any case, the moral justification of a claim provides a moral basis for the legal recognition of new rights, and for the interpretation and of rights already recognised. The justification of rights may be made explicit through scholarly research, but the enjoyment of rights requires both justice service officials (judges, lawyers, conciliators, arbitrators, indigenous authorities, etc.) as well as users or clients of the justice system to believe their claim is justified in some form. Usually, the moral justification of claims is learned through normal socialization processes (school, religion, upbringing, etc) that contain embedded religious and cultural values, and these are sometimes (but not always) reflected in legal norms and practices. The “legal culture” in a society is composed of the explicit moral values that justify legal claims as well as the “implicit” values behind actual legal practices, which sometimes stand in tension with one another. As moral and cultural values change, different target groups may justify their legal claims on the basis of different moral and cultural precepts.

Social needs as indicators of the potential for human development

Social needs, understood as indicators of the potential for human development, both constitute and give rise to the human rights that are necessary to achieve minimally acceptable living conditions. Social needs, in a broad sense, constitute the main source for the justification of legal claims based on human rights, and so constitute the main justification for the interpretation, enforcement and development of human rights. The UN has made an effort of measuring current possibilities for human development in order to satisfy the most urgent social needs in the world, having as a result the Millennium Development Goals.⁹ These goals are feasible because they take into account available resources. The Millennium Development Goals represent the normative projection – a projection in terms of what “ought to be” - of social needs understood as indicators of potential for human development. In this way, the Millennium Development Goals provide substantive content for social rights, rights which otherwise would amount to an empty promise. The achievement of these goals rests on the world’s available resources. In this sense, the universality of human rights is seen not only from the side of the beneficiaries of the rights but also from the side of those who are duty-bound to implement them. Cambodia has adopted the Millennium Development Goals, and has already elaborated a National Poverty Reduction Strategy (2002), which constitutes part of the substantive content of the social rights recognised by Cambodia’s law today.¹⁰

⁹ There are eight Millennium Development Goals the UN hopes to achieve by 2015: 1) [Eradicate extreme poverty and hunger](#), 2) [Achieve universal primary education](#), 3) [Promote gender equality and empower women](#), 4) [Reduce child mortality](#), 5) [Improve maternal health](#), 6) [Combat HIV/AIDS, malaria and other diseases](#), 7) [Ensure environmental sustainability](#), and 8) [Develop a global partnership for development](#). See website: <http://www.un.org/millenniumgoals/>.

¹⁰ See the full document Cambodia’s government’s official website: <http://www.cambodia.gov.kh/unisq1/egov/english/home.view.html>.

The concept of *social needs* is necessary to deal with the open textured definition given to many human rights, since many human rights are stated as broad and abstract principles. As mentioned above, human rights must be applied to concrete situations, and thus need interpretation. The definition and implications of the concepts of “human dignity”, “fair and human treatment”, “good conditions of living”, as well as the specific content of the right to health, education, housing, work, among other rights, depend on: a) the socio-cultural context where those rights must be respected, and b) the existing possibilities for human development in each particular moment of history.

For instance, the enforcement of the “right to health” depends on the concept of health/illness in a particular society, and the existing means to safeguard health. In most western cultures, the concept of health is associated with physical and psychological well-being, but in other cultures, such as in some Asian and Indian American cultures, the concept of health may also comprehend spiritual equilibrium. So, the satisfaction of the social need of health in the latter societies may require a wider set of responses than in western ones, including the recognition or participation of the local institutions and individuals who deal with health in broader terms (such as midwives). In relation to current possibilities for the satisfaction of this social need, we have to consider the level of development of the medicine in the world. So, if medicine has developed a cure for some illnesses that were fatal in the past, the content of the right to health incorporates this advancement in the development of medicine. The same is true of other rights. For instance, in a multicultural society, the implementation of the right to education requires the respect of different languages and cultures. Or, in a context of high rates of illiteracy in women, this approach calls for adequate incentives to promote gender equality in terms of access to education. The historic approach takes into account that social relationships and values change. The changing social needs can take the form of human rights and therefore must be satisfied.

Rights, duties, and guarantees

This study assumes that a theory of rights also requires of the concepts of duties and guarantees.¹¹ The mere existence of a right implies the existence of a correlative duty, which makes the right possible. The guarantee is the mechanism that ensures that the right will be respected.

The beneficiary of rights could be individuals, groups (such as children, women, minorities, etc.), peoples, or the entirety of humanity. The duties may be owed by individuals and the State. As a final resort, because the rights are guaranteed by the State, it is responsible for their protection, enforcement, restoration and, if necessary, remedies for their breach. When a state such as Cambodia commits to international law on human rights (through ratification or other means), individuals affected by the violation of their rights can appeal to the corresponding international mechanisms for protection (such as the International Criminal Court). For humanitarian reasons, in some extreme circumstances such as genocide or other serious crimes against humanity, international customary law allows the international community to intervene, even if a particular country has not ratified an international mechanism for the protection of human rights.

Duties. The duties could be positive: an obligation to do something; or negative: an obligation to abstain from doing something. For instance, the right to legal defence requires that the judge allows the defendant to have a lawyer and to let her do her job (a negative duty for the State that has positive dimensions as well if the State must provide the lawyer). In addition, this right imposes an indirect positive duty on citizens and companies of paying their taxes, so the State may have funds to hire lawyers. Another example is the right to basic education granted by the Constitution. It implies a positive duty on the State to provide schools and pay teachers; and the negative duty of the State and individuals to abstain from obstructing students from attending school (for instance, by discriminating

¹¹ See: Rey Pérez, 2004.

against students, mistreating them, or charging them illegal fees). The enforcement of this right also entails the positive duty of tax-paying so that the State may have funds to provide basic education. The same is true with respect to other civil and political rights, as well as social, economic and cultural rights. The respect of every right requires positive and negative duties.

Chart 2: Example on structure of duties in the right to legal defence

Duties / Subjects	Negative (abstention)	Positive (action)
State	Does not obstruct with the lawyer's work	<ul style="list-style-type: none"> - Facilitate lawyer's work, such as compelling the attendance of witnesses and disclosing evidence. - Provide a defence lawyer if the defendant cannot afford one.
Citizens	Civil party in criminal case and others: Do not interfere with the lawyer's work.	Citizens and companies in the country pay taxes to allow the State to have funds to hire public defenders.

Guarantees. The guarantees could take different forms. One general guarantee for the protection of human rights established in the Constitution is access to justice. The lack of specific mechanisms for the protection of constitutional rights does not negate the state's obligation to protect them. Judges are obliged to protect constitutional rights -because the Constitution is the supreme law of the land- even if those rights have not been further specified through legislation or subordinate regulation, or if there is no specific procedure to claim when they are not respected. In the absence of legislation or regulation, judges must interpret those rights consistent with the commitments Cambodia has made in international law through the ratification of human rights instruments. Otherwise, those commitments would be rendered meaningless.

In some countries there are specific mechanisms for the protection of constitutional rights. Examples include: a) "*habeas corpus*", for the protection of physical integrity and individual freedom;¹² b) judicial injunction against administrative action that threatens constitutional rights different from physical integrity and individual freedom (meetings, expression, association, social rights, etc.); c) habeas data, for the protection of the personal data; d) constitutional challenges and references or "action of unconstitutionality", for the protection against laws (legislation or regulations) which contravene the Constitution. There also specialised institutions in charge of the protection of constitutional rights such as constitutional courts. Another institution is the Ombudsman, but typically it does not have jurisdictional powers.¹³

In Cambodia there are no specific bodies for the protection of constitutional rights different from the judiciary. Therefore, it is necessarily the duty of the judges to protect them.¹⁴

¹² When the affected person or a relative files the *habeas corpus* before a judge, this authority is obliged to visit immediately, or with in 24 hours, the place of arrest and if, she/he finds the arrest arbitrary, the judge order immediate release. Apart, the judge might initiate criminal charges.

¹³ Note, however, that some Human Rights Commissions of Ombudsman's, such as those in Canada, do have jurisdictional powers.

¹⁴ See Constitution of Cambodia, articles 31 and 39, in Annex I.

Principles of interpretation, enforcement, and development of human rights

The principle of the “progressiveness” of human rights

“Progressiveness” is considered as a feature of human rights and, as a consequence, of the international law on human rights.¹⁵ Social needs change and so do the requirements to make more effective the protection of rights. The scope and mechanisms used for the protection of human rights increase and expand continuously. This has several implications with respect to the recognition, interpretation and implementation of rights. In terms of interpretation, the principle of progressiveness means that if a judge or authority is confronted with different possible interpretations of a particular right, the interpretation that recognises more rights or advantages in favour of the legal person prevails over the interpretation that restricts those rights or advantages. For instance, if the wording of a particular right in the national law is narrow, but the State has subscribed to international law on human rights that has a wider definition or interpretation of that right, the latter prevails. No inferior regulation (law, decree, sub-decree) or any order of an authority may limit or reduce the scope of a right. If this happens, that restriction should be considered invalid. The idea is that human beings –individuals and groups- should always benefit from the most generous commitment the State has made to human rights, since otherwise the State’s most generous commitment would be rendered meaningless. Another sense in which “progressiveness” is sometimes used refers to the exercise of social, economic and cultural rights, the implementation of which requires governments to take positive steps towards the objective in a progressive manner. As a corollary, governments are not allowed to disrespect rights through inaction or the adoption of regressive measures.¹⁶

The principle of “minimum international standards”

This study assumes that international standards of human rights provide the minimum framework for the interpretation of human rights, but that in each social context it is necessary to consider social needs and moral claims to contextualise how rights will be applied in particular circumstances.

The principle of “maximization of the satisfaction of social needs”

Rights should be interpreted and enforced in a way that permits the maximum satisfaction of social needs for human development. It implies consideration of the particularities of the target group or social context where a right will be enforced, such as: cultural values, local language, gender and ethnic issues. The consideration of social needs and cultural context at the moment of the enforcement of human rights should not be used by the governments as a pretext to reduce international standards of human rights, but as a condition to implement them in a more appropriate form. The enforcement of a right shows the effectiveness of the law and strengthens its moral value and legitimacy; but the main purpose of it is to ensure the satisfaction of a social need.

Attention to local cultural values and social needs lets us avoid the critique that human rights are alien to a the population and constitute an external imposition by dominant western countries onto developing countries from Africa, Asia and Latin America. It is true that human rights instruments have been adopted from the western legal tradition, and that critique may have some merit if human rights are just interpreted using the standards, cultural patterns, and social needs of western societies. Nevertheless, if human rights have been adopted by the developing countries due to their populations’

¹⁵ Defensoría del Pueblo de Venezuela: “El principio de progresividad” (Available at: <http://www.defensoria.gov.ve/lista.asp?sec=140403>).

¹⁶ This principle is explained in *Quito Declaration* on the enforcement and realization of economic, social, and cultural rights in Latin America and the Caribbean (Quito, July 24, 1998):
29. “In addition, the State has the following obligations: d. The obligation of progressiveness and the correlative prohibition against regressiveness: The State has the obligation to take a course of action aimed at ensuring the full effectiveness of ESCR [economic, social and cultural rights], and therefore its inertia, unreasonable delay in acting, and/or the adoption of measures that constitute setbacks in enforcing these rights are contrary to the principle of progressiveness. The State is prohibited from implementing regressive policies, which are understood to be those that have as their object or effect a decline in the enjoyment of ESCR (...).” (Available at: <http://cesr.org/filestore2/download/592>).

demand for democratisation, and defined and interpreted considering the social needs, cultural context, and particular conditions of the societies where they will be enforced, then they should not be considered as an external imposition.

The internal legitimacy of human rights is also associated with the possibility that the population actually finds in human rights a response to their social needs. Human rights are largely unknown to the majority of the population, and even to public officers. Nevertheless, it is important to note that while respect for human rights seeks to satisfy some social needs that are shared by many societies, it requires an intercultural dialogue at the moment of their interpretation and enforcement. It is necessary that the State, NGOs and civil society make an effort to promote the appropriation of human rights by the population, as well as the sense of responsibility for the duties associated with those rights. Popular appropriation of human rights should be based on the understanding of human rights as a response to the cultural values, moral claims and social needs of the population.

Cambodia faces the challenge of developing an intercultural dialogue among the different groups found within it, and to make more explicit the moral and cultural foundations of human rights, considering the various cultural traditions, religions, and ethnic groups present in the country. In this manner, people may be able to come to identify their needs in terms of respect for human rights.

Principle of local adaptation without neglecting the principle of equal dignity

The key concept of human rights is that all individuals, ethnic groups and peoples have equal dignity. This principle could be seen as one that conflicts with the idea of cultural and local adaptation of human rights, if locally there is a social classification based on cultural or religious values that distribute privileges and duties among individuals and groups in a manner that produces discrimination and prejudice (such as occurs with women, children, outcasts, etc.). It is important to note that respect of the principle of equal dignity of all human beings is the cornerstone and foundation of the entire human rights project. Local adaptation of human rights seeks to serve better that principle, not to jeopardize it. It is a challenge for each society that has adopted human rights into its law to discover how to ground the concept of human dignity in its own cultural roots and social needs.

It is true that the idea of “individual rights” arose with the modern State, the rule of law, and the separation of powers established in the constitutions. Those institutions and the legal order they facilitate conform the institutional preconditions for respect of human rights.¹⁷ The idea that all individuals are equal and have inherent rights, regardless of their social condition, eventually overcame the pre-modern idea of attributions and duties based on social status. This concept is what distinguishes a “society of rights” from a “society of status”. In the former, every individual is considered a subject of rights, so each individual may claim those rights. In the latter, individuals do not have inherent rights, but duties and attributions or privileges relative to their social status.¹⁸ So, if a person is a dignitary, s/he has some privileges over those who are under him or her on the social scale. A woman has some duties and privileges in relation to a man, a child in relation to a senior, and so on. In a society of rights, every human being is considered the subject of rights and with equal dignity before the law, regardless of their gender, social status, race, language, or origin. So, every human being has the right to enjoy the freedoms and liberties recognised by the law, and he/she is entitled to claim protection before the law if those rights are violated. The point of democratic institutions is to guarantee those rights.

The principle of the equal dignity of human beings requires overcoming the social differences that create unequal opportunities and treatment among individuals and groups. This is a considerable challenge for every society, whether it is a modern western society dominated by a free market economy or developing countries with different and non-western cultural traditions.

¹⁷ The mere idea of “constitution” implies the division of powers and the respect of individual rights and guarantees, as the Declaration of the Rights of Man and of the Citizen (France, 1789) says: 16. “A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all.” (Complete text available in English at: <http://www.hrcr.org/docs/frenchdec.html>).

¹⁸ Clavero, Bartolomé (2001): “Freedom’s law and oeconomic status: The Euroamerican constitutional moment in the 18th century”, in *Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno* No 30 (2001) T. I, p. 81-135.

In Cambodia, there are many social differences to overcome in order to guarantee equal dignity for all individuals and groups, in particular for those most vulnerable. Without a minimum level of social equity, neither democratic institutions nor the justice system will be capable of effectively respecting human rights. As in other Asian societies, in Cambodia cultural traditions give rise to differential treatment and some privileges to elders, monks and powerful individuals who are considered honourable and wise. And, in turn, they offer advice, service or protection, based on a network of patronage and hierarchical principles. The same pattern (patronage and hierarchical principles) characterized the historic relationship between government and subjects.¹⁹ Even family relationships used to work under similar hierarchical principles. The Khmer language also reflects the relative and different social positions and treatment among speakers from different social positions. During the Pol Pot regime, respect for elders, parents, monks and historic social structures was abolished under the declared purpose of creating an egalitarian society. Property –as the main source of economic difference- was abolished and everyone was sent to the countryside to work. Nevertheless, that regime did not abolish the hierarchical structure of political power; and, of course, neither the Pol Pot regime nor the old hierarchical structure was based on the principle of equal dignity of all human beings. After the fall of the Pol Pot regime and the subsequent wars, the country suffered many transformations. In a context of limited regulation and institutional chaos, new social, economic and political structures developed. Some poor people in the countryside express concerns about the *nouveaux riche* who arrive in luxury cars, and who buy or appropriate lands with high-ranking public officers or the military backing them.²⁰ New networks of hierarchical patronage have been created. The traditional respect for elders and honourable people seems to have been transferred to this new plutocracy, a plutocracy that does not offer traditional wisdom or advice, but still provides protection and wields influence to obtain public goods that the law says belongs to everyone.²¹ Under the ideology of the traditional reverence to honourable elders, new economic inequalities are hidden. This constitutes one of the biggest challenges for the country: how to guarantee an acceptable level of respect for the right to the equal dignity of all individuals within the context of widespread corruption and patronage.

Equality is an important demand made by many people, and the basis for a real democracy. Otherwise, institutions cannot function impartially and fairly. For example, if a judge speaks in one language with reverence to one party, and in another language with disrespect to the other party, how can s/he deliver even the appearance of justice?. Bringing a minimum level of real equality of opportunity and access to justice is not only a legal obligation of the State, but also a political need, to prevent future violence. Cultural traditions, such as respect for elders and honourable individuals, should not be used as a pretext to cover new structures of economic inequalities and avoid the necessary democratisation of the country.

The intersection of individual and group's rights

In practice, the social differences of gender, economic position, ethnic origin, language, etc. may produce unequal treatment of individuals and groups, jeopardising the principle of equal dignity. So the development of the liberal theory of human rights has evolved to recognise specific rights for those vulnerable groups in order to guarantee better the respect of their equal dignity, as individuals and groups, and to prevent discrimination. These specific rights for vulnerable groups have been incorporated in conventions and treaties related to women, children, minorities, and indigenous peoples.²² The group's rights are conceived of in such a way as to guarantee the protection of differentiated groups, as well as to permit respect and realisation of individual rights.

¹⁹ Among others, see: Mabbet, Ian and David Chandler (1995): *The Khmers. The Peoples of South-East Asia and the Pacific*. Cambridge: Blackwell Publishers.

²⁰ Some workshop participants and interviewees express frustration over land conflicts, as they perceive that a new wealthy class are making a lot of money accumulating lands to sell them later with the development of roads. This land speculation takes place in the context of a lack of regulation and a failure to enforce of the law. This situation provokes corrosive social phenomena. For example, many people try to survive paying a sort of indulgence to the new wealthy class in order to be included in the chain of patronage, to obtain some benefits. Others manifest a longing for the authoritarianism of the past reminiscence, which could be very dangerous in terms of country's political stability: "During the Pol Pot regime all of us were poor, but still, all of us were equal. There were no rich people like there are now". And, especially among the youth, some try to obtain through delinquency what society cannot offer through peaceful and legal means.

²¹ For instance, some workshop participants and interviewees complain that for every kind of economic activity -all of which requires permits or licenses, even to operate a small business- one must count with the support of some high-ranking officers or the military.

²² Otherwise, the police and other low level officers will ask them for money to operate their business.

See Annex 1.1. *Legal framework on the Right to Access to Justice and Human Rights in Cambodia*.

In the case of multicultural societies where there is just one official language and culture which belongs to the dominant ethnic group, the individuals who belong to the dominant group will be in an advantageous position relative to individuals who belong to other ethnic groups, and the latter will not be able to enjoy the same freedom and equality as the individual who belongs to the dominant group. So, some liberal authors have started to talk about “ethnocultural justice”, referring to a minimum level of equality that must be enjoyed by the different ethnic groups in a democratic society, in order to guarantee their identity and the enjoyment of equal opportunities.²³

1.2. Access to justice concept

1.2.1. The “conflict resolution” approach to access to justice

The most generalized concept of access to justice is associated with access to fair and effective mechanisms for the “settlement of disputes” or “remedy of conflicts”, where disputes are mostly conflicts of interest between individuals.²⁴ The design of research and policy on access to justice based exclusively on this approach will concern itself with the main conflicts and disputes between individuals (including conflicts between the poor and a powerful party), the different mechanisms that people use to resolve those conflicts, and the most effective and efficient forms with which to respond to social conflictivity. Nevertheless, some phenomena, such as corruption, illegal detention, or lack of enjoyment of social rights do not appear as part of the social demand for justice under this approach, because those situations do not reflect conflicts between individuals, but rather speak to a failure on the part of the State vis-à-vis its citizens. The daily corruption in the delivery of public services is a clear example of a kind of events that people suffer as a problem, but which do not attract formal complaints due to the lack of an expectation that the existing institutions may “resolve” it. The lack of enjoyment of social rights, such as access to basic education, healthcare, etc. (due to corruption or lack of public investment to implement those rights), is also perceived by people as “unfair situations”, “problems” or part of the fatality associated to poverty, but not as rights’ violations amenable to a legal remedy that might follow from filing a complaint before a competent authority, unless it is an extreme case of mistreatment.²⁵ These events do not usually trigger a “conflict” because the affected party only rarely lodges a complaint, and so a “conflict resolution approach” would not consider these situations as part of the social demand for access to justice. Hence, this approach does not prioritise recommendations on how to seek justice in relation to abuses of power, corruption, or the lack of enjoyment of social rights.²⁶

²³ See: Kymlicka, Will (2001): *Politics in the vernacular. Nationalism, multiculturalism and citizenship*. Part II, Chapter 4: “Human rights and ethnocultural justice” (p. 69-90).

²⁴ An example of this approach appears in a World Bank’s research project in Cambodia, which associates access to justice with “transparent, fair and affordable mechanisms for the settlement of disputes”. So, “The Justice for the Poor Program will investigate the types of systems and mechanisms that are in place to resolve and manage conflicts, how effective they are and why. (...) The purpose of the program is to develop a national and local reform agenda that defines concrete actions and improves the likelihood that social conflicts involving the poor are resolved fairly and equitably.” World Bank Cambodia: *Justice for the Poor Program. Concept Note*. Phnom Penh: World Bank, May 2005 (p. 1-2). A similar definition, but in a wider framework, is given by the Regional UNDP Program on Access to Justice: “What is Access to justice? People need remedies to protect themselves from possible harm caused by others when involved in disputes or conflicts of interest. Remedies are measures that redress this harm, for instance through restitution or compensation. (...) UNDP defines ‘access to justice’ as: The ability of people to seek and obtain remedy through formal or informal institutions of justice, and in conformity with human rights standards.” United Nations Development Programme: *Programming for Justice Access for All. The Access to Justice Practitioner’s Guide*. UNDP Asia Pacific Rights and Justice Initiative, April 2005 (p. 4). (*Hereinafter* UNDP Asia Pacific, 2005).

²⁵ The newspapers give account on cases of serious negligence in hospitals resulting in mistreatment or even the death of patients. The relatives of these patients claim that it is due to the lack of payment of extra fees, and the fact that they are poor and do not know who to claim before.

²⁶ Several research studies have been released in Cambodia, or are in execution, under the “conflict resolution approach”, especially at the local level. So, they include in the methodology questions to identify conflicts and disputes, and how they are managed. Those studies do not consider other social demands for justice, to the extent that people do not file complaints concerning those events, such as corruption and violation of individual and social rights. See, among others: Hughes, Caroline: *An investigation of conflict management in Cambodian villages. A review of the literature with suggestions for future research*. Phnom Penh: Centre for Peace and Development and Cambodia Development Resource Institute, 2001; Luco, Fabienne: *Between a tiger and a crocodile. Management of local conflicts in Cambodia. An anthropological approach to traditional and new practices*. UNESCO: Phnom Penh, 2002; Ninh Kim and Roger Henke: *Commune Councils in Cambodia: A national survey on their functions and performance, with a special focus on conflict resolution*. Phnom Penh: The Asia Foundation in collaboration with the Center for Advanced Study, May 2005; Diprose Rachel, Payton Deeks and Sovothikar Invong: *Dispute Resolution and Commune Councils in Cambodia: A study of conflict and best practices for peace*. Phnom Penh: USAID and The Asia Foundation (draft Sept. 2005).

1.2.2. A human rights based approach to access to justice

A human rights based approach to access to justice is wider than the approach that focuses exclusively on “dispute resolution”, and has several implications.

First, access to justice is defined as a right. This concept includes the idea of duties and guarantees as well.

Second, the right to access to justice is conceived of as a response to a widespread set of social needs, larger than just the resolution of conflicts between individuals, comprehending also the protection of human rights and the control of abuse of power in potential claims as well as actual conflicts between citizens and the State.

Third. The human rights approach pays attention to the actual demand for justice (cases already filed to any authority) and the potential demand for justice. The latter may reflect the lack of right awareness as well as the lack of available channels to process that demand.

Fourth, the human rights approach pays attention to the various agencies and mechanisms that provide justice services, as well as to the processes and outcomes of the justice services, in order that they respond to social needs and meet human rights standards.

Fifth, the human rights based approach makes evident the relationship between the right to access to justice and the required democratic institutions and practices to enforce it.

Sixth, a human rights based concept of access to justice serves as a critical reference for analysing social reality, and in turn offers theoretical and methodological tools for research and policy development.

The right to access to justice: definition and content

The right to access to justice is recognised in the Cambodian Constitution and international human rights instruments.²⁷ The mere idea that access to justice is a right is very important. It means that citizens are entitled to claim justice services. Citizens are not and should not be obliged to beg for them as “favours” subject to illegal payments.²⁸ In addition, as this right enjoys international protection due to international obligations undertaken by the State, when people do not find justice inside the country, they may use international avenues to seek it.

An operational definition of “the right to access to justice” could be the following:

A person’s ability to seek and obtain fair and effective responses for the resolution of conflicts, control of abuse of power, and protection of rights, through transparent processes, and affordable and accountable mechanisms. These mechanisms must be responsive to social needs, and must be sensitive to cultural, linguistic, and gender issues.

²⁷ See Annex 1.1. *Legal framework on the Right to Access to Justice and Human Rights in Cambodia*.

²⁸ The very concept of access to justice as a “right” is quite important in a social context where public services are conceived of as “favours”, subject to non-transparent payments by citizens. The justice service delivered by the courts is considered as one the most corrupt by the population. The Center for Social Development (CSD) has published several documents related to the corruption of public services, such as: CSD (1998): *National Survey on Public Attitudes Towards Corruption*. Phnom Penh: CSD. This research was followed by “The Impact of and Attitudes Towards Corruption, November 2003 – April 2005”, also published by CSD (2005): and available at: <http://www.bigpond.com.kh/users/csd/cs.htm>.

Chart 3: Contents and features of the right to access to justice

Content of the Right	<ol style="list-style-type: none"> 1. Protection of rights 2. Control of abuse of power 3. Resolution of conflicts
Features of justice services	<ul style="list-style-type: none"> ● Accessible: geographically, economically, culturally, linguistically ● Fair ● Effective and efficient ● Responsive to social needs ● Sensitive to cultural, linguistic, ethnic, and gender issues ● Democratic: transparent procedures/ due process of law ● Pacific: coercion or use of force is according to public laws and regulations, and used only as a last resort ● Accountable: authorities and specific measures are subject to oversight and control

Contents of the right to access to justice

Protection of human rights and control of abuse of power under the rule of law

The first concept associated to access to justice for international law on human rights is referred to as the right to have an effective remedy for violations of rights, a remedy that is granted by the Constitution as well as by international human rights instruments. Access to justice for the protection of rights is considered essential to the very concept of human rights. The recognition of rights requires the effective protection of those rights when they are violated. The Universal Declaration of Human Rights, adopted in 1948 (Article 8) says: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

The International Covenant on Civil and Political Rights (ICCPR)²⁹, adopted by the UN in 1966 and signed by Cambodia in 1992, has a broader formulation of this right including the protection of the rights recognised in international law, not only in the Constitution or internal law. The ICCPR takes account of rights violations committed by both private parties and public authorities, and it seeks to ensure the enforcement of the remedies granted, by judicial or other kinds of authorities (Article 3): "Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; ... (c) To ensure that the competent authorities shall enforce such remedies when granted."

The existence of a system of guaranties for the protection of rights and liberties is a concept directly linked with the principle of the division of powers. In a democratic society, the Constitution establishes the separation of powers and a system of checks and balances to prevent and control the abuse of power. If an authority or a person acting in an official capacity takes advantage of his/her public position to violate the law, this constitutes a form of abuse of power. The Constitution of Cambodia 1993, amended in 1999, establishes as a function of the courts the control of any state or social organs that threaten the rule of law (article 39): "Khmer citizens shall have the right to denounce, make complaints or file claims against any breach of the law by state and social organs or by members of such organs committed during the course of their duties. The settlement of complaints and claims shall be the competence of the courts."

²⁹ See the complete text at: <http://www.ohchr.org/english/law/ccpr.htm>.

The rights violated could be individual or collective, civil and political, as well as social, economic, and cultural rights.

Enjoyment of freedoms. The international law on human rights protect individuals from any form of violation of freedoms and liberties. So, for instance, if a policemen or any officer of the executive branch commits an abuse of power, such as an illegal arrest, mistreatment, or torture, or dissolves illegally a meeting or march, the judicial branch is obliged to control the excessive use of force and restore the freedoms and liberties violated. At first instance, the State's duties (the duties of the government) are mainly related to abstention, to prevent arbitrary restrictions of liberties, so individuals may enjoy their freedoms. But, if there is, for instance, an intervention by the Police that illegally restricts liberties, then the State's duties is to intervene through another branch, the judiciary, to control the abuse of power.

Respect of due process of law. Due process of law establishes different rights and guarantees to protect the individuals in the event they face criminal prosecution, such as the principle of the presumption of innocence, the right to a legal defence, the right to translators if necessary, the right to be brought promptly before a judge (ICCPR, Article 9.3), the right to a prompt judicial review of the act of a public authority, the right to compensation for unlawful arrest (ICCPR, Article 9.5), among other rights. In this case, the duties of the State require intervention to guarantee the presence of public defenders, judges to control police behaviour, humane prison conditions, attention to crime victims as established in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985, etc. A summary of those rights have been established in the Declaration on the Right and Responsibility of Individuals, Groups, and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (1998), Article 9.2: "To this end, everyone whose rights or freedoms are allegedly violated has the right, either in person or through legally authorized representation, to complain to and to have that complaint promptly reviewed in a public hearing before an independent, impartial and competent judicial or other authority established by law and to obtain from such an authority a decision, in accordance with law, providing redress, including any compensation due, where there has been a violation of the person's rights or freedoms, as well as enforcement of the eventual decision and award, all without undue delay."

Enjoyment of social rights. Apart from the so-called civil and political rights, the Constitution and international law establish social rights. The International Covenant on Economic, Social and Cultural Rights (ICESR)³⁰, adopted also in 1966 and ratified by Cambodia in 1992, includes labour rights, good living conditions, housing, access to health care, social insurance, education, and food, among other rights. The States parties commit to one another to bring about a progressive implementation of these rights in order to achieve minimum standards. There is an international mechanism to monitor compliance through reporting the advancement in the implementation of these rights. There is a clear violation of the right when there are practices of discrimination or other forms that prevent individuals or groups from enjoying these rights. Access to justice has the objective of removing those obstacles. Although there is a long discussion concerning the necessary level of enforcement of these rights, it is clear that individuals and groups have the right of access to justice to stop practices of discrimination, corruption, or other events that prevent the enjoyment of these rights. There is also an increasing international jurisprudence that obliges states to take positive steps to bring about a progressive implementation of these rights. So, it is possible to seek justice when these rights are not granted due to specific administrative measures or acts of authority, or when there are omissions or "regressive" measures. The same could be said of specific rights of women, children, minorities, and indigenous peoples.

³⁰ See full text at: <http://www.ohchr.org/english/law/cescr.htm>.

The resolution of conflicts for the sake of social peace

Peace is considered by international law to result not from merely a cessation of hostilities or the end of conflicts, but from the recognition of rights. The ICCPR affirms this principle in its first considering: "(...) in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world (...)."

The consequence of this principle is very important because social peace should be founded on the recognition of dignity and rights. Sometimes pragmatism appears to augur for the resolution of conflicts for the sake of social peace at the expense of the rights of the parties. Even when there are well-founded social claims that seek legal redress on the basis of unchallengeable rights, some authorities are more concerned to maintain "public peace" than with ensuring respect for human rights. The same could be said of mediators, conciliators or other conflict resolution operators when they give greater priority to resolving the conflict than to assuring the rights of the parties involved, especially if those parties are weak and vulnerable. This study assumes that a human rights approach to conflict resolution means that while social peace is an obvious and indisputable public good, obtaining social peace should not be pursued without due regard for the rights at stake. Put another way, taking rights seriously ought to be the main purpose of conflict resolution because taking rights seriously constitutes the only sustainable way to build a solid foundation for ongoing social peace. While compromise will usually be necessary to resolve a serious conflict, the compromise should occur at the level of the parties' interests rather than at the level of their rights.

In synthesis, the right of access to justice seeks the protection of human rights, the control of abuse of power, and conflict resolution that pays due regard to human rights. Now, to bring about access to justice in a particular society it is first necessary to analyse and understand the social needs that compose the social demand for justice.³¹

The social construction of the demand for justice

The social demand for justice is composed of the *potential* as well as the *actual* demand for justice.³²

The potential demand for justice

The potential or latent demand for justice consists in social needs, problems or conflicts to be resolved, but that are not yet brought before a third party for resolution. The potential or latent demand for justice may be defined from an objective perspective, or on the basis of a subjective approach.

- i) The "objective" definition comes from the law or customary law. The law establishes rules, rights and duties, as well as proceedings and other legal conditions that define the framework of what could be termed "justiciable event", an event that may result in a claim amenable to resolution before a competent legal authority.
- ii) The subjective approach refers to people's perceptions of what kinds of events could constitute a *justified claim* suitable to be presented to a third party for resolution, based on their moral values and legal culture.

³¹ See Chapter 2.

³² The terms « potential » and « actual demand » have been taken by analogy from the field of economics and adapted for application to the justice sector.

Perception of social needs, problems and conflicts. Social needs are the material and cultural goods that people (individuals, groups, peoples) perceive as necessary for their human development. The social perception of needs depends on general socio-economic conditions, legal and political frameworks, and cultural codes. Social needs are not only “objective”, but part of a social and cultural construction of reality.³³ Social needs may differ in each historical moment, culture or group.³⁴ Social problems and conflicts may affect the satisfaction of social needs and cultural values. Normally, social problems are associated with structural or long-term living conditions. Social problems arise from and in part form the environment in which interpersonal conflicts may arise. Conflicts and disputes are part of social life, and may affect people’s social needs or interests. Cultural values and legal norms provide the basis to define whether a particular impingement on a social need constitutes a justified claim or *justiciable event*.

The definition of a social need or conflict as a *justiciable event*. As indicated above, a *justiciable event* is an event –dispute, problem, violation of right- suitable to be presented to a third party for being resolved. From a dogmatic legal point of view, a *justiciable event* is typically characterised as an event amenable to adjudication before a court of law. This study does not limit the scope of *justiciable events* to this characterisation of them, one that finds its origins in legal theory that presupposes *legal monism*.³⁵ This study uses a broader definition, drawing on the sociology of law and legal anthropology, to effectively capture the perception of social needs.³⁶ The scope of this study includes events defined by the (official) law as “justiciable cases” and therefore as amenable to judicial determination, as well as those defined by individuals or groups as suitable to be submitted to an available mechanism, such as one based on customary rules, indigenous rules, or non-official legal values and practices. The means used by these mechanisms include those that resolve conflicts based on the conciliation of interests, equity, or adjudication according to a system of rules, rights and duties. The conceptualisation and recognition of a problem or conflict as a *justiciable case* by the people affected depends on their moral and cultural values, legal knowledge and rights awareness (based on official law or customary law), as well as on their expectation of whether or not the available institutions will deal with their grievances fairly.

From a human rights approach, this study considers as *justiciable events* all of those that people would be able to file if they would know their rights. If people do not do file these events, these events remain as part of the potential demand for justice.

The actual demand for justice

The actual demand for justice consists of all *justiciable cases* currently filed by individuals with different agencies (persons or institutions) for resolution. For comparing the potential and the actual demand on justice, this study will consider the list of *justiciable events* and the cases already filed before any third party.

³³ See: Berger, Peter and Thomas Luckmann (1991): *The Social Construction of Reality: Treatise in the Sociology of Knowledge*. Penguin Books.

³⁴ For instance, poverty or domestic violence could be culturally defined as inevitable events, part of a persons’ destiny, or as unfair events, which affect human rights and are able to be changed.

³⁵ Legal monism is discussed and contrasted with legal pluralism (the theoretical perspective of this study) in section 4 below. From a legal dogmatic point of view, a *justiciable event* is a particular event suitable for or amenable to judicial determination. The event must be contemplated by the law to be able to become a “justiciable case” (civil or criminal). The law also defines the substantive and procedural rules, as well as the competent authority to deal with the case. The third party able to resolve a justiciable case is the judge, and the process used is adjudication. In civil cases, the judge vindicates (or not) the alleged violation of right (or, to the same effect, the breach of a duty), and decides between two parties which side wins. In criminal cases, the judges decide if a person is guilty or innocent, based on the law. The power to adjudicate is called *jurisdictional* power and is independent from the executive and Legislative powers, in order to guarantee independence and to operate as a check and balance in a democratic system.

³⁶ From a legal socio-legal point of view, a *justiciable event*, is any occurrence, contemplated or not in the law, that people perceive as suitable to be presented to any third party. This third party could be an individual or collective, designated or not by the law, but considered legitimate by the parties to do so. The third party may resolve or manage the event (problem, conflict or dispute) by helping the parties to arrive at an agreement; or deciding on the case according to substantive or procedural rules, cultural or religious values, equity, common sense, or his/her own personal criteria.

Individuals actualise their demand for justice and make it public by presenting *justiciable cases* to a third party, depending on: a) general or objective factors, and b) individual or subjective factors.

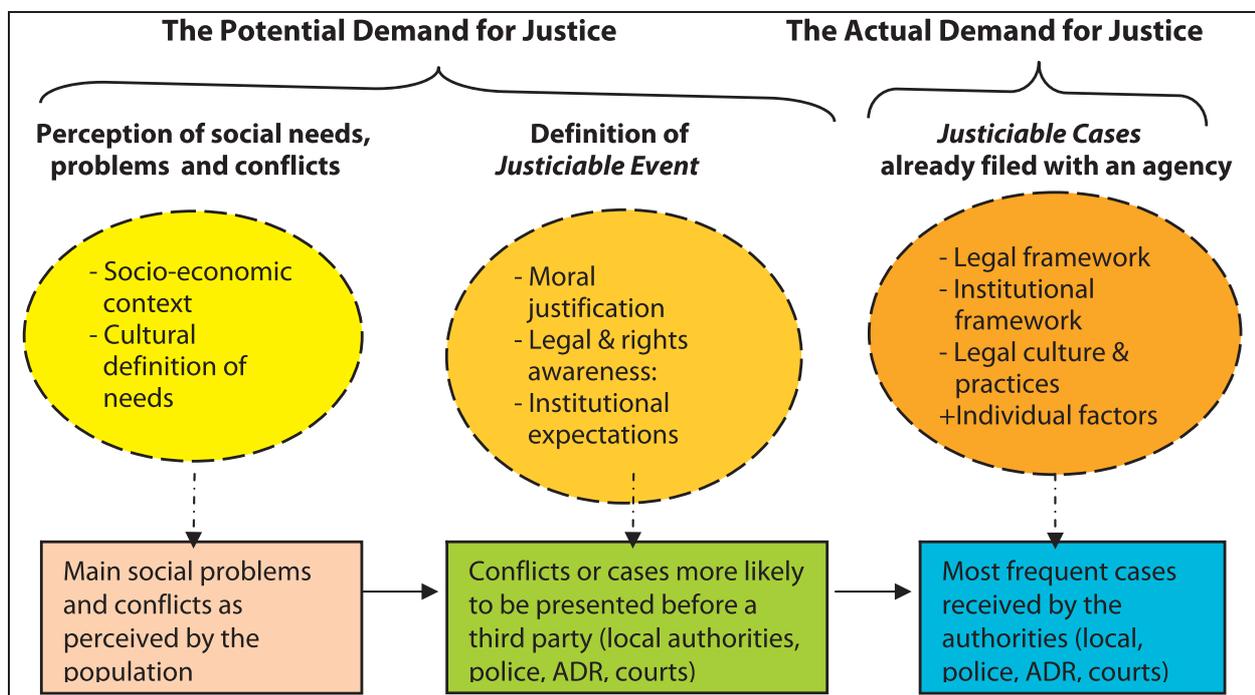
The general or objective factors that allow individuals to actualise their demand for justice include the following:

- i) Legal framework: the existence of legal regulation or customary rules that establishes norms, rights and duties, and which permits the legal system to define a problem, conflict or dispute as a *justiciable event*, as well as establishes institutions and proceedings to deal with those *justiciable events*.
- ii) Institutional framework: the existence of accessible agencies (persons or institutions) able to receive and process *justiciable cases*.
- iii) Legal culture: the existence of a common legal knowledge, shared values that justify legal claims, and practices shared by the justice services' providers and clients, all of which permit the legal system to deal with *justiciable cases*.

Individual or subjective factors depend on the concrete conditions of the plaintiff, such as:

- i) Legal and rights awareness (specific knowledge of the rules, rights, proceedings, institutions, legal practices);
- ii) Economic and material conditions (time, human, and finance resources, etc.)
- iii) Moral support; social and political allies; personal values and goals, etc.

Chart 4: The social construction of the demand for justice



Processes, outcomes and mechanisms

The human rights approach to access to justice implies the existence of minimum standards related to the outcomes and processes in the delivery of justice services.³⁷ So, the way that conflicts are resolved is very relevant. Under the human rights approach, justice is not served if conflicts are settled in a way that violates rights, or if the suppliers of justice services are not independent from de facto powers (economic, military, political), or if the justice system is incapable of preventing the imposition of the will of the powerful over the poor, men over women, the ethnic majority over ethnic minorities.

According to international law on human rights, the rights associated with the right to access to justice are, among others, the following:³⁸

- Access to a public facility without discrimination (where to file a claim)
- Filing a claim or complaint
- Having a hearing before an independent and impartial authority
- Having prompt decision
- An effective remedy
- Enforcement of the remedy

Institutional preconditions

The human rights perspective of access to justice takes into account the model of society and State in which justice is delivered. The institutional preconditions of the right to access to justice are: a political democratic system, good governance, freedoms and liberties; as well as social, economic, and cultural rights. Justice cannot be served when there are no social means to control the abuse of power, nor effective checks and balances. In this sense, the right to access to justice is linked with a wider framework of social goals such as democratisation, transparency, and poverty reduction; as well as social, gender, and ethnic equity.

The supply of justice services

The subjects entitled to enjoy the right of access to justice are individuals or groups. The party obliged to respect the right through the fulfilment of correlative duties is the State. Nevertheless, the social demand for justice could be satisfied by different justice services. These justice services are composed of diverse agencies, i.e. individuals, institutions and organizations of a public or private nature and which may be local or national in terms of their jurisdiction, such as the judiciary, ADR, community based conflict resolution mechanisms, indigenous authorities, etc. For international law, these different mechanisms for conflict resolution could intervene in civil and also criminal cases, so long as they serve the objective of the better protection of rights.

Traditionally, the international human rights instruments focused on the judiciary as the main institution to provide justice, in particular in criminal matters. In later development, several instruments contemplated other mechanisms to provide justice, including remedy for the victims. One example is given by the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985, Article 7: "Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate consolidation and redress for victims." The Convention 169 on Indigenous and Tribal Peoples in Independent Countries of the International Labour Organization recognises to indigenous authorities competence for dealing with conflict resolution including the prosecution of criminal matters among indigenous peoples (articles 8 and 9).³⁹

³⁷ This study shares this point of view with UNDP Asia Pacific, 2005, p. 3.

³⁸ See Annex 1, where are listed the correspondent instruments and articles.

³⁹ See Annex 1 for the text of these articles.

The final responsibility of the State, and then international enforcement mechanisms, is to ensure that the social demand for justice is satisfied with respect to human rights understood in a comprehensive form (considering the minimum standards, social needs and cultural context, in each society). If the right of access to justice is not satisfied internally, citizens may go to international agencies such as the International Criminal Court, or other instances that State is part of or can be part of in the future.

Chart 5: Supply of justice services

Possible providers of justice services	<ul style="list-style-type: none"> - Judiciary - ADR (mediation, conciliation, arbitration) - Customary justice - Indigenous law and conflict resolution methods - Informal mechanisms for the resolution of disputes
State's role	<ul style="list-style-type: none"> Coordination Guaranteeing human rights

Research in access to justice

A human rights approach also has implications in the field of research and policy development. A research study oriented to policy development based on a human rights definition of access to justice cannot be limited to the study of conflicts, how people channel them, and how to resolve them more efficiently. Research should also study situations of rights violations and abuses of power, and other social demands for justice that people themselves may not claim for due to a lack of either awareness or faith in the legal system. Research in this field must also take account of how this latent social demand for justice is managed now (if it is managed at all), and how to establish more effective mechanisms to enforce rights and control the abuse of power.⁴⁰

1.3. Approaches to the concept of law: legal monism/ legal pluralism

The concept of “law” could be understood from the perspective of “legal monism” or the “legal pluralism”.

Legal monism

Legal monism is a theory that identifies “the State” with “the law.” Legal monism is a theory that can operate prescriptively as well as descriptively. As a descriptive theory, it says that there is no other “law” in a certain geopolitical space apart from the one produced by the State. As a prescriptive theory, it says there *should not* be another legal system in the same geopolitical space of the State: in one State there should be just one legal system.

Legal monism holds that only the State produces “law”, and it monopolizes the use of coercion (the legitimate use of force). The State, in turn, must be regulated by the law. The “Law” is defined as a system of norms produced by the State through its powers, according to specific regulations, and enforced by State agencies following legal procedures. Legislative power is the one that monopolizes the function of elaborating general law that is obligatory for everyone. The judiciary monopolizes the function of interpreting the law and adjudicating disputes. The executive monopolizes the power of implementing and enforcing the law and controlling public order.⁴¹ The individuals within a society may engage in voluntary contracts between each other. A contract has force of law for the parties. But,

⁴⁰ We will develop this topic later, in the methodological approach.

⁴¹ In several countries, other autonomous constitutional bodies may share some of these powers, such as the ombudsman, constitutional council, constitutional court, electoral power, etc.

according to legal monism, no individual or a group outside the State may create mandatory rules for others. According to the traditional liberal theory of the State, only the State is authorized to establish obligatory rules for all citizens, and to use coercion to enforce them, in order to protect its citizens' freedoms.

We can track the origin of legal monism from two ideas. One idea, that only the State can make a claim to the legitimate use of force emerged at the historic moment of the concentration of political power by the modern western states over the many feudal lords who used to exercise coercion in their territories. In liberal political theory, the monopoly of the use of coercion by the State is justified by saying that it is the way the State can protect the rights of the citizens.⁴² The other idea, also basic to the traditional liberal theory of the State, is the separation of powers.⁴³

Another theoretical source of legal monism is the legal positivism, in vogue during the XX century. For legal positivism, the law just consists in specialized norms guaranteed by the coercion; norms different from the moral and religion.⁴⁴ The State monopolizes the use of the coercion. And, according to Kelsen, the entire legal system rests on the possibility of it being enforced through coercion applied by the specific organs of the State through legal proceedings.⁴⁵

As legal monism identifies the law with the rules produced by the State, other norms or rules of social conduct, which have not been produced by the State, are defined as "customs". Customs are conceptualised as social norms repeated frequently for a long time, so people follow them as if they were mandatory. The law (state law) defines the legal status of customs, giving them some kind of legal recognition in specific cases, when those customs are complementary or supletory to other state rules, and as far as they are not against state law. State law does not recognise customs *contra legem*.

Limits. As a descriptive theory, the legal monism faces serious challenges to explain the co-existence of several legal systems in the same geopolitical space due to historic changes, colonialism, the presence of indigenous peoples, etc.

As a prescriptive theory, its justification is in the modern liberal theory. The State monopolises the production of law and the legitimate use of force for the protection of rights and liberties. In point of fact, it is necessary to organise social order and prevent the use of violence by private forces that lack the control that law supplies. Nevertheless, when in reality there co-exist different legal systems or legal practices, and the State does not recognise customary norms or indigenous rules practiced by some sectors of the population, the consequence could be that those who practice and live under non-official norms may remain outside the State's protection (e.g., their marriages, the system of use of lands, and other interactions may not be recognised), while at the same time people who live under customary law usually do not have access to the official institutions of the State. So, in point of fact,

⁴² Thomas Hobbes, the father of the liberal philosophy, defends the idea that only the State should monopolise the use of legitimate force to guarantee pacific coexistence among the citizens, through the imposition of the law. Without laws guaranteed by state coercion, individuals would tend to do whatever is necessary to satisfy their needs, without consideration of others, resulting in insecurity of life and property. This is the idea that "every man is a wolf to every other man" in the state of nature. See Hobbes, Thomas (1651): *Leviathan, or the matter, forme and power of a common-wealth ecclesiasticall and civill*. London: Penguin Books, reimp. 1985.

⁴³ If the State monopolises the use of legitimate force, that force should not be used in a form that may arbitrarily threaten life, security, property or other human rights. In liberal theory, the protection of those rights is the reason why the State exists. So, the separation of powers within the State is necessary to create a system of check and balances among the state powers, organs or branches, ensuring that the use of coercion is in accordance with the law. The Judiciary is in charge of controlling the use of force by the executive branch. The theory of the separation of powers comes from Montesquieu. See: Montesquieu, Charles-Louis (1748): *The Spirit of the Laws*, translated by Thomas Nugent, revised by J. V. Prichard based on a public domain edition published in 1914 by G. Bell & Sons, Ltd., London.

⁴⁴ Legal positivism distinguishes norms according to their source and nature. For Kelsen, the father of the legal positivism, the norms (rules of "ought to be") could be religious, moral, or legal. The difference, finally, depends on the presence of coercion in the case of legal norms. Religious norms are guaranteed by a prize or threat in another world (heaven, hell), so some people may follow them, while others will not. Moral norms are guaranteed by social pressure. The social pressure could be diffuse, and may occur or not. But, legal norms or "law" are guaranteed by the coercion. See: Kelsen, Hans (1967): *Pure Theory of Law*, (Knight trans.), UC Berkeley press.

⁴⁵ Coercion is also called "legitimate violence". The law requires: 1) validity (one norm should be based on a superior one, resting ultimately on the Constitution), 2) legitimacy (general acceptance), 3) efficacy (to be in forced) and 4) international recognition. Kelsen (ob. cit).

insistence on legal monism in the context of multiple legal orders within the same State has the effect of denying rather than protecting rights and liberties.

Legal pluralism

Legal pluralism is a theory that admits the possibility of more than one “law” or legal system in the same geopolitical space, and generally is committed to studying and developing means to regulate possible conflicts of laws.⁴⁶ Legal pluralism also has descriptive and prescriptive dimensions.

A theory of legal pluralism requires a definition of “law” which could be used to identify and compare different legal systems in the same geopolitical space. The defenders of legal pluralism, mostly from the area of legal anthropology, give several definitions of law. A minimum definition of “law” calls for: i) a system of norms, ii) authorities, and iii) procedures; used to: a) regulate social life, b) organize public order, c) resolve conflicts, and d) change rules. The system of norms, authorities and procedures must be, to some extent, effective (in vigour or enforced) and legitimate (considered good or necessary by their users) to count as law, properly so-called. The norms could be specialized or mixed with religious, moral and social norms; *i.e.*, they could be based on religious principles, moral values, traditional norms, and also new regulations created in assemblies or agreements. The enforcement of the system could be done by different kinds of mechanisms and authorities, not necessarily specialized (these mechanisms could be a political and religious authority, and could take the form of either an individual or a group). The norms could be produced or reproduced in different contexts and by diverse agencies. Under this definition of “law”, there could be law even in the absence of a State, or several legal systems in the same geopolitical space.

Legal pluralism is produced in several situations.⁴⁷ One is a situation of Colonialism, in which a Colonial government imposes a new regulation in a territory ruled already by previous authorities, norms and proceedings. So, some sectors of the population or some areas of the social life continue to be regulated by the old legal system. Legal pluralism also exists in the contexts of wars, revolutions, and processes of fast modernization, where the old legal system and the new coexist for a certain period. Legal pluralism may occur too where indigenous peoples or ethnic minorities co-exist with an ethnic majority that imposes a “national legal system”. The coexistence of different systems of rules at the same time in the same geopolitical space may produce conflicts of interlegality.

Historical roots. In some developing countries in Asia, Africa and Latin America there was and is a process of “legal importation” of western legal bodies and institutions, which became the “official” or “national law”. In most of these cases, the western legal institutions are implemented in just some “modern” part of the country, such as the cities or urban areas, while in the rural areas people keep regulating their social interactions (marriage, inheritance, land contracts, etc.) and resolving their conflicts according to their local customs and culture. In these circumstances, a process of accommodation between the “national legal system” and the local legal practices occur. This situation also produces conflicts of interlegality when both legal systems collide. Usually, the modern legal system, based on western institutions, is poorly implemented, as it requires professionalized legal operators (judges, prosecutors, etc.) and other resources to operate in the most remote areas of the country. In addition, the new legal bodies are carriers of a legal culture different from the local one; they regulate important institutions (such as marriage, inheritance, etc.) in different ways than people are accustomed to; and, they offer different responses to criminal activity than what was there previously as a matter of local custom. western legal codes also presuppose the existence of different institutions

⁴⁶ Santos, Boaventura de Sousa (1995): *Towards a New Common Sense: Law, Science and Politics in the Paradigmatic Transition*. Nueva York: Rutledge; (1991): *Estado, Derecho y Luchas Sociales*. Bogotá: ILSA (p. 63-72); (1987): “Law: A Map of Misreading: Toward a Postmodern Conception of Law”, en *Journal of Law and Society* 14. See also: Griffiths, John (1986): *What is Legal Pluralism?*, in: *Journal of Legal Pluralism and Unofficial Law* No. 24: 1-56; Gluckman, Max (1955) *The Judicial Process among the Barotse of Northern Rhodesia*. Manchester. Merry, Sally (1988): “Legal Pluralism”. *Law and society review*, Vol. 22, p. 869-96.

⁴⁷ Santos, Boaventura de Sousa (1994): “Entrevista”, en *Desfaciendo Entuertos* N° 3-4 (pp. 27-31).

for social control, such as a judiciary, lawyers, prosecutors, etc. So, in rural or remote areas, people tend to preserve some legal practices and customs that are different than the national legal system, and keep going to local authorities to resolve daily conflicts according to local culture and custom.

This phenomenon of coexistence of an official western style law-civil law (continental or French system) or common law (English influence)- and non-official customary regulation (local) was very common in Asia and Africa, due to the process of colonization by European countries, and in Latin America, after the Independence process, from the nineteenth century onward.⁴⁸ All countries that imported the continental system under the French influence in the nineteenth century (such as Cambodia) adopted the Napoleonic codes and legal monism. So, they rejected officially legal pluralism. Legal monism was consecrated in all the constitutions adopted under the modern continental system. This had two consequences: the idea of the Nation-state and the identity of the State with law. The constitutions of these states prescribed and authorised just one legal system, one official language, and one dominant culture for the country. This means that only state powers are allowed to produce law and use legal coercion, and all citizens must be ruled by the same authorities, laws, and proceedings, as established in the Constitution. After the adoption of this system in Asian and Latin American countries in the nineteenth century, a divorce between the official law and social reality was apparent. In rural and remote areas local legal institutions survived, such as traditional marriages and conciliation processes used to resolve different kinds of conflicts, but the official law ignored or even forbade those practices. In some countries of Latin America and Asia, the legal and judicial reform that has taken place over the last decades of the twentieth century has tried to take into consideration this situation and close the gap between official law and local practice. For example, in several Asian and Latin American countries local mechanisms for conflict resolution, as well as traditional marriages, have been recognised by the official law as having binding legal effects.

When indigenous peoples conserve, in some ways, their authorities, customary rules, and their mechanisms and proceedings for conflict resolution, we then have what is commonly referred to as “indigenous customary law” or indigenous law. If indigenous law is not recognised as a legitimate kind and source of law, the national legal system by default necessarily imposes a “national” legal regime over indigenous peoples, with varying degrees of violence that will depend on the extent of indigenous resistance to the official legal order. Throughout history, “national-states” have used policies of extermination, assimilation or integration to impose the “national legal system” over indigenous peoples, under the ideology of national sovereignty and territorial integrity. Over the last two decades there has been an important development in international law related to indigenous peoples. The International Labour Organization adopted the Convention 169 on Indigenous and Tribal Peoples in Independent Countries in 1989, which banned the policy of integration and assimilation, and recognises the capacity of indigenous peoples to preserve and develop their social, cultural, economic and political institutions, as well as their customary law, with their own authorities, rules and methods to resolve conflicts and prosecute criminal events among their members. This is a kind of “internal legal pluralism” within the State and under a common framework of the respect of human rights. Under a multicultural and pluralistic policy, several states now recognise indigenous law, authorities and conflict resolution proceedings, and try to coordinate indigenous law and the national law in a pacific and democratic way.⁴⁹

⁴⁸ The nations colonized by United Kingdom in the nineteenth century could accommodate local legal systems to new western regulation under the model of “indirect rule”, as Spain practiced during colonial times in Latin America (16th – 18th centuries). Under this model, native authorities, rules, and conflict resolution methods were allowed, but in a subordinated position in relation to the authorities, rules and proceedings of the Colonial government. This is the case of the so-called “customary courts” in African countries, chaired by clan or tribal authorities. In English colonies, legal pluralism was permitted in a limited form, so the native legal systems were allowed to resolve some kinds of disputes and to impose some kinds of penalties. A total different system was imposed under the influence of the continental legal system.

⁴⁹ As an example, many Latin American constitutions have recognised to indigenous authorities jurisdictional power to resolve conflicts according to their customary law and own proceedings. See: Yrigoyen Fajardo, Raquel (2004): “[Legal Pluralism, Indigenous Law and the Special Jurisdiction in the Andean Countries](#)”, en *Beyond Law, Informal Justice and Legal Pluralism in the Global South Vol. 10*, Issue # 27, 2004. (Available at <http://www.ilsa.org.co/biblioteca/bl27/bl27.htm>).

Policies in relation to a *de facto* situation of legal pluralism. The admission of the existence of *de facto* legal pluralism does not mean the political acceptance of it. There are different options:

- a) **Prohibition and assimilation policy.** Even if it is theoretically possible to establish a situation of legal pluralism, the State may deny any legal authority to customary law or indigenous law. The State may (as a matter of fact) use force to oblige indigenous peoples or those who have customary rules to submit to the official law, language, and culture. As a result, the members of indigenous peoples and other minorities cannot enjoy the same freedom nor the rights of those who belong to the dominant ethnic group. Without the protection of their lands, cultural identity and authority, those indigenous peoples may feel oppressed and therefore alienated from the State, and have less opportunity to live the good life than the members of the dominant culture.
- b) **Integrationist Policy.** The State alone may decide the extent of the recognition of indigenous or customary rules, in order to progressively integrate indigenous peoples or those who live under non-official rules to the mainstream culture.
- c) **Pluralistic policy.** In the presence of several *de facto* legal systems in the same geopolitical space (e.g., official state law and indigenous law), the State promotes an intercultural dialogue for the recognition of indigenous customary law (authorities, rules, proceedings for conflict resolution) and democratic coordination between the different systems. In this way, indigenous peoples may perceive themselves as part of a pluralistic State, with the right to preserve and develop their own cultural identity, but also with the duty to participate in the national society and respect a common framework of human rights.

Chart 6: Legal monism and legal pluralism

	Legal monism	Legal Pluralism
Theoretic arena (descriptive)	There is one law or legal system in one State. Law is a system of: a) Specialized "legal norms" (different from moral or religious norms) b) Produced by the State, Enforceable by state agencies according to legal procedures.	There could be several legal systems or "law" in one geo-political space. Law is a system of: a) Norms or rules (could be specialized or not), b) Authorities (individuals, collective bodies) Proceedings To regulate social life, resolve conflicts and organize public order; effective and legitimate for their own constituency
Political consequences (prescriptive)	Only State norms are enforceable. - Other norms are "customs" and must be limited. - Norms, which oppose state norms, are illegal and must be forbidden.	There are different options: a) Assimilation policy: elimination of legal pluralism, even by force. b) Integrationist policy: acceptance in part, in order to integrate progressively c) Pluralistic policy: democratic recognition within a pluralistic State and a common frame work of human rights

1.4. Formal / Informal systems of justice

Frequently, the terms “informal”, “alternative”, “non-official” or “non-state” are used as synonyms. The Strategic Plan for the Legal and Judicial Reform in Cambodia uses the term “alternative dispute resolution” to cover mechanisms: a) established by the law and part of the State (Cadastral Commission), b) established and regulated by law but independent (Labour Arbitration Council), c) traditional conflict management, and d) local conflict resolution. Other studies assume that “ADR denotes all forms of dispute resolution other than litigation or adjudication through the courts”, including customary law.⁵⁰ The Regional UNDP work on Access to Justice assumes that the term “informal systems of justice” comprises alternative conflict resolution (ADR) as well as “traditional and indigenous justice systems”.⁵¹ Finally, another study uses the term “Non-state justice systems” to denote all forms of “traditional, customary, religious and informal systems.”⁵² The common thread that runs through all of those terms is that they have been used and developed in opposition to the State’s official and western system of justice. The discussion above of legal monism and legal pluralism will help to clarify this point.

The terms “formal” and “informal” come from the sociology of law and the idea of law as social control. Two concepts are often opposed to one another:

The so-called “formal” control refers to the social control organized by the State, based on legal regulations, enforced by specific agencies or institutions, and following procedures determined by law; and

A “diffuse” social control produced by social agencies (individuals, social organizations, private institutions), following different mechanisms, including spontaneous reactions, which is considered “informal” control.

The formal system of justice, as part of formal social control, is comprised of the courts, police, prosecution office, etc. These institutions must follow formal regulations established by law. “Informal” social control also denotes that the formal system of justice is set up by law, and is considered legal, while “informal control” is not considered legal and therefore its norms are not binding as law. Following this conceptualisation, some studies⁵³ consider “informal systems of justice” to consist in all mechanisms for conflict resolution different from the courts, including ADR and indigenous justice systems. Nevertheless, this characterisation oversimplifies matters.

In several countries, some forms of ADR are legally recognized, in form public, private or social institutions. So they are regulated by law and follow proceedings established in the law. In this sense, we could not say that those mechanisms are “informal”, because the law already formally regulates them. The same is true of indigenous justice systems.

⁵⁰ The South African Law Commission (established by the South African Law Commission Act 19 of 1973): *Alternative Dispute Resolution*. Issue paper 8. Pretoria: South African Law Commission, 1996 (available at [http://wwwserver.law.wits.ac.za/salc/issue/ip8.html#a\)%20What%20is%20ADR](http://wwwserver.law.wits.ac.za/salc/issue/ip8.html#a)%20What%20is%20ADR)).

⁵¹ UNDP (2005): *Programming for Justice: Access for All*. The Access to Justice Practitioner’s Guide. Bangkok: UNDP Asia Pacific Rights and Justice Initiative. (Available at: <http://regionalcentrebangkok.undp.or.th/practices/governance/a2j/>).

⁵² “In many places worldwide, the main institutions dealing with disputes and providing security are not part of the state. Instead, these functions may be carried out by a variety of traditional, customary, religious and informal systems. It is DFID (Department for International Development) policy to recognise such systems can be more relevant and accessible for poor people than state institutions, and to incorporate such systems into a sector-wide strategy where appropriate. However, DFID acknowledges that these institutions may re-enforce local power inequities, and in some contexts may violate human rights.” It is therefore important that any support to non-state systems must pay attention to issues of accessibility and equity.” See: Governance Resource Centre Exchange United Kingdom: *Non-state justice and security systems*, available at: http://www.grc-exchange.org/g_themes/ssaj_non-state.html.

⁵³ Such as the UNDP Asia Pacific 2005.

In Cambodia, the Cadastral Commission and the Labour Arbitration Council constitute ADR regulated by law. The former is part of the Ministry of Land; the latter is independent. In addition, the Land Law (2001) recognises the competence of traditional indigenous authorities to manage common indigenous lands, according to their own customary rules and decision-making process. So, some ADR neither indigenous rules could be called “informal” in Cambodia.

From the perspective of legal pluralism, other non-state systems, such as indigenous law or other forms of customary law, become “law” after passing an internal process of what Bohannan calls “double formalisation”: first as social norms, and then, as legal norms for themselves.⁵⁴ So, they are not “informal” in the sense of being spontaneous citizen reactions without any formality or institutionalisation. Indigenous systems have their own authorities, rules and proceedings. They are formalized.

But, even from the perspective of legal monism, indigenous customary rules are no longer “informal” as they have formal and legal recognition, notwithstanding the fact that their proceedings are different from the courts. In Latin American countries, various constitutions have recognised jurisdictional powers of indigenous peoples, so “indigenous jurisdiction” is not informal anymore, in the sense that it has formal and legal recognition.

For this study, by “informal” we refer to spontaneous reactions, inorganic and sporadic forms of social control practices that occur outside the bounds of legal regulation. In this sense, for instance, the conflict resolution practices of the police or clerks that take place outside the bounds of their legal authority constitute “informal practices”. The same could be said for practices outside their own regulation in the case of ADR.

Chart 7: Formal and Informal concepts

	Formal	Informal
Agencies	State institutions: judiciary, police, etc.	Other social actors: neighbours, social organizations, private institutions, etc.
Rules	Written law	Social, moral, religious values
Procedure	Specific procedures established by law	Social pressure, rumours, diffuse mechanisms of social control
Implicit	“Legal” or Legally recognized	Not recognized as having legal authority, and could be illegal
	“Law” or “Formalized” legal system	“Informal” mechanisms cannot be “law”
Examples	Criminal system	- Neighbourhood watch organizations to control crime
Confusing or problem cases	<ul style="list-style-type: none"> - “Police behaviour outside the law”: <i>formal</i> institution but <i>informal</i> behaviour - ADR operates differently than the formal system of justice, but ADR is legally regulated. 	Indigenous law: <ul style="list-style-type: none"> - Indigenous rules have passed, for themselves, a process of formalisation. So they are not “informal” or spontaneous. - Some laws recognise indigenous customary rules (the Land Law 2001, in Cambodia). - ILO Convention 169 and some constitutions (Latin America) recognise “internal legal pluralism” where indigenous authorities have jurisdictional powers. They are not “informal”.

⁵⁴ Bohannan, Paul (1964): “La antropología y la ley”, en *Antropología una nueva visión*. Cali: Editorial Nosma.

Problems with the formal/informal dichotomy. In synthesis, this dichotomy presupposes a monist framework, i.e. the idea that only the State produces “law”, and the rest of the “social” agencies produce “social” or “informal” control, but not law. The term “informal” may include a wide range of situations, from casual reactions of a group of neighbours to illegal gangs, as well as ADR and ancient customary law and indigenous law. Indigenous law could be considered “informal” from the point of view of legal monism, but not from the perspective assumed by legal pluralism. However, even from the point of view of legal monism, neither indigenous rules nor ADR could be called “informal” if they are legally recognised.

An important caveat, therefore, is in order. In this study, the term “formal system of justice” refers to the “official” system of justice based on state law, enforced by state agencies and following specifically recognised legal procedures. This term does not imply that the state is the only source of law. The use of that term, for us, does not exclude the existence of customary and indigenous law. For this study, the term “informal” refers to the non-regulated mechanisms of social control, spontaneous and inorganic reactions, or the behaviour of any institution outside its own regulation and legal authority. For instance, the behaviour of the police beyond the bounds of their statutory authority is “informal”; but the Cadastral Commission and indigenous law are not informal to the extent that they follow their own rules.

1.5. Alternative dispute resolution mechanisms (ADR)

ADR has arisen as a result of perceived failures and weakness in the formal dispute resolution system, regulated by law, and enforced through the judiciary. It is implicit that the “law” and the “formal system of justice” belong to the State. So, other mechanisms to resolve disputes, different from the judiciary, are labelled as “alternative”.⁵⁵ ADR is composed of negotiation, mediation, conciliation, and arbitration.

Jurisdictional powers, according the legal theory include: a) the power to investigate, call witness (*Notio*); b) the power to decide or adjudicate (*Iudicium*), and c) the power to enforce the decision rendered (*coertio*).⁵⁶ To the contrary, there is a common understanding that ADR:

- Refers to non-litigation systems outside the courts. The agency that resolves the problem is not the judiciary, but a third party who could be a mediator, conciliator or arbitrator.
- The procedures consist of less formalized procedures than the courts, face-to-face oral agreements, negotiated solutions which consider the interests of both parties.
- The matters should be ones that the parties can negotiate or concede. ADR cannot deal with matters related to public order (such as crimes or divorce).
- Cannot exercise jurisdictional powers such as compelling parties or witnesses to appear,
- investigate, enforce decisions, etc.
- Cannot adjudicate rights (except arbitration that makes a decision).
- Cannot enforce the decisions or agreements. The enforcement relies in parties’ good will.

ADR is characterized by the use of non-adjudicative mechanisms to solve conflicts, except arbitration, which is the closest to the judiciary in the sense of having a third party that can adjudicate. On the other extreme is negotiation, which is based just on the interaction between the disputing parties, without a third party. Adjudication, on the other hand, implies that one authority, a party distinct from the parties in conflict, decides by itself the case before it. The formal justice system, through judges, performs adjudication and reaches a decision based on the law. The formal system of justice reserves the jurisdictional powers, while ADR does not have jurisdictional authority. In this way, the judiciary can

⁵⁵ ADR also refers to mechanisms of conflict resolution that constitute an alternative to violence.

⁵⁶ Carlos, Eduardo B. (1963): *Voice Jurisdicción*. In: *Enciclopedia Jurídica Omeba*. Buenos Aires: Editorial Bibliográfica Argentina, Tomo XVII, p.538.

accommodate with ADR, and they can be complementary. These mechanisms may or may not be recognized by law, and may be directed by private parties or state agencies. Some studies use the term “informal” as synonymous of ADR, but “informal” implies lack of regulation, and ADR could be regulated.⁵⁷

Mediation, conciliation and arbitration rely on the intervention of a third party. The difference among these mechanisms is the level of intervention of the third party. At the lowest level of involvement, mediation, the third party (mediator) tries to help the disputants solve the problem using the disputants’ own proposals and without offering a third-party solution. At the next stage, conciliation, the third party might bring his or her own proposals to facilitate conflict resolution between the parties. And finally, with arbitration, the third party brings the solution himself or herself, after listening to the parties. There is a long debate in the literature concerning the proper name of the third party involved in the middle stages of mediation and conciliation. For this study we will adopt the following nomenclature and categories.

Chart 8: The principal forms of ADR

	NEGOCIATION	MEDIATION	CONCILIATION	ARBITRATION
Parties involved	Parties in conflict	Parties in conflict + Mediator	Parties in conflict + Conciliator	Parties in conflict + Arbitrator
Role of third party	Parties alone resolve their conflict.	Mediator tries to facilitate a solution considering interests and proposals of the parties. Parties decide the solution.	Conciliator brings proposals to the parties to resolve their conflict. Parties decide final solution with the help of conciliator.	Arbitrator brings the solution to the case. Parties must respect that decision.
Initiation of the process	Voluntary	Voluntary	Voluntary	Voluntary (or mandatory by law or previous agreement)
Result	Depends on the parties alone.	Depends on the decision of the parties.	Conciliator proposes a solution, but it depends on the acceptance of the parties	Depends on the decision of the Arbitrator.
Enforcement of the result	The agreement is like a contract, but if one party does not fulfil the agreement the other has to go to court.	The agreement is like a contract, but if one party does not fulfil the agreement the other has to go to court.	The agreement is like a contract, but if one party does not fulfil the agreement the other has to go to court.	Awards could be enforced through tribunals or by other direct means.

Problem. As in the previous case, the term ADR could include different realities, like specific mechanisms authorized by law to solve conflicts, social mechanisms, and also customary law and indigenous law. This oversimplification could create misunderstanding. So once again, a caveat is in order. The use of the term ADR in this study does not imply the negation of legal pluralism in the sense that everything that is not part of the official state justice system is considered to be, in one form or another, ADR. Customary law or indigenous law may have mechanisms to solve problems which could

⁵⁷ For the difference between ADR and indigenous law, see below.

be seen as “alternative” to the judicial mechanisms to solve problems, but it does not mean that they are conceptually reduced to the category of ADR.

1.6. Customary law and indigenous law

Indigenous law

The use of this term in this study is derived from the framework of legal pluralism. Indigenous law, assuming the wide definition of law offered by legal anthropology and ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries, refers to a system of norms, principles, values, authorities, procedures and even methods to control criminal events which are used by indigenous peoples to regulate their social life, organize public order, and resolve their problems and conflicts. Their norms are enforced by different means and are considered legitimate (good or necessary for them). Their norms are produced, reproduced and change through the sources they consider legitimate or necessary. In a de-facto situation of legal pluralism, normally indigenous peoples are in a disadvantaged situation, so they are subject to limitations imposed from the outside or they tend to adjust their system in order to survive in the face of the dominant state system (e.g., they may limit the matters they resolve).

Conceptually, indigenous law has more legal capacities than ADR. First, indigenous law implies legal authority to regulate social life through customary rules (e.g., rules concerning the use of common land), govern, and resolve conflicts. Second, indigenous law may apply diverse techniques for conflict resolution, including adjudication in matters that ADR is not permitted to resolve, such as some crimes, and control of public order within indigenous communities. ADR does not have the capacity to investigate, call witness, and enforce decisions. Indigenous law has that capacity. In practice, indigenous authorities can investigate, adjudicate, and enforce their decisions. In this sense, they use de facto jurisdictional powers.

In some countries, indigenous law has been legally recognised, so it is not “informal”.

Customary law

This term has its origin in Roman law. It refers to a system of customs, norms, uses, and practices repeated by a particular people for such an extent of time that they consider them mandatory (*consuetudo veterata*). The source of the customs or norms may be lost in time; but it is a living system because people enforce and recreate the norms through practice and adherence to them. This concept is opposed to a written legal system created by a centralized power. The “common law” is also considered a “customary system” in the sense that it is based on decentralized judicial decisions. Nevertheless, this term is mostly used to refer to legal systems in a politically subordinated position. Because Roman law was an imperial law, this concept was created to qualify the legal systems of those peoples subordinated under the Roman Empire. The Roman Empire used indirect rule, permitting the existence of the subordinated legal systems to regulate their conquered subjects’ everyday life, but without questioning the central authority of Rome. In situations of legal pluralism that begin with colonial imposition, revolution, wars or rapid modernization, usually the previous dominant legal system loses *de facto* command of the territory and is relegated to a subordinated position without a central power to produce law. As a consequence, the subordinated system survives in a form of isolated norms or practices, local level authorities, and a reduced scope of jurisdiction. As these norms are transmitted by practice, they are adaptable and flexible, but the extension of customary law is conditioned vis-à-vis its relationship with the State. In this sense, the lack of a presence of state agencies may permit the expansion and continuity of customary law.

Chart 9: Summary of the concepts in relation to the State legal functions

Functions	State law ("Formal")	Indigenous law	Customary law	ADR	"Informal"
Capacity to regulate social life	Legislative: produce general rules for everybody	Regulate social life within the community, or ethnic group	Regulate some institutions: such as traditional marriage	No	- Spontaneous reactions - Outside official law - Outside own regulation
Capacity to control public order and govern	Executive: control the order, govern	Authorities: at community level	At local level	No	- Armed groups, or - Behaviour outside the law
Capacity to resolve conflicts	Judiciary- Jurisdictional powers: 1) Investigate (<i>Notio</i>) 2) Decide: Capacity to adjudicate (<i>Iudicium</i>) Enforce (<i>coertio</i>)	1) Investigate 2) Decide: Capacity to adjudicate 3) Enforce (with interference by State)	Limited capacity, subsidiary of the central State	1. Limitations for investing. 2. Non-adjudicatory (except Arbitration) 3. No capacity to enforce	Conflict resolution outside regulation
South African Commission	FORMAL	ADR			
UNDP Asia Pacific	FORMAL	INFORMAL			
UK	Formal	NON-STATE			
Assumptions under legal monism	Under law & HR	<ul style="list-style-type: none"> - Politically subordinated - Non-legally recognised - Outside rules - Outside HR - Should be "subordinated to formal system" 			
Propositions under legal pluralism	<ul style="list-style-type: none"> - An integral pluralistic approach to justice services - All systems should be under HRB: sensitive to culture, language, gender - All should be accountable and legitimate for the people - All should be responsive to people's needs at different levels, scopes, areas, competences 				<ul style="list-style-type: none"> - Informal behaviour of the police or other instances should be controlled - Violent informal reactions should be prevented

2. Research study

2.1. Institutional Background

In 2003, the Council of Ministers adopted the Legal and Judicial Reform Strategy (LJRS) drafted by the Council for Legal and Judicial Reform. Its ultimate objective is to provide “justice for all Cambodians”. This legal and judicial reform is part of a broader reform process that aims to reduce poverty and strengthen democracy in Cambodia. The two legal and judicial reform goals are (i) “Completing the legal framework to sustain rapid development and to promote and protect rights; and (ii) institutional strengthening to ensure transparent and equitable justice for all”.⁵⁸ This process is intended to be comprehensive and participative, and counts on the support and cooperation of the international community.

The LJRS identified seven strategic objectives to fulfil its goals. One of them is “To introduce alternative dispute resolution mechanisms”, taking into account the difficulty the population faces to access to the formal (official) system of justice. In December 2003, the participants of the “National Workshop on Implementation of the Legal and Judicial Reform Strategy” organized by the CLJR and the Legal and Judicial Technical Working Group (LJTWG), recommended the following: improving the legal framework, improving the quality and access to legal and judicial services, strengthening of legal and Justice Sector institutions, and introducing and reinforcing Alternative Dispute Resolution Mechanisms/ Legal Awareness. In order to achieve this goal, the Plan of Action establishes as one of its Shortter mpriorities (2004-2005) to “Investigate into, build upon and strengthen other alternative and traditional methods of alternative dispute resolution” (Activity 6.2.1). In response, UNDP accepted the challenge to launch the research project “Interfaces between Formal and Informal Cambodian Justice Systems- Alternative Dispute Resolution”, in coordination with the CLJR and the MoJ. This research proposal underwent some modifications and then became the current study.

Institutional foundations for the research project

Source	Content / Institutional foundations of the research project
1. “National Poverty Reduction Strategy”- NPRS (2002)	The Legal and Judicial Sector is one of the four areas where reform is needed to strengthen institutions and improve governance in support of poverty reduction . The goals of the Judicial reform: i) Completing the legal framework to sustain rapid development and to promote and protect rights ; and ii) Strengthening the judiciary to ensure transparent and equitable justice for all. This approach is defined as “comprehensive and participative.” ⁵⁹
2. The Legal and Judicial Reform Strategy (LJRS) adopted by the Council of Ministers, and drafted by the Council for Legal and Judicial Reform (CLJR). June 20, 2003	The seven strategic objectives of the Legal and Judicial Reform Strategy are: 1. Improve the protection of fundamental rights and freedoms 2. Modernise the legislative framework 3. Provide better access to legal and judicial information 4. Enhance the quality of legal processes and related services 5. Strengthen judicial services , i.e. judicial power and prosecutorial services 6. Introduce alternative dispute resolution mechanisms. 7. Strengthen Legal and Judicial sector institutions to fulfil their mandates

⁵⁸ Council for Legal and Judicial Reform: *Legal and Judicial Reform (adopted by the Council of Ministers on June 20, 2003)*. Cambodia: Royal Government of Cambodia, 2003 (Hereinafter: LJRS). This document, in its Annex 2, includes an extract from Chapter 4, Section 4.4: Strengthening Institutions and Improving Governance. 4.4.4. Reforming the Justice Sector of the “National Poverty Reduction Strategy” (NPRS), p. 25-27.

⁵⁹ LJRS, Annex 2: NPRS, 2003: 25-27.

<p>3. Plan of Action, derived from the LJRS, Short-term priorities (2004-2005)</p>	<p>Short-term priorities (2004-2005) Streamline mechanisms for resolving minor disputes through mediation Activity 6.2.1. “Investigate into, build upon and strengthen other alternative and traditional methods of alternative dispute resolution.”</p>
<p>4. “National workshop on Implementation of the Legal and Judicial Reform Strategy” organized by the CLJR & the Legal and Judicial Technical Working Group (LJTWG). Phnom Penh, December 9, 2003⁶⁰</p>	<p>Conclusions and Recommendations of the workgroup related to Alternative Dispute Resolution Mechanisms/Legal Awareness:</p> <ul style="list-style-type: none"> ● There are two systems of alternative dispute resolution mechanisms (ADR on land and labour), which need to be improved, and other kinds of ADR must also be established. ● The role of the courts needs to be clarified in relation to the resolutions of the Cadastral Commission. ● There is a pressing need to carry out studies/research, including a survey on existing ADR systems in communities. The UNDP has agreed to finance this study. ● Public awareness must be made a priority (...).⁶¹

2.2. A human rights-based methodological approach

The human rights approach to access to justice has descriptive and prescriptive implications.

In the descriptive arena, this approach obliges the researchers to look for the social needs that people have, to describe better the social demand for justice. As indicated already, due to a lack of both rights awareness and confidence in the legal system, some social needs have not been expressed and defined as claims before a competent authority. However, these social needs nonetheless constitute part of the social demand for justice, notwithstanding that the demand is of a latent rather than explicit nature. So, it is important to go beyond popular perceptions of “problems” in general in order to know and understand what people do in fact suffer from. If the research study limits itself to merely “conflicts” or “disputes” and how are they managed, it will only be able to address those social needs which have been already translated into claims brought before an authority. It will leave unattended other situations of abuse of power (such as corruption) or violations of rights that people suffer but that they do not believe that can form the basis of a legal claim.

Because the target groups do not necessarily know their human rights, the research process is necessarily an interactive process. Part of the research activities need to be dedicated to informing the target groups about their rights so that participants can understand their needs in terms of rights. In short, the target groups must be able to express their needs as rights in order for the UNDP to be able to measure the capacity of the supply of justice services to respond to the social demand for justice in a fair and efficient manner. Consultation and participation lie at the core of a research methodology that has as one of its objective an appraisal of the *social needs* of the target groups, as the target groups define them. It is worth noting from the outset that participation has been recognised in Cambodia as a constitutional right.

⁶⁰ Council for Legal and Judicial Reform: *National workshop on Implementation of the Legal and Judicial Reform Strategy. Workshop proceedings*. Phnom Penh: Government of Cambodia, CLJR and the Legal and Judicial Technical Working Group (LJTWG), December 2003. (Hereinafter: *National Workshop on LJRS*). p. 2.

⁶¹ *National Workshop on LJRS*, 2003: 38.

From a human rights perspective, it is necessary to evaluate critically if and how justice services are able to overcome the influence of *de facto* power (economic, political, military, gender, ethnic, etc.), and if the mechanisms, processes, and outcomes of conflict resolution respect human rights, with special attention to some specific rights of vulnerable groups (prisoners, women, children, indigenous peoples, minorities, etc.). It is necessary to evaluate if the different mechanisms that provide justice services are sensitive to gender, ethnic, and linguistic issues. So, the evaluation of the supply of justice services should include an assessment of the adequacy of the justice services in those terms: for instance, if linguistic rights are enforced for ethnic minorities when they face legal processes; or if indigenous rules concerning land management are respected in the practice.

In the prescriptive arena, the human rights approach requires consultation with the target groups in order to propose recommendations in at least three fields. First, consultation is necessary in order to devise policies that aim at the empowerment of target individuals and groups (in particular those with less access to justice) so that such individuals and groups may be able to claim their rights and participate in the reform process concerning access to justice. People know their needs, but they require legal and rights awareness to translate their social needs into human rights, in order to be able to claim their rights and demand that the State fulfil its correlative duties. Second, consultation is necessary to improve the delivery of justice so that it: (i) responds better to people’s social needs, (ii) is more efficient, (iii) resists the pressure and influence exerted by *de facto* power over weaker parties, and (iv) respects human rights, especially those concerning to women, children, indigenous peoples and minorities. Third, consultation is required to improve the transparency and accountability of the justice services, and prevent corruption. As the social needs change and the content of rights becomes progressively greater, citizen participation must play a fundamental role in defining the social demand for justice.

Chart 10: Implications of a human rights approach in a research study on access to justice

Methodological Presuppositions	Descriptive implications <i>Analyse:</i>	Prescriptive implications <i>How to improve:</i>
<ul style="list-style-type: none"> ● Target groups: know their needs, have moral values & legal practices ● Human rights: must be informed ● Consultation and participation is necessary to address this issue ● Observation, other tools, and contrast of different sources information 	<ul style="list-style-type: none"> ● Social demand for justice: based on needs ● Supply of justice services: capacity to respond the social demand for justice in an adequate manner ● Human rights standards in processes and outcomes ● Equity: Capacity of justice services to overcome the influence of <i>de facto</i> powers 	<ul style="list-style-type: none"> ● Empowerment of target groups <ul style="list-style-type: none"> a) Legal and rights awareness: to understand social needs as Human rights b) Capacity-building to claim rights c) Capacity-building of justice services and strengthening leadership for legal reform ● Delivery of justice services to: <ul style="list-style-type: none"> a) Be more accessible, fair, efficient, and transparent b) Respond better to social needs, c) Respect human rights, especially the rights of vulnerable groups d) Overcome <i>de facto</i> powers ● Accountability: to control the abuse of power and corruption in the delivery justice services

2.3. Main objectives and outcomes

During the project design process, the UNDP saw the necessity of adopting a broader research framework than just the study of the so-called alternative dispute resolution mechanisms, in order to

have a better and fuller understanding of the challenges posed with respect to access to justice in Cambodia. Thus, this research study was designed to have a wider range of objectives than originally anticipated, but with a focus on more defined target groups. In addition, taking into account the necessarily participatory nature of a democratic reform, the project was designed to incorporate a research-action methodology, to empower people to participate in the improvement of the access to justice. Participation and consultation were taken as the essential and indispensable components of the research. Consistent with these themes, the project was reformulated as a research-action project on “Access to justice with a focus on the poor, women, and indigenous peoples”, with the following objectives and outcomes.

Main expected outcomes:

- a. Target groups better informed and empowered to participate in the ongoing reform process to improve access to justice.
- b. An overview of the main social problems and conflicts which comprise the social demand for justice, especially by the most disadvantaged, women, and indigenous peoples; and the different mechanisms used by the population to channel their demand for justice;
- c. A general evaluation of the supply of justice services, including the judiciary, the police, governmental authorities, ADR -the Cadastral Commission (CCo), and the Labour Arbitration Council (LACo)-, and community based conflict resolution mechanisms, considering customary law applied by indigenous communities in Cambodia;
- d. Recommendations to inform policy development in the field of access to justice, in particular relating to ADR and local justice;
- e. Other recommendations addressed to policy-makers and donors.

Chart 11: Main objectives of the Research

General Objectives	Specific objectives	Outcomes
1. To analyse the social demand for justice and evaluate the supply of justice services	Design and implement a research study to better understand: <ol style="list-style-type: none"> 1. The main problems and conflicts that comprise the social demand for justice, in particular related to the poor, women, and indigenous peoples. 2. The supply of justice services: A “map” of the different systems and conflict resolution mechanisms the population accesses and uses, especially the poor, women and indigenous peoples. 3. Evaluation of the impact of ADR and local justice. 4. Interactions and tensions between the different systems 	1. Overview of the social demand for justice and the supply of justice services, including an analysis of the interface between systems
2. To provide information to target groups in order to empower them and to promote their participation	Offer to target groups: <ol style="list-style-type: none"> 1. Information related to: a) the justice reform process, b) the right of “access to justice”, c) the right of “participation”, and d) specific women’s and minority rights 2. Legal and institutional information on the FSJ, ADR and local justice. 3. Comparative experiences 	2. Target groups informed and consulted about the legal and judicial reform process
3. To propose recommendations to inform policy development in the access to justice area, based on consultation	Elaboration of a set of proposals, based on consultation with the target groups, relating to: <ol style="list-style-type: none"> 1. Legal reform and institutional strengthening in order to: a) strengthen and institutionalise local justice, b) improve ADR, c) Improve the formal system of justice, to be more responsive to the needs of the poor, women and indigenous peoples; d) recognise indigenous law; and e) establish mechanisms for the coordination of the different justice services (<i>National System of Justice Services</i>) 2. Empowerment of the poor, women, and indigenous peoples through rights awareness 3. Capacity-building of justice services’ officials 	3. Set of recommendations to inform policy development on access to justice, including legal reforms, institutional strengthening, and rights awareness

2.4. Methodological features

Broad coverage: from the social demand for justice to the supply

This research study starts by asking people about the main problems and conflicts they face in general. But just some of those problems or conflicts are perceived by the people as “justiciable cases”, *i.e.*, cases suitable to be presented to a third person or agency to be resolved or managed in some ways. And finally, just a small proportion of those problems or conflicts are in fact submitted to an agency to be managed or resolved. This means that some serious problems or conflicts are not brought before a competent authority, due to the lack of rights awareness or confidence in the formal legal system, as well as due to a basic lack of access to justice in the sense that the formal system is prohibitively costly or difficult for target groups to access. Bearing these concerns in mind, this research study will first focus on how the social demand for justice is expressed and what it includes.

Having developed an understanding of the social demand for justice, the study then analyses the different avenues that people use to channel their problems and conflicts, and how these avenues respond or not to those problems and conflicts. These different avenues may or may not be regulated by law; *i.e.*, they may be formal or informal, or mixed. This study includes an analysis of the relevant legal framework, institutional implementation, legal culture, and practices of the different agencies (authorities or institutions) that currently deliver justice through mediation, conciliation or some form of adjudication. The study also includes an evaluation of the supply of justice services provided by the target groups, and their proposals to improve access to justice. In short, this research study seeks to report on both the demand for and the supply of justice services, and offers recommendations to improve access to justice.

Lesson learned:

This study confirms the importance of starting from the social needs of the people to evaluate the delivery of justice services. Most studies just address the management of particular conflicts by particular institutions, without considering that there are other social demands for justice that go unmanaged (such as violations of rights, corruption, and abuse of power). This is probably the only study that goes beyond conflict resolution, to cover other social demands for justice.

This study confirms the importance of addressing all the different mechanisms related to access to justice, in order to obtain a panoramic view of all the mechanisms available to the individuals and groups.

It is important to study the police as one of the key players in conflict resolution.

Exploratory and panoramic, but with a focus on the poor, women and indigenous peoples

The study’s methodology aims to provide a panoramic overview of the most significant problems relating to access to justice, mostly in rural areas, with a focus on the local level. Special attention is paid to the problems faced by Cambodia’s most disadvantaged groups. This study seeks to explore the systems and mechanisms of justice that exist at present in Cambodia, and how these mechanisms and systems respond to the social demand for access to justice. Because the methodology contemplates a broad range of subject matter, rather than in-depth analysis of a specific problem, the research is exploratory and panoramic, rather than exhaustive.

Although this research study is panoramic, it concentrates on the needs of the poor, women, and indigenous peoples. The vast majority of the population of Cambodia live in rural areas (84%), but receive just 1/3 of national income.⁶² So, most of them are poor, and at least one third live under the

⁶² The population of Cambodia’s rural area is estimated in 84.3% (NIS) and the labour force in the agriculture sector is calculated in 75 %. Nevertheless, the participation of the agriculture sector in the Gross Domestic Product reaches just 35%, *i.e.* 1/3 of the GDP (estimations for 2003). USA Government: *The World Factbook*, Cambodia, in website: <http://www.cia.gov/cia/publications/factbook/geos/cb.html> (visited: April 25, 2005)

poverty line. Women constitute approximately 52% of the population and, in a significant percentage, they experience gender discrimination and violence on a daily basis. Indigenous peoples in Cambodia constitute a minority of the total population of the country (around 1-2%), but they are the majority in a couple of provinces (Mondulakiri and Ratanakiri). Even in the provinces where they constitute the majority of the population, indigenous peoples suffer serious threats to their mere existence as peoples due to the loss of their material and cultural means of living, and the lack of respect of their languages and cultural identity. In summary, this research study pays attention to socio-economic, gender, and cultural conditions of the most disadvantaged groups in Cambodia. There are other subjects in serious danger who deserve attention too, such as children, elders, prisoners, young offenders, and refugees; but this study cannot cover in depth all of Cambodia's disadvantaged groups.

Lesson learned:

This study confirms the importance of addressing the needs of specific target groups: the poor, women and indigenous peoples.

It is necessary to study in depth indigenous law, as well as conflicts in urban areas (e.g., conflicts related to housing, traffic accidents, and police management of complaints), and youth issues (domestic violence, and juvenile gangs, violence, the youth criminal process).

Synchronic methodology (not diachronic)

Due to the limited timeframe of this study, the methodology used is mainly focused on the problems and proposals that exist at this time. In other words, this study is synchronic rather than diachronic. The history of Cambodia and references to past mechanisms of conflict resolution constitute a necessary framework for this research project, but do not constitute its object of study. This research study does not seek to analyse past mechanisms of conflict resolution that are no longer in use. These have been the subject matter of other studies,⁶³ and would require more time than is available for this project.

Participative methodology and research-action approach

The methodological approach of the research project is human rights based. The methodology explicitly adopts a "research-action" approach because one of the objectives of this project is to empower the target groups in order to promote their participation in the ongoing reform process. The methodology incorporates specific tools to ensure a process of participation and consultation. It took place through workshops and interviews. Participation permits proposed reforms to respond to the social needs, languages, and cultures of all the citizens and groups. These tools provided Cambodians an opportunity to exercise their constitutional right to participate in the judicial reform process. The Constitution (Article 35) establishes that: "Khmer citizens of either sex shall have the right to participate actively in the political, economic, social and cultural life of the nation. Any suggestions from the people shall be given full consideration by the organs of the State."

Workshops offered an opportunity for self-diagnoses of problems, debate, and the development of proposals. Some tools were oriented to "take information" from the subjects about their main problems (the social demand for justice) and how the different dispute resolution systems work (the supply of justice services). Others were established to "give information" to the participants about their rights relating to access to justice, and the current legal and judicial reform. Finally, some tools seek to offer a space for debate and the development of proposals. Citizen awareness of rights, as well as understanding of national events, are the principal tools that can enable citizens and grass roots organizations to participate more effectively in the improvement of access to justice. In this way, the current reform will respond better to Cambodian's social needs.

⁶³ See: Luco, Fabienne: *Between a tiger and a crocodile. Management of local conflicts in Cambodia. An anthropological approach to traditional and new practices*. Phnom Penh: UNESCO, 2002; Hughes, Caroline: *An investigation of conflict management in Cambodian villages. A review of the literature with suggestions for future research*. Phnom Penh: Centre for Peace and Development, Cambodia Development Resource Institute, 2001.

This study consulted with: rural inhabitants, women, and indigenous peoples. In addition, both officials and clients of current ADR mechanisms (Cadastral Commission and Labour Arbitration Council); village chiefs and commune council members; policemen and judges; indigenous elders; Non-Governmental Organisations (NGOs), international agencies, and reform stakeholders were also consulted.

The process of design, implementation, monitoring, report writing, and validation of this research study was also conducted in a participatory manner. The members of the institutions partners of this research study (the Council for Legal and Judicial Reform, the Ministry of Justice, and UNDP Cambodia) as well as other stakeholders have had the opportunity to contribute and learn throughout this process.

Lesson learned:

Local workshops should be organized first for similar groups, such as: women, indigenous peoples, minorities, etc. In the latter case, these workshops should be in their own languages. In a second phase, the workshops may be mix, including with local authorities; later the regional or national level. It would be important to promote also national workshop just for women or indigenous peoples, and later with other stakeholders. Making the participation “meaningful” requires previous empowerment of the most disadvantaged groups.

Quantitative and qualitative research methods

This study uses quantitative and qualitative methods of research, including field research and the case study method. Given the limited timeframe available for this research study, it does not pretend to be ethnography. Nevertheless, this study brings together a substantive body of information from the field as well as institutional data. This report is mainly based on that information. The consultation process and the collection of written material was possible due to the collaboration of governmental and non-governmental institutions, local authorities, international donors, centres of investigation, academics, workshop participants, and interviewees.

2.5. Methods and tools

This research study includes the following methods and tools:

Desk study and document analysis

We have collected and analysed the most relevant literature available relating to the study’s subject matter. This literature includes: legislation, studies, reports, official statistics, surveys, workshops proceedings and projects. We have reviewed books, magazines, “grey” literature, and digital information.

Survey

As part of the field research, a survey has been designed and implemented. It addresses five specific target groups: 1) Formal justice officials, such as judges, lawyers and policemen; 2) Local authorities, such as village chief and commune council members; 3) Alternative Dispute Resolution officials and clients (Cadastral Commission and Labour Arbitration Council); 4) Women, and 5) Indigenous people. This survey has been conducted in four provinces: Kampong Chhnang, Kampong Speu, Mondulhiri and Siemp Reap. Indochina Research Ltd. (IRL) was commissioned by the UNDP to carry out the survey. IRL prepared five questionnaires in Khmer and English. Khmer-speaking interviewers have collected the information locally. Then, it was systematised in English using a web-based database. The final report is in English and Khmer. The results are useful for illustrative purposes, to support or contrast information gathered through other sources and methods. This survey has also produced several “lessons learned” that will be useful for future surveys of this nature.

Lessons learned:

- a) The survey's point of departure relied on the concepts "formal/informal" to organize questions and answers. Under the category "formal" the survey included judges, prosecutors and the police. And, under the category "informal" the survey contemplated ADR, local authorities and indigenous authorities (elders). These broad concepts, it turns out, are confusing and misleading.⁶⁴ We do not recommend using those categories for a survey or research in the future. For instance, the police promote conciliation as a regular practice in many criminal cases, which is against the law, and in this sense, "informal". So, bringing the case to the police does not necessarily mean bringing the case to a "formal proceeding" given that the local practice is, from a legal point of view, "informal".
- b) The survey put together "indigenous peoples" and minorities. We do not recommend doing this again. The former usually have their own authorities and procedures for conflict resolution within their communities, and have a defined territory, which does not happen with the immigrant minorities (Vietnamese, Chinese, Muslim, etc.). Immigrant minorities do not have "their own authorities", but indigenous peoples do, so they each may have different perceptions and recommendations in relation to local authorities. Another example: the questions related to the knowledge of "indigenous law" was confused with the question about "minority rights". Minorities have specific rights such as linguistic or cultural rights, but they do not have collective rights to common lands or traditional authorities (rights to which indigenous peoples may claim).
- c) We do not recommend putting together institutions of ADR established by law (such as the Cadastral Commission or the Labour Arbitration Council) with local authorities. In each case, the sources of their legitimacy, their behaviour, kinds of matters they manage, and the results they obtain are very different.
- d) We encourage including broad questions in the surveys related to the "main problems" people suffer, and not focussing exclusively on "conflicts" or disputes. Most surveys of the kind conducted for this study focus on conflicts, so they miss a very important part of the social demand for justice such as corruption or violations of individual and social rights, or the potential demand for justice. In this study those broad questions were considered and their consideration permitted a wider comprehension of social needs (poverty, corruption, etc.). Nevertheless, in the survey, only women were asked if they suffered domestic violence, but that question was not included as a possible problem for the rest of the target groups. In workshops and from other sources domestic violence appears as one of the two most serious problems in the country, along with land conflicts.
- e) It is necessary to do some previous research, such as focus groups, before launching a survey, in order to test the assumptions behind the survey questions (for instance, to test the categories "formal", "informal").

Selected interviews

Semi-structured and open interviews have been carried out in order to obtain qualitative information from communal authorities (commune/village/indigenous communities), leaders of grass-root organizations, women, functionaries (Judges, prosecutors, lawyers, policemen), ADR officials and arbitrators; and parties involved in cases before the judiciary, ADR, local authorities, and indigenous conflict resolution systems. We have also interviewed NGOs, researchers, stakeholders, donors, and

⁶⁴ The same classification appears in UNDP Asia Pacific, 2005. We recommend do not use that classification.

other relevant parties. Most of these interviews have been recorded and transcribed in English and Khmer. The interviews have been conducted in Kampong Chhnang, Kampong Speu, Mondulkiri, Siemp Reap, Kampong Thom, Banteay Meachey, Udar Meanchey, Ratanakiri, and Phnom Penh.⁶⁵

Lessons learned:

we needed to include more interviews with women and indigenous individuals.

Field study and case-study

Although this study is not ethnography per se, it uses an ethnographic approach. It includes field research in 8 provinces, with different levels of depth. The field studies conducted outside Phnom Penh lasted from one-week to almost one month. Extended stays and the survey were conducted in the following: Kampong Chhnang, Kampong Speu, Mondulkiri and Siemp Riep. Short field visits without the survey took place in these jurisdictions: Kampong Thom, Banteay Meanchey, Udar Meanchey, and Ratanakiri. Some data collection, case-observation and interviews were also conducted in Phnom Penh. The field study would typically include: a) visits to communes and villages; b) interviews with all relevant judicial, governmental, and ADR officials; local authorities and elders; parties in conflict, lawyers, and NGOs; c) case observation of conciliations or trials; and d) collection of various documents, such as judicial reports, conciliation processes, and agreements. We have collected some commune council's books where they register complaints, minutes of the conciliation sessions, and agreements between the parties. The cases we could observe helped us obtain a better understanding of the process, outcomes, timing, and behaviour of the parties involved in the conflicts we observed. We were able to observe cases resolved by different kinds of bodies (local authorities, Cadastral Commission, Labour Arbitration Council, and Courts) at all levels (village, commune, district, provincial, and national), and we were able to follow up on some of them to check on the enforcement of the solution or agreement. We have observed just a few cases, but we complemented these observations in a sample of communes with interviews of the parties and an analysis of agreements reached, in order to give us direct information on local conflict resolution practices.

Lessons learned:

- a) This research study confirms the importance of an ethnographic approach.
- b) It is necessary to spend quite a long period of time in each area to follow: i) local conflictivity and its evolution, ii) long term conflicts in major land or labour conflicts, as well as in domestic violence; iii) management and perception of daily-life corruption and major corruption, and iv) perceptions of violations of human rights, in particular in relation to social rights, such as lack of access to public education and health due to corruption.
- c) We could not observe cases before the police. It would be useful to do that.
- d) It would be fruitful to compare "registered cases" with non-registered cases before local authorities.
- e) It would be beneficial to do ethnographic research to cover: indigenous communities in depth, urban areas, juvenile problems, and minority problems (in particular with Vietnamese, and other disadvantaged minorities).

Consultation workshops

The organization of three consultation workshops at the local level, and one at national level, plays a central role in the methodology. The national workshop let us consolidate the information gathered in the local workshops, and have a "national view" of the problems the study unearthed. As well, the national workshop permitted us to discuss broad proposals built upon local recommendations and

⁶⁵ See the list of interviewees in the Annex III: Interviews with authorities, NGOs, and justice service users.

developed with the input of participants from the local level. In total, around four hundred people have participated in these consultation workshops. In summary, the workshops have been useful for: a) taking information from the participants, b) giving them information and empowering them to participate in the current judicial reform, and c) debating and developing proposals and recommendations.

Lessons learned:

- a) It is necessary to have preliminary workshops with similar participants, such as women, indigenous peoples, minorities, etc., in the language of the participants, and later with authorities.
- b) The presence of authorities in local workshops under a “neutral ambiance” called by the UN to permit a space for villagers to ask questions of, or challenge, the authorities directly, as there are few or no other opportunities for doing so. The villagers took advantage of the presence of these authorities to learn about some decisions in particular cases as well as to inform themselves about the law. This exercise of democracy shows the importance of more long term and institutionalised instances of civil participation with the authorities to resolve access to justice and other social problems. These kinds of spaces offer the opportunity to demand accountability from authorities. They could be also an opportunity for cooperation in the resolution of local problems and strengthening of the transparency of public administration.
- c) The workshops confirm the importance of offering information on human rights to the participants, so that participants may systematise better their experiences and offer proposals. Do not organize focus groups or workshops just to “take” information from participants, as “objects” of study, but let them appropriate the process of consultation, as “subjects” of it.
- d) Prepare audio-visual materials for barely literate and illiterate persons such as elders, women, etc.

Validation and revision

At different steps of the study there were specific mechanisms of validation; i.e. evaluation and adjustment of the research study conducted in close consultation with partner institutions and stakeholders. Validation took place at several moments of the study, including: a) after the presentation of the outline in June 2004 (internal); b) after each workshop and field study trip (November- December 2004); c) at the end of the first part of the field research, in December 2004 (with stakeholders), d) at the end of the systematisation and first draft of the findings, in April 2005 (internal), and May 2005 (with partners); e) throughout the writing process, with partner institutions (May-June 2005); and (f) at the end of the research, in June 2005 (with stakeholders and workshop participants). After each process of validation, there was a revision to take account of the results of the validation process.

Lesson learned:

The validation was crucial. Many participants were interested in expressing their opinions. It would be useful to program validations at the local level also.

Chart 12: Summary of the methodological approach and tools

4.1. General features of the research project	<ul style="list-style-type: none"> a. Broad coverage: from the social demand for justice to the supply b. Exploratory and panoramic, but with a focus on the poor, women and indigenous peoples c. Synchronic methodology (not diachronic) d. Participative methodology and research-action approach
4.2. Kinds of methods: Quantitative/ Qualitative	<ul style="list-style-type: none"> a. Desk study and document analysis b. Survey: in 4 provinces: Kampong Chhnang, Mondulkiri, Kampong Speu, and Siem Reap, carried out by Indochina Research Ltd. c. Selected interviews in 8 provinces, including Phnom Penh. d. Field study and case-study in 8 provinces. Field studies outside Phnom Penh lasted from one week to almost one month: a) extended stays and survey: Kampong Chhnang, Mondulkiri, Kampong Speu, and Siem Reap, b) short stays: Kampong Thom, Udar Meanchey, and Ratanakiri, c) Case observation, interviews, national forum, and data collection in Phnom Penh. e) Consultation workshops: 3 local workshops in 3 provinces: Kampong Chhnang, Mondulkiri, Kampong Speu, and one National Forum in Phnom Penh.
4.3. Validation and feedback	<ul style="list-style-type: none"> a) Validation with partners, stakeholders and target groups b) Revision c) Edition

3. Research study data

3.1. Calendar of Activities

The research study design (project outline, tools and guidelines for the field study, survey and workshop), the bidding process to hire the institution in charge of the survey, and the personnel hiring were carried out from May to August 2004.

Most of the activities of the research project were carried out from September to December 2004, including the desk study, the survey in 4 provinces, field studies, trips to 5 provinces, interviews, and workshops in 3 provinces, and one national forum.

A Preliminary Report was drafted by the middle of January 2005 and revised in April 2005. All the data collected was systematised from January to March 2005 by the research team. Some case-observation also took place during this period.

From April to June 2005, some field visits and interviews were completed. During that time, the Final Report was written, in a consultative process with partner institutions. It was followed up by a validation session with stakeholders and revision by partner institutions.

Phases & Calendar

Phase	Date	Activities
I. Project Design & work organisation	May- August 2004	<ul style="list-style-type: none"> - Terms of reference - Desk review - Project design & tools - Consultant hiring process - Bidding process for survey
II. Preliminary Field Study	September- October 2004	<ul style="list-style-type: none"> - Completion of desk study - Field research in 3 provinces - Survey design

III. Field Study, Survey, and Consultation Workshops	November December 2004	<ul style="list-style-type: none"> - Field study in 4 provinces - Visit to other provinces - 3 Local Workshops - 1 National forum - Survey in 4 provinces - Preliminary Report
IV. Data systematisation	January- March 2005	<ul style="list-style-type: none"> - Case-observation - Preliminary report - Workshops systematisation - Document translation - Interview transcriptions
V. Final Report writing	April- July 2005	<ul style="list-style-type: none"> - Completion of interviews & data collection - Field visit to complete information on indigenous peoples - Consolidation of data - Draft report - Revision sessions with partners - Validation session with stakeholders - Final report

3.2. Human Resources

UNDP team

UNDP Staff	Person in charge	Period
UNDP Personnel	<ul style="list-style-type: none"> - Beate Trankmann, chief of Governance Cluster - Sara Ferrer, HR Officer in charge of the project - Narin Sok, program manager 	Permanent
UNDP support Staff	<ul style="list-style-type: none"> - Personnel from the Service Centre, Finance, Communications, and Transport 	Permanent
UNDP Research team		
International consultant, Team Leader	<ul style="list-style-type: none"> - Raquel Z. Yrigoyen Fajardo 	May 2004- July 2005 (193 working days)
National consultant	<ul style="list-style-type: none"> - Kong Rady 	September 2004- July 2005 (11 months)
Interpreter-research assistant	<ul style="list-style-type: none"> - Phan Sin 	November 2004- July 2005 (9 months)
3 Local research assistants for field study and workshops	<ul style="list-style-type: none"> - Mrs. Ouch Bo, Kampong Speu - Mrs. Puth Theavy, Kampong Chhnang - Mr. Em Veasna, Mondulkiri 	October-December 2004 (15 working days)
Driver	<ul style="list-style-type: none"> - Da Raseng 	Throughout the entire project
UNDP Bangkok Regional Office, consultant	<ul style="list-style-type: none"> - Basnyat Aparna 	Support at one local workshop and the national forum

Partner institutions

Partner institution	Participation
Ministry of Justice	Project partner Participation in one local workshop and co-organization of the National forum Follow up of final report and validation - H.E. Neou Kassie, Secretary of State, Ministry of Justice

Facilitator Institution	Participation
Project Management Unit (PMU) of the Council for Legal and Judicial Reform (CLJR)	Project partner Co-organization of the local workshops and National Forum 10 professionals of the PMU participated in the workshops as facilitators and speakers PMU members who participated in the workshops and forum: - H.E. Suong Leang Hay, Deputy Director, PMU - Mr. Pen Bun Chhea, Deputy Director, PMU - Mr. Buon Somony - Mss. Huong Sokol - Mr. Ching Phengsroy - Mr. Chhe Ly - Mr. Chhong Hout - Mr. Khlok Dara - Mr. Kong Phallack - Mr. Kauy Sao

Other Institutions	Participation
Indochina Research Ltd.	IRL carried out the survey in 4 provinces. - Stefano Magistretti, IRL - Ingrid Fitzgerald, IRL project manager UNDP officers and the research team monitored the survey.
NGO – Workshop coordination	Mr. Pen Sy, Mondulkiri (VIGILANCE) Mr. An Phin, Kampong Speu (ADHOC)
Local authorities, judges, governmental authorities, and non-governmental organizations	Judges, prosecutors, District and Provincial governors, commune council members, village chiefs, cadastral officers, mediators, arbitrators, and non-governmental organizations participated and collaborated with the organization in each local workshop and other research activities
National and international organizations	Different organizations collaborated in different ways in the organization of the National Forum and with the research project in general

3.3. Main activities and outcomes

Activity	Outcomes	Persons in charge	Date
Project Design			
Terms of Reference		- UNDP officer	
Desk study Project Outline Tools Guidelines	1. Project Research Outline (2 versions) 2. Legal framework 3. Tools for Field Study, Desk Study, and Survey 4. Workshops guidelines	- International consultant	May- June 2004

Desk Study			
Complementary desk study	1. Desk study report on legal framework 2. Country data study 3. Charts of judiciary, Cadastral Commission & LACo	- National consultant	Sept. 2004
Survey			
- Bidding process	ToR	UNDP officer	July 2004
- Tools design phase.	Questionnaires for 5 target groups 1. Authorities 2. ADR: officials and clients 3. Community authorities 4. Women 5. Minority	- Indochina Research Ltd. - Feedback: UNDP officer & Research team	August-October 2004
- Field work	Survey in 4 provinces: Kampong Chhnang, Mondulkiri, Kampong Speu & Ratanakiri	IRL	Nov.-Dec. 2004
- Preliminary report	- Power Point presentation (at the National Forum)	IRL	Dec. 2004
- Final report	- English version - Khmer version	IRL	April 2005
Field & case-study			
Field study and workshop organization in 3 provinces	3 written reports of Field Study - Kampong Chhnang report - Mondulkiri report - Kampong Speu report Around 50 people Interviewed	- National consultant and research assistants	Oct.- Nov. 2004
Complementary field study in the 3 mentioned provinces, and visits to other locales to observe conflict resolution	- Visits to Kampong Chhnang, Mondulkiri, Kampong Speu; - Visit to Siem Riep - Visit to CLEC mediators project in Kampong Thom - Collection of conflict resolution books, minutes & agreements at village, commune & District level	Research team	Nov.- Dec. 2004
Case-study Observation of conflict resolution cases in 5 provinces	- Visit to BFD project in Banteay Meanchey and Udar Meanchey province - Report on 7 case-observations in 5 provinces: Kampong Speu, Kampong Chhnang, Kampong Thom, Udar Meanchey, and Phnom Penh	- National consultant, research assistant and PMU members	January – March 2005
Complementary field visit to indigenous peoples	- Visit to indigenous community, ADR & judiciary in Ratanakiri	Research team, UNDP officer & PMU member	May 2005
Interviews			
Interviews in depth	- Interviews in 8 provinces - Around 150 interviewees	- Research team - Translator	Sept. 2004- May 2005

Consultation Workshops			
3 local: Kampong Chhnang, Mondulkiri, Kampong Speu	Materials delivered in workshops - Agenda	- Research team, UNDP personnel, PMU & MoJ	December 10-22, 2004
1 National Participants from 9 provinces: hnomPenh, Kampong Chhnang, Mondulkiri, Kampong Speu, Siemp Reap, Kampong Thom, Kratie, Takeo, Kandal	- Cover, index - Guidelines for working groups - Guidelines for facilitators - Handouts for 5 topics - Power point presentations (5) - Registration forms (2 forms) - Speeches - Talking points, & other materials Total participants: 380	- Research team, UNDP personnel, PMU, MoJ & stakeholders	Dec. 16-17, 2004
Data Systematisation			
Workshops	Systematisation guidelines	Int. consultant	Nov.2004
	Consolidating report on main findings from local workshops	Research team	Dec.2004
	Systematisation of local & national workshops in Khmer - Translation into English	- National consultant - Translator	January 2005
Translation of documents	- Translation of 70 documents (related to case study, court reports, and conciliation process) from Khmer into English	Translator-research assistant (RA)	January- March 2005
Transcription of interviews	- 31 Interviews of approx. 70 interviewees transcribed in Khmer & English	Translator-RA	May- June 2004
Systematisation of conflict resolution documents	Systematisation of commune council books and other documents related to conflict resolution	National consultant and Translator-RA	April 2005
Systematisation of statistic data and legal research	- Court and prison statistics - Cadastral Commission statistics - LACo statistics - legal research	National consultant	April – May 2005
Systematisation of country data	- General data on poverty, women, and indigenous peoples	National Consultant and Translator-RA	April-May 2005
Report writing			
- Preliminary Report	- First draft - Second draft	International consultant	- Dec. 2004 - Jan. 2005
- Revised version	- Preliminary report revised	Research team	April 2005
- Final report writing	- Outline of final report - Draft of Chapter by chapter	Research team	April- June 2005
- Revision with partners	Revision of Preliminary report, and chapter by chapter of the Final Report, with Partners	UNDP, PMU & MoJ	April-June 2005
Validation	Validation session	- Stakeholders	June 2005
- Final report	- Revision - Completion of Final report - Book edition	- UNDP & Research team	July-Aug. 2005 Sept. 2005

Other activities			
- Administrative - Attendance to meetings or workshops	- 12 Updating / Progress Reports - 5 Administrative Reports - Dissemination materials - Attendance to other institutions' workshops & meetings	- International consultant - Research team	June 2004- August 2005

Consultation workshops data

Workshop (place)	Date	Men	Women	Total
Kampong Chhnang	November 10-11, 2004	34	16	50
Mondulkiri	November 16-17, 2004	48	19	67
Kampong Speu	November 22-23, 2004	41	24	65
Organizers of local workshops		15	5	20
National Forum in Phnom Penh	December 16-17, 2004	142	36	178
Sub total3		280	100	380
Validation Session in Phnom Penh	June 23, 2005			135
Grand Total				515⁶⁶

4. Limits of the research study

This research study includes information taken directly from field studies in 8 provinces of Cambodia, so it does not pretend to reflect the reality of the entire country. Some information refers to the whole country, such as statistics related to the courts, prosecution offices, Cadastral Commission and Labour Arbitration Council. The information on commune councils and village chiefs refers to those visited or interviewed by the research team. The reality reflected here is mostly related to the situation of the poor, women, and indigenous peoples in the countryside. It does not include a study of conflict resolution in the cities.

This study uses an ethnographic approach, but it is not ethnography per se. The field studies and the different tools used reflect different levels of depth and coverage. The survey was conducted in only 4 provinces. The local consultation workshops were carried out in 3 provinces, and one national forum. The field studies outside Phnom Penh, including the case study method and workshops, lasted from one week to one month. The case study method and case observation took place in 7 provinces. The research team and some members of the PMU observed cases resolved or managed by different bodies (local authorities, ADR, courts) and at all levels (from local to national), but they constitute just some samples to give us an idea of conflict resolution in practice. It was not possible to observe a broad range and significant number of cases at the same level for the purposes of statistical evaluation and comparison. We were not able to observe cases resolved by the police nor the district governor. We have collected and systematized several books of different communes in 4 provinces, so our opinion of the formalization of the conciliation process reflects practices observed and evidence collected from mostly those communes. We are aware that the books reflect some of the cases dealt with in those communes, and the form they are written in reflects just some part of the local reality. The field trips and interviews in depth were carried out in 8 provinces. The field trips include interviews with almost all authorities and parties involved in conflict resolution, such as judges, prosecutors, prison directors, provincial and district governors, Cadastral Commission officers, police at district and commune level, commune councils and village chiefs, indigenous communities and authorities; users of the different

⁶⁶ The number of participants who attended the local and national events is 401. As some of them participated in more than one event, the number reaches 515. See: Annex IV.5 List of people consulted in workshops.

systems, prisoners, NGO lawyers and activists, and victims. Nevertheless, we could not observe all of those institutions in practice.

The methodology of the study let us know the social needs that comprise the social demand for justice, beyond specific conflicts. This was very important. Nevertheless, a long-term study would be useful to analyse the moral justification and cultural values related to justice issues among the different sectors (women/men; adults/youth, etc.), ethnic, as well as religious groups. This requires in depth linguistic and cultural research to understand both cultural values and the moral justifications relevant to the target groups of potential claims. That kind of study is also necessary to build the basis of a long-term intervention based on inter-cultural dialogue, in relation to domestic violence, corruption, juvenile violence, and other matters.

In relation to indigenous communities, this research study reflects the field visit to the provinces with the highest indigenous population, Mondulkiri and Ratanakiri. Only in the former did we conduct a consultation workshop. In the latter we had the opportunity to interview the provincial authorities as well as an entire community that had land alienation problems. In both provinces we carried out interviews in depth with indigenous authorities, as well as with members of the community who were parties in conflict resolution processes. These interviews dealt with indigenous conflict resolution mechanisms. Nevertheless, we did not have the opportunity to do case-observation in these provinces. The survey conducted by IRL was carried out only in Mondulkiri. The IRL Survey covered indigenous persons as well as members of minorities (mainly Vietnamese), so the results reflect both approaches. We had the opportunity to participate in workshops where indigenous peoples voiced their demands (ILO Consultation Workshop, May 6, 2005; Policy draft workshop, July 10-11, 2005), but we consider that an important future research must include an ethnographic research on indigenous law, and a consultative process on how to articulate indigenous conflict resolution systems with the national system of justice.

In relation to women, they were invited to all consultation workshops, and they raised their specific problems. Women also constitute one of the target groups of IRL Survey. In addition, we interviewed NGOs dedicated to women's rights. Nevertheless, this study mostly reflects the situation of women in the countryside, not in the cities.

The proposals and recommendations found in this study reflect those produced in the field studies, the consultation workshops, and the validation sessions with partners, stakeholders and interviewees. In total, there were representatives of 11 provinces (out of 24) in the national consultation workshop and validation session.