

Programming for Justice: Access for All



**A Practitioner's
Guide to a Human
Rights-Based
Approach to
Access to Justice**

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Approach to Access to Justice**

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FOREWORD

The Hon Justice Michael Kirby AC CMG*

I like this book. It aims to help officials, aid agencies, civil society organizations and judges and lawyers to fulfil the true purposes of law.

The book has grown out of the fine objectives of the United Nations Development Programme (UNDP). I honour UNDP and the officers who work within it. Truly, they participate in an agency that takes seriously the fundamental purposes of the United Nations organization, declared in the Charter. From the start, the United Nations has been founded on the tripartite principles of attaining peace and security; upholding human rights and fundamental freedoms; and promoting economic equity and justice. The subjects of this book are important for the promotion of these objectives. Attaining them is essential to building a better, safer and more equitable world.

I have seen UNDP at work in the post-conflict situation in Cambodia; in the changeover to multi-party democracy in Malawi; and in a myriad of programmes in many other lands. The people of the world thirst for real justice and not just words and shibboleths. This book is aimed at responding to that thirst. It has taken a practical, simple and hands-on approach.

At the threshold there is a fundamental challenge in preparing a book such as this. It must be capable of being used in many lands, specially in the Asia-Pacific region. Yet the diversity of legal systems, the sharply differing institutions and rules of law, the disparate cultures, religions and values and the divergent traditions of the respective judiciaries and legal professions to whom the book is addressed make it difficult to state general rules. Hence, I like the fact that the book is based on the concept of lessons, not prescriptive rules.

For instance, in the opening of the book, reference is made to a hierarchy in which constitutional and international law are placed above the ordinary rules of national and local law and the common law. Yet in many countries, including within the Asia-Pacific region, international law remains a poor cousin of the established national legal systems. The dualist theory still tends to banish international law to the periphery of practical concerns. Even where there is a fundamental conflict between national (including constitutional) law and the international law of human rights, it may be the duty of local judges and lawyers to uphold the national law.

This problem arose recently in my own court in Australia. It appeared fairly clear that a federal law that required automatic detention of infant aliens who arrived or stayed in Australia without proper visas, was in conflict with international law, including provisions of the Convention on the Rights of the Child. Yet because the national law was held to be clear and within the constitutional powers of the Australian Federal Parliament, it was upheld. It had to be obeyed within Australia. The most that the court could do was to call attention to the disparity between Australian law and the country's international obligations under international law.

Nowadays, communications about such disparities can often be taken by those affected to regional or international human rights courts or other bodies. National courts will commonly try to avoid, or reduce, such disparities. The influence of international law upon national law is increasing all the time. Even in the sphere of constitutional law, the Supreme Court of the United States, in a legal culture traditionally isolationist, has been looking closely and beneficially at the international law of human rights to cast light on the meaning of the American Constitution. So this is an age of transition in the law. But the tension between the two worlds cannot be brushed aside by judges and lawyers. The rule of law means that judges and lawyers must uphold the governing law, once it is ascertained.

* *Justice of the High Court of Australia. One-time President of the International Commission of Jurists*

I like the fact that this book inserts in its text practical examples from many countries to illustrate its themes. Thus, there are notes on pertinent developments in Bangladesh, Cambodia, Nepal, the Philippines, India, Timor Leste and Viet Nam. Concrete illustrations will help readers and users of this book to view their problems in context and to take heart from instances where the justice system has been improved.

I also like the fact that the book is strong on practical measures for translating the aspirations of international human rights law into practical means of assuring access to justice for all people. Thus, there are useful notes on expanding alternative dispute resolution; on promoting the use of information technology in court registries; on coordinating the initiatives of donor agencies; on helping in judicial training in ways that respect the independence of the judges from propaganda; on tackling corruption; on promoting public interest litigation; and on teaching people about their rights and how they can use the courts to repair violations and to promote the entitlements of the vulnerable.

There are also useful chapters on particular groups who need added help to turn the legal system into an instrument of justice. These include women; indigenous peoples; immigrants and displaced persons; people living with HIV and AIDS; and people with physical and mental disabilities. Yet these groups do not exhaust the classifications of human beings who often miss out in protection of their rights within the legal order. Other such groups include illiterate persons; religious minorities; injecting drug users; prisoners and detainees; homosexuals and other sexual minorities; and commercial sex workers.

The principle of "equal justice under law," carved into stone over many a courthouse, needs to be translated into action in our world. And we have to realize that gaining real access for all to the justice system is only the beginning of the attainment of justice. Thus, many people who, after a struggle, obtain access to courts, find indifference to their concerns; lack of sympathy for their vulnerability; antagonism to their claim of rights. Or they find that the law is completely out of date, with no reform mechanism to improve it and no real interest to repair its injustices and inefficiencies. Sadly, it is in such circumstances that corruption breeds; because corruption is all too often the solution that economics provides to remedy outdated, unjust and inefficient laws. We do not cure corruption only by imposing big punishments. We must tackle the inflexibilities of the justice system with precisely the same energy with which we endeavour to promote access to it.

I welcome the instruction of this book to its readers never to lose sight of the big picture; always to encourage participation of affected groups; to attend to minorities; and to promote institutional change. Sixty years ago, a great Australian Chief Justice, Sir John Latham, said that it was comparatively easy for legal systems to uphold the rights of majorities and the powerful. The real test comes when they are asked to protect the vulnerable, minorities and the weak. This remains true today. This practical book suggests ways in which judges and other actors can rise to the challenge. Doing so, they will bring to bear that happy blend of idealism and practicality that is the hallmark of a justice system worthy of that noble name.



*Michael Kirby
18 March 2005
High Court of Australia
Canberra*

PREFACE

The linkages between human rights and development have been highlighted by a growing amount of literature over the past few years. However, handbooks that provide practical guidance on how to link the two are still rare. In this context this Practitioner's Guide, Programming for Justice: Access for All, provides an excellent and long overdue contribution in highlighting practical linkages between the different components of the justice sector and the normative framework of human rights. This Guidebook primarily addresses UNDP staff who have the responsibility of supporting programmes to secure the human rights of people afflicted by poverty and other disadvantages in developing countries. It would be useful also to their counterparts in governments and civil society organisations.

The Guide has been produced by UNDP's Asia-Pacific Rights and Justice Initiative. UNDP embarked on this endeavor in August 2002 to engage in systematic knowledge sharing with one of the intended end results to produce a handbook with practical suggestions for implementing access to justice programmes. Since then, facilitated by the Bangkok and Kathmandu SURFs, half a dozen regional workshops have been held, hundreds of projects have been screened and "deconstructed" to codify useful lessons and a multitude of ideas have been exchanged on the access to justice knowledge network. Meanwhile, the Initiative has continued to grow, with 16 UNDP country offices and more than 30 UNDP country office practitioners now involved in the Initiative, sharing their knowledge and experience with each other.

Two aspects of the Initiative need to be highlighted because they were instrumental in preparing this Guide:

First, a UNDP community of practice was at the heart of the undertaking, meaning that the generation, codification and dissemination of knowledge happened primarily through practitioners rather than theoreticians. We believe that the practical orientation and the focus on translating concepts into action are reflected in the structure and content of this guide.

Second, the Initiative applied a human rights-based approach to development by advocating (a) the use of relevant human rights standards as a roadmap for policy change; (b) the voice of disadvantaged people; (c) the establishment of a clear framework for accountability in development; and (c) the analysis of conflict risks and power inequalities in development efforts.

Drawing on experiences and lessons learned from different access to justice interventions within the Asia-Pacific and sometimes beyond, this Practitioner's Guide discusses a wide range of obstacles and capacity development strategies to enhance access to justice. The formal and informal systems of justice, legal aid and empowerment as well as specific obstacles facing disadvantaged groups and those in conflict situations in terms of their ability to access justice are all examined in the different sections of the Guide.

The various entry points suggested in the Guide should not be seen as prescriptive, since strategies will need to be tailored to specific development problems or obstacles. Instead, the Guide offers a methodology to assess problems in access to justice and design tailored responses.

The suggestions made in the Guide are already being pilot tested by UNDP, at both the country and regional levels. This exercise is being supported by the regional governance portfolio of programmes implemented by the Regional Center in Bangkok, in collaborative partnership with the Bureau for Development Policy. Donors, as well as national and regional institutional partners have all contributed to this product, and are expected to be critical actors in furthering this exercise. We welcome their continued involvement in the future and fruition of this initiative. As more lessons are learned from the application of the manual, we will update the Guide to ensure that it remains dynamic and applicable to a variety of development contexts.



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HOW TO USE THIS GUIDE

The overall aim of the Practitioner's Guide is to facilitate programming in access to justice. To this end the Guide takes the approach that the combination of a clear model in line with UNDP precepts, an assessment methodology and a mapping of highly distilled lessons will help the programmer to come to the strategic decisions.

This guide has been broken down into seven chapters. It is recommended to first read Chapters 1 and 2, while the other chapters can be consulted as and when needed.

Chapter 1 starts by describing the goals and scope of the justice sector in line with human development and human rights-based approaches. The core concept of the chapter is a model of access to justice that divides the scope of access to justice into three conceptual building blocks: (a) normative protection, (b) capacity to provide justice remedies, (c) capacity to demand justice remedies. These building blocks are later revisited in much greater detail in Chapters 3-5.

Chapter 2 provides a 10-step plan for practitioners to develop access to justice programmes. Hence, after scope and goals (the "what" access to justice comprises) has been clarified in the previous chapter, Chapter 2 is a "How-To" Guide to assess access to justice problems and to identify effective strategies.

Chapters 3-7 map typical obstacles in access to justice and strategies that can be applied to address such obstacles. These Chapters consist of a myriad of possible strategies and entry points. None of them is per se more or less valid or feasible than others, hence we have not prioritized them. Rather, their validity and feasibility needs to be assessed on a case by case basis (by means of the methodology outlined in Chapters 1 and 2). This is a reflection of the fact that there is of course no "one size fits all" solution to access to justice. It may be sufficient to skim the information on the various obstacles and strategies in the beginning; details can be referred to once a certain entry point is selected and a response to a development problem is designed.

The chapters have the following content:

Chapter 3 discusses capacity development strategies with regard to the normative frameworks that need to be in place to ensure that disadvantaged groups are protected and access to justice is ensured.

Chapter 4 examines the role and ability of institutions that are tasked with providing access to justice. This chapter is divided into five sections – The Ministry of Justice, The Court System, Informal Justice Systems, Oversight and Enforcement. Chapter 4 will rarely need to be read as a whole, and readers may want to go directly to the section most relevant to their work.

Chapter 5 explores legal empowerment, legal awareness and legal aid. It examines the different actors and types of interventions that can facilitate people's ability to demand a response and accountability from the justice system.

Chapter 6 focuses more specifically on the justice needs of disadvantaged groups. The first part of the chapter provides a general overview and highlights the main challenges to successful implementation of access to justice programmes focused on disadvantaged groups. It also suggests capacity development strategies that can be used in response to these challenges. The remaining sections discuss the specific impediments faced by particular disadvantaged groups.

Finally, **Chapter 7** focuses on the unique challenges faced by countries recovering from conflict.

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*Aparna Basnyat, Amparo Tomas, Stefan Priesner and Sanaka Samarasinha
AP-A2J Facilitation Team*

ACRONYMS AND ABBREVIATIONS

| | | | |
|---------------|---|----------------|--|
| A2J | Access to Justice | IDP | Internally Displaced Person |
| ABA | American Bar Association | IDS | Institute for Development Studies, University of Sussex |
| ADB | Asian Development Bank | IDU | Injecting Drug Users |
| ADR | Alternative Dispute Resolution | ILO | International Labour Organization |
| AHRC | Asian Human Rights Commission | IOM | International Organization for Migration |
| AI | Amnesty International | IP | Indigenous Peoples |
| AIDS | Acquired Immunodeficiency Syndrome | IPO | Indigenous Peoples Organizations |
| AP-A2J | The Asia-Pacific Rights and Justice Initiative | LAWASIA | Law Association for Asia and the Pacific |
| BBC | British Broadcasting Corporation | M&E | Monitoring and Evaluation |
| CBO | Community-Based Organizations | MDG | Millennium Development Goals |
| CIDA | Canadian International Development Agency | MoJ | Ministry of Justice |
| CEDAW | Convention on the Elimination of All Forms of Discrimination Against Women | MRG | Minority Rights Group |
| CERD | Committee on the Elimination of Racial Discrimination | MSM | Men who have Sex with Men |
| CO | UNDP Country Office | NGO | Non-Governmental Organization |
| CSO | Civil Society Organization | NHRI | National Human Rights Institution |
| CSW | Commercial Sex Workers | NHRC | National Human Rights Commission |
| DCHR | Danish Centre for Human Rights | NSW | New South Wales |
| DFID | Department for International Development (UK) | OHCHR | Office of the High Commissioner for Human Rights |
| DG | Democratic Governance | PAR | Public Administration Reform |
| ESCAP | UN Economic and Social Commission for Asia and the Pacific | PLWHA | People Living With HIV/AIDS |
| ESCR | Economic, Social and Cultural Rights | PRI | Penal Reform International |
| GA | UN General Assembly | PVO | Private Voluntary Organizations |
| HDR | Human Development Report (UNDP) | RBA | Rights-Based Approach |
| HIV | Human Immunodeficiency Virus | RBP | Rights-Based Programming |
| HRBA | Human Rights-Based Approach to Programming | TAC | Treatment Action Campaign |
| HRBAP | Human Rights-Based Approach to Programming | TIJS | Traditional and Indigenous Justice Systems |
| HRW | Human Rights Watch | UN | United Nations |
| HURIST | Human Rights Strengthening Programme | UNAIDS | Joint United Nations Programme on HIV/AIDS |
| ICCPR | International Covenant on Civil and Political Rights | UNDP | United Nations Development Programme |
| ICERD | International Convention on the Elimination of all Forms of Racial Discrimination | UNESCO | United Nations Educational, Cultural and Scientific Organization |
| ICESCR | International Covenant on Civil and Political Rights | UNHCHR | United Nations High Commission for Human Rights |
| ICG | International Crisis Group | UNHCR | United Nations High Commissioner for Refugees |
| ICHRP | International Council on Human Rights Policy | UNICEF | United Nations Children's Fund |
| ICTJ | International Center for Transitional Justice | UNIFEM | United Nations Development Fund for Women |
| | | UNMIK | United Nations Interim Administration Mission in Kosovo |
| | | UNODC | United Nations Office on Drugs and Crime |
| | | USAID | United States Agency for International Development |

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INTRODUCTION TO ACCESS TO JUSTICE

CHAPTER



Overview of the Chapter

1.1 Access to Justice and Human Development

1.2 Basic Concepts on Access to Justice

OVERVIEW OF THE CHAPTER

All human beings are born free and equal in dignity and rights.¹ Therefore, all human beings should have equal access to justice when their dignity or their rights are infringed upon. However, deficient or discriminatory justice systems can undermine this basic human rights principle. When such systems cannot ensure equal access to justice by all, the vulnerable and marginalized become even more vulnerable and marginalized, and their human dignity is placed at risk.

This first chapter discusses the role of the justice system in ensuring access for all, and clarifies some of the key concepts underpinning the Access to Justice Practitioner's Guide.

The first section focuses on the links between access to justice, human development and poverty reduction, and explains the human rights-based rationale of the United Nations Development Programme's (UNDP) framework for action in this field.

The second section presents the basic concepts underpinning access to justice, and gives details on UNDP's efforts to develop key capacities in the application of, and access to, justice.

¹ UN (United Nations). 1948. "Universal Declaration of Human Rights." General Assembly Resolution 217 A (III) of 10 December, Article 1, New York.

1.1 ACCESS TO JUSTICE AND HUMAN DEVELOPMENT

The Link Between Access to Justice and Poverty Reduction

Access to justice is essential for poverty eradication and human development for the following reasons:

Firstly, groups such as the poor and disadvantaged who suffer from discrimination, also often fall victim to criminal and illegal acts, including human rights violations. Because of their vulnerability, they are more likely to be victims of fraud, theft, sexual or economic exploitation, violence, torture or murder.

Secondly, crime and illegality are likely to have a greater impact on poor and disadvantaged people's lives, as it is harder for them to obtain redress. As a result, they may fall further into poverty. Justice systems can provide remedies which will minimize or redress the impact of this – e.g., by clarifying agreements and titles, determining financial compensation, and enforcing penal measures.

Thirdly, justice mechanisms can be used as tools to overcome deprivation by ensuring, for instance, access to education by girls and minorities, or by developing jurisprudence on access to food, health or other economic, cultural or social human rights.

Lastly, fair and effective justice systems are the best way to reduce the risks associated with violent conflict. The elimination of impunity can deter people from committing further injustices, or from taking justice into their own hands through illegal or violent means. In many countries, the reduction of violence is critical for achieving the Millennium Development Goals (MDGs).²

Access to Justice and a Human Rights Approach to Development

The focus on access to justice by all is a recent approach in development cooperation. It supports, and is supported by, a human rights approach to development: access to justice is a fundamental right, as well as a key means to defend other rights. A human rights approach provides a necessary framework for action on human development.

The focus on human rights brings two important values to development work: firstly, it provides a framework for policies and programmes.³ Secondly, the attainment of human rights enhances a key capacity needed by the poor to overcome poverty – the capacity to demand accountability.

- **Human rights help to clarify the scope of development objectives while paying**

special attention to those who may suffer discrimination. The value of using human rights as a framework for development is that human rights protect the basic well-being of all persons, including those who are disadvantaged, and/or are excluded from participating in the development process.

- **The capacity to make claims and to demand accountability is an important capacity for most people.** This is especially important when inequalities in power are present. Power imbalances can result in unfair health or trade policies that protect the interests of one group over another, or lead to abuses of power (e.g., corruption, trafficking of children or domestic violence). This can affect people's vulnerability to poverty.

A human rights approach seeks to develop people's capacity to demand accountability in two ways: by defining a minimum scope of legitimate claims (human rights); and by enhancing the accountability mechanisms and processes through which they protect these claims (e.g., the justice system).

Defining a scope for accountability through legitimate claims and obligations

From the national level to the household, issues such as imbalances in power relations, or control or abuse of power may affect people's financial capital (e.g. income), physical capital (e.g. infrastructure), natural capital (e.g. water and forests), human capital (e.g. education and health) and social capital (e.g. institutions such as households and communities). Unfortunately, often it is the people who are least able to influence decision-making that are also the ones most at risk. As a consequence, they are likely to fall further into poverty. This can have ramifications not only on themselves, but may also affect the stability of their communities.

Human rights define a minimum basis for legitimate demands and obligations in regards to people's well-being. This basis aims to empower the poor and other disadvantaged people, and to strengthen democratic governance.

As most states are bound by human rights obligations, people can use them as a mechanism for accountability. The State has an obligation to respect human rights through its actions, but also an obligation to protect people from abuses by others and to promote a policy environment that favours respect for human rights. Although human rights deal mainly with state-citizen relationships, they can guide state action in transforming other situations that contribute to poverty. The State can also strengthen the accountability of non-state actors under its jurisdiction.

² The MDGs are a set of concrete development goals that have emerged out of the Millennium Summit held in 2000. See the UNDP website for UNDP's role in promoting the MDGs. [<http://www.undp.org/mdg/>].

³ UN. 2002. "UN Common Understanding on a Human Rights Approach to Development." Stamford, Connecticut.

UNDP programmes can prioritize access to justice by poor and disadvantaged people since poverty and discrimination (e.g., on the grounds of gender, ethnicity or caste) can disadvantage those seeking judicial remedies through existing institutions. Some groups are considered “disadvantaged” because their inability to pursue justice remedies through existing systems increases their vulnerability to poverty or to other problems (e.g., conflict, crime or sexual exploitation). In turn, their vulnerability to those problems makes them less able to use existing justice systems. Disadvantaged groups vary depending on the situation. They may be women suffering domestic violence, indigenous peoples illegally evicted from their homes, or prisoners facing torture for example.

Strengthening accountability mechanisms

A human rights approach calls for strengthening and expanding the mechanisms that people can use to demand accountability. These mechanisms may include internal disciplinary procedures, special parliamentary commissions, the media, and other legitimate means of demanding responsibility or obtaining redress. Accountability of non-state actors (e.g. private institutions and individuals) should also be strengthened.

The choice of the most effective mechanisms to demand accountability depends on the context. In recognition of this, UNDP focuses on strengthening other critical pillars of accountability as well, such as anti-corruption, parliamentary reform and access to information. This Practitioner’s Guide focuses on accountability channels that engage the justice system.

Human rights can empower people and strengthen democratic governance.

People can use human rights as a minimum basis for legitimate demands for accountability, as most states are bound by them.

On the other hand, compliance with human rights obligations legitimates the use of power, and this is key to democratic sustainability.

1.2 BASIC CONCEPTS 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 interests. Remedies are measures that redress this harm, for instance through restitution or compensation.

When remedies are guaranteed by law or by customary norms, they are called legal remedies. Justice remedies are legal remedies that typically involve a third party (the justice institution or mechanism), whose functioning is also regulated by norms, in settling the dispute. For instance, when an employer gives compensation to an employee in case of inappropriate dismissal, though he or she is giving a legal remedy, it is an economic remedy and not a justice one. However, if the decision to compensate was taken by a justice institution or as a result of its mediation, it becomes a justice remedy.

Justice systems serve to recognize people’s entitlement to remedies when these are in dispute. For this reason, they are particularly important in the context of power inequalities, when people’s inability to claim remedies through other means may put their well-being at risk.

The meaning of access to justice is interpretative and contextual:

When people think of “access to justice,” they are not necessarily thinking of the justice system. For example, a UNDP participatory survey on people’s perceptions of justice in India found that slum dwellers prioritized access to justice with regard to economic issues, whereas members of marginalized castes highlighted the social dimensions of access, and indigenous minorities highlighted the political dimension.

Therefore, the potential of formal and informal mechanisms to provide people with a sense of “justice” in a particular situation depends on the context, and is just one part of a bigger picture.

UNDP defines “access to justice” as:

The ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards.

When approaching access to justice programming, it is important to bear in mind that:

- **Access to justice is a process that needs to be adapted to a particular context.** The process enables people to claim and obtain justice remedies, whenever conflicts of interests or particular grievances put their well-being at risk.
- **Justice institutions are established by law, either formal or customary.** The justice system as referred to in this Guide encompasses not only formal institutions, such as courts and police, but also traditional or customary ones, such as village-level dispute resolution, and coordination mechanisms among the different components in the system.
- **Justice systems are based on a normative hierarchy in which constitutional and international law takes precedence.** This creates the opportunity to strengthen human rights at other levels if rights recognized at one level (e.g., the Constitution) are denied because of norms operating at another level (e.g., legislation or customary norms). However, justice institutions alone are insufficient to produce the social change necessary to transform norms operating at informal levels.

- **The justice process requires different capacities at different stages.** These capacities may vary between formal and informal justice systems.

UNDP’s Framework for Action on Access to Justice

UNDP’s framework for action on access to justice is based on two goals: human rights and capacity development.

Human rights as qualitative parameters for access to justice programmes

Human rights serve to set qualitative parameters for both the type of justice outcomes that UNDP activities promote, and on the process undertaken to reach such outcomes.

Programme outcomes should be respectful of human rights standards. Human rights standards relevant to access to justice may include, but are not limited to, independency, due process, freedom from torture, and guarantees on arrest and detention. This Guide contains an annotated summary of some human rights standards, which are further explained within the relevant chapters. The UN Office of the High Commissioner for Human Rights also keeps updated information on international human rights standards. International standards provide general guidance; the specific standards that define programme outcomes need to be localized taking into consideration social, economic, political and cultural factors.

UN Standards Related to Access to Justice:

- Universal Declaration of Human Rights
- International Covenant on Civil and Political Rights
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of All Forms of Discrimination against Women
- Code of Conduct for Law Enforcement Officials
- Basic Principles on the Use of Force and Firearms by Law Enforcement Officials
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
- Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power
- Declaration on the Protection of All Persons from Enforced Disappearance
- Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions
- Guidelines on the Role of Prosecutors
- Declaration on the Elimination of Violence against Women
- United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty
- Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice

⁴ Fukuda-Parr, S., C. Lopes and K. Malik, Ed. 2002. “Capacity for Development: New Solutions to Old Problems.” UNDP.

⁵ See UNDP’s practice note on “Access to Justice Practice Note.”

A human rights approach also provides guidance on the process of development. The next section suggests how to develop and implement access to justice programmes from a rights-based perspective.

Capacity development for access to justice

UNDP defines “capacity” as “the ability to solve problems, perform functions, and set and achieve objectives”⁴. A capacity development approach promotes activities building on existing strengths.

UNDP’s strategic role is in developing capacities in the justice system so as to ensure it also works for the disadvantaged⁵. Being from a disadvantaged group makes people more vulnerable and less able to use justice remedies, in turn reinforcing their vulnerability.

Access to justice can be divided into different stages; starting from the moment a grievance occurs (causing a dispute) to the moment redress is provided. Full access is ensured when the process is completed.

The process of justice requires different skills at different stages, as depicted by Figure 1. These key capacities form the basis of UNDP support on access to justice. Their content is explained in the following chapters in this Guide. The three major dimensions of capacity development are:

- **Normative protection** – Normative protection refers to individual, institutional and collective capacities to ensure that justice remedies to disadvantaged people are legally recognized, either by formal laws or by customary norms.

- **Supply of remedies** – Includes capacities enabling adjudication of decisions, enforcement of remedies and accountability of the process through civil society and parliamentary oversight.

- **Demand for remedies** – This relates to the key skills people need to seek remedies through formal and informal systems, including legal awareness, legal aid, and other legal empowerment capacities.

Together with insufficient capacities, risk is a major obstacle to effective access to justice. The process of seeking or delivering justice often brings risks with it – risks of economic loss, physical threats, social ostracism, etc. Therefore, even when people and institutions have sufficient capacities in terms of awareness, expertise, or resources, they may not be willing to pursue the justice remedies due to the inherent risks they entail. The role of risk is particularly important for poor and marginalized groups, as they often live in situations of high insecurity (economic, social, environmental, etc). Institutional actors may also face substantial risks when trying to provide remedies to people. Similarly, conflict situations increase insecurity and therefore exacerbate risks.

Strategies on access to justice should examine the risks and attempt to minimize them. Development activities in other areas (e.g. livelihoods or environmental protection) can help to reduce some of the risks faced by disadvantaged people.

Table 1 on the next page provides a brief explanation of each of UNDP’s access to justice support areas and details the type of institutional actors involved.

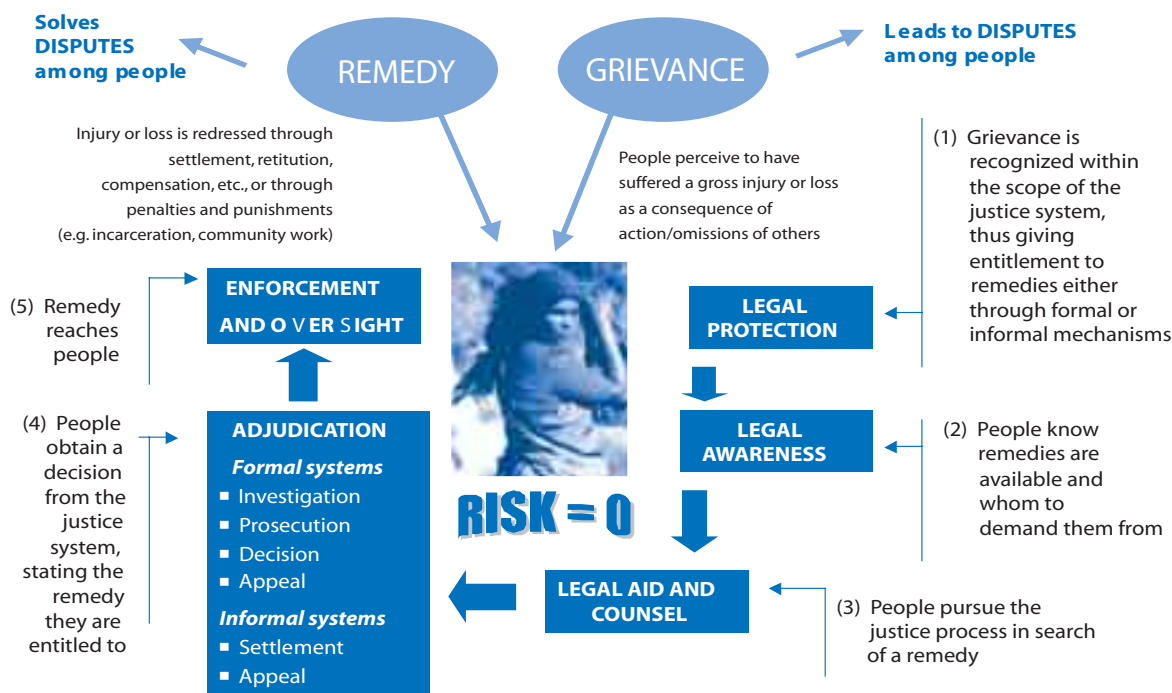


FIGURE 1: THE JUSTICE PROCESS

TABLE 1: UNDP PRINCIPAL AREAS OF SUPPORT ON ACCESS TO JUSTICE AND KEY ACTORS

| AREA | DESCRIPTION | KEY ACTORS |
|---|--|---|
| LEGAL PROTECTION | Provision of legal standing in formal or in traditional law, or both. It involves the development of capacities to ensure that people's rights are recognized within the scope of justice systems, thus giving entitlement to remedies either through formal or traditional mechanisms. Legal protection determines the legal basis for all other stages in the access to the justice process. Legal protection can be enhanced through: (a) treaty ratification and implementation in domestic law, (b) constitutional law, (c) national legislation, (d) implementing rules, regulations and administrative orders, and (e) traditional and customary law. | <ul style="list-style-type: none"> - Parliament - Ministries of Foreign Affairs - Ministries of Law and Justice - National Human Rights Commissions - Law Reform/Legislative Commissions - Legal drafting cells of relevant ministries - Local officials involved in legal drafting - Judges, particularly of courts whose decisions are binding on lower courts or, under the law, are able to influence courts in other jurisdictions - Traditional Councils - Community leaders (chiefs, religious leaders) - Civil Society Organizations |
| LEGAL AWARENESS | Degree of people's knowledge of the possibility of seeking redress through the justice system, whom to demand it from, and how to start a formal or traditional justice process. | <ul style="list-style-type: none"> - Ministry of Justice - Ministry of Education - National Human Rights Institutions - Legal aid providers - Quasi-judicial bodies (human rights, anti-corruption and electoral commissions) - Local government bodies - Non-Governmental Organizations |
| LEGAL AID AND COUNSEL | Includes capacities (from technical expertise to representation) that people need to initiate and pursue justice procedures. Legal aid and counsel can involve professional lawyers (such as in the case of public defence systems and pro bono lawyering), laypersons with legal knowledge, who are often members of the community they serve (paralegals) or both. | <ul style="list-style-type: none"> - Ministries of Justice and state-funded legal aid programmes - Public Attorneys - Bar Associations - Court system (e.g. to deal with court fees) - Police and the prison system - Local governments - Non-Governmental Organizations - Law clinics (often linked to university faculties of law) |
| ADJUDICATION | Describes the process of determining the most adequate type of redress or compensation. Means of adjudication can be regulated by formal law, as in the case of courts and other quasi-judicial and administrative bodies, or by traditional legal systems. The process of adjudication includes a series of stages such as (i) investigation, (ii) prosecution, and (iii) decision. | <ul style="list-style-type: none"> - Courts - Prosecution - National Human Rights Institutions - Alternative Dispute Resolution (ADR) mechanisms attached to the court system, or to administrative bodies - Traditional ADR mechanisms |
| ENFORCEMENT | Relates to the implementation of orders, decisions, and settlements emerging from formal or traditional adjudication. Enforcement systems are key to ensure accountability and minimize impunity, thus preventing further injustices. | <ul style="list-style-type: none"> - Prosecution - Formal institutions (police and prisons) - Administrative enforcement - Traditional systems of enforcement. |
| CIVIL SOCIETY AND PARLIAMENTARY OVERSIGHT | Includes watchdog and monitoring functions that civil society actors (or parliamentary bodies) perform with regard to the justice system. Strengthening the overall accountability within the system is critical in many cases. | <ul style="list-style-type: none"> - NGOs working on monitoring and advocacy - Media - Parliamentary select and permanent committees |

TEN STEPS TOWARDS DEVELOPING AN ACCESS TO JUSTICE PROGRAMME

CHAPTER



Overview of the Chapter

2.1 Human Rights-Based Programming for Access to Justice

2.2 Programming Steps

OVERVIEW OF THE CHAPTER

Access to justice is a human rights-based objective. However, not every access to justice strategy has a human rights-based outcome as its objective. A human rights approach focuses not only on the intended goal of a programme or project, but also on the process of its design and implementation. Therefore, when adopting a human rights-based approach, UNDP programme officers also need to make sure that initiatives to ensure access to justice are present.

This chapter provides a guide on how to develop programmes that ensure access to justice using a human rights-based perspective. The approach of this chapter is based on the UN Common Understanding on the Implementation of a Human Rights Approach to Development reached by UN agencies in 2002.

The guide is presented in ten steps, each of which has specific objectives. The different sections within the chapter provide tips and recommendations on how to attain the objectives, as well as illustrative examples.

2.1 HUMAN RIGHTS-BASED PROGRAMMING FOR ACCESS TO JUSTICE

Human rights-based programming, or rights-based programming (RBP) is a methodology to develop programmes and projects that include the key elements of so-called “good” programming. It is based on a human rights framework.

The rationale for using human rights-based programming is two-fold: firstly, to promote empowering development processes, and secondly, to enhance the accountability and effectiveness of development initiatives.

As explained in Chapter 1, human rights help to define a scope for individual and state accountability. They also help to determine the claims people can make when holding others accountable for the achievement of their rights. The ability to make claims is especially important for poor people. Poor people can use this ability to protect their personal, physical, political, economic and social capital, and thus enhance their well-being. Human rights contribute to empowerment by defining a minimum basis for claims.

Flexibility should not compromise accountability and non-discrimination.

Human rights standards set the overall direction a programme should take. The twin principles of accountability (of duty bearers) and empowerment (of claim holders) provide an objective for capacity development strategies. Non-discrimination implies a particular focus on disadvantaged groups and paying attention to the impact of the programme on those who are not the focus of other development interventions. Participation is a key principle underlying all stages of the programming process.

Key Considerations in the Programming Process

■ Be respectful of whoever is leading the process, but ensure basic standards:

Projects and programmes supporting access to justice may be initiated following a request from a government, civil society or any other development partner, or as a result of UNDP’s own will to address a particular issue. UNDP’s involvement in the programming process varies according to the situation. Sometimes political situations can limit UNDP’s ability to ensure participation or to address critical access to justice issues. However, while guidance should always be given allowing flexibility, UNDP should continue to strive for accountability and non-discrimination in all its activities.

■ Do not lose sight of the big picture:

All UNDP access to justice initiatives should be geared towards one ultimate goal: to empower poor and disadvantaged people to access fair justice remedies that can help them to enhance their well-being. This goal should guide all analysis and strategy formulation. However, it is important not to idealize logical frameworks or programming steps. Encouraging access to justice by vulnerable people implies a process of social change, and such a process cannot be captured in project documents. Development results require creative and dynamic development processes.

The following section sets out ten steps to a human rights approach in programming. Annex 1 presents a table with key parameters in rights-based programming, their programming implications and examples from UNDP programmes. The key components of rights-based access to justice programming are summarized below.

Key Features of Rights-based Programming for Access to Justice

Rights-based programming is different from conventional tools and methods in that it:

- Situates access to justice in the context of a human rights/legal framework
- Analyzes different degrees of vulnerability with regard to a particular problem, and selects those groups who may be more seriously impacted as priority beneficiaries of the project
- Divides relevant stakeholders into claim holders and duty bearers
- Focuses on enhancing empowerment of people with legitimate claims, and accountability of those who are mandated or able to respond
- Assesses the capacity of both the claim holders and the duty bearers to address the problem and aims to ensure there are capacity development strategies for both sides
- Attempts to establish participatory processes where those who are impacted on as a result of the problem are freely and meaningfully involved

2.2 PROGRAMMING STEPS

The process of developing an access to justice programme can be summarized in ten steps:



PROGRAMMING STEP 1: FAMILIARIZATION WITH THE PROGRAMMING CONTEXT

OBJECTIVES

To gain an understanding of:

(a) The rationale for UNDP's policy on access to justice, and

(b) The type of access to justice issues in the country that are impacting on poverty and/or violent conflict

Before starting the programming process, it is important to understand how empowering poor and other vulnerable groups to access justice may impact on poverty reduction and other development goals. Chapter 1 provides an overview of UNDP's policy on access to justice. Key documents on access to justice by UNDP and other authors are included in the annotated bibliography at the end of this Guide.

Further information on UNDP policy and experiences on access to justice can be accessed through:

- UNDP Regional Centre in Bangkok
- UNDP Oslo Governance Centre
- UNDP Bureau for Development Policy
- UNDP global and regional knowledge networks (e.g., the AP-A2J network, the Democratic Governance network, Human Rights Policy network)

Programme officers should start by gathering an overview of the major access to justice-related issues in the country. Information should be gathered not only on legal and judicial issues, but also on other issues related to the overall capacity of poor and vulnerable people to seek and obtain remedies.

The relevant scope of information on access to justice includes not only legal and judicial issues, but also other issues related to the situation of poor and other vulnerable people in the country.

UNDP is sometimes asked to formulate programmes on a particular issue such as women's empowerment or police reform. In these cases,

programme officers need to gather country-specific information on that particular issue and seek lessons learned from other countries and projects.

Information should be gathered through national and international sources. International sources can include articles, reports and other documents – a selected list is provided in the bibliography. For access to justice issues in a particular country, reports of the UN Special Rapporteurs and the Recommendations of UN Treaty Bodies (e.g., human rights committees on CRC, CEDAW etc.) as well as the Commission on Human Rights are key resources. These documents can be found on the Office of the High Commissioner for Human Rights (OHCHR) website.¹

People are a critical source of information: listening to informed perceptions will enhance understanding

National sources may involve assessments, government and non-government reports, newspaper and journal articles, etc. At the local level, a critical source is people: it is important to seek informed perceptions on the issue, for example through personal conversations, attending strategic seminars and conferences, etc. Listening to contradictory opinions and the perspectives from both the demand and supply sides of justice will enhance understanding.

Rapid mapping exercises through in-depth interviews can provide a wealth of information, although they are intensive in terms of staff time. However, they may produce valuable results for the country office (for instance by establishing detailed profiles of relevant actors in both government and civil society). Annex 2 provides sample interview guidelines for NGO mapping prior to an access to justice assessment.

¹ Office of the High Commissioner for Human Rights - www.ohchr.org

PROGRAMMING STEP 2: SELECT A DEVELOPMENT PROBLEM



Selection of what to address is a critical step. Experience shows that programming often deals with general capacity development of institutions without focusing on addressing specific development problems.

When selecting a particular issue as the basis for programming, programme officers should avoid assumptions and define problems as specifically as possible. Access to justice issues that need UNDP's action arise whenever a development problem (e.g., violent conflict, poverty or environmental degradation) is exacerbated by people's inability to claim and obtain remedies through the justice system.

UNDP action is needed whenever a particular development problem is exacerbated by people's inability to claim and obtain remedies.

To assess whether a particular problem requires UNDP's action on access to justice, you may want to ask the following questions:

- To what extent is harm being done without appropriate redress?
- How is lack of redress causing or sustaining people's poverty?

Selection of a specific problem may be based on different factors such as linkages to UNDP's activities at the country level or that of other donors. UNDP may also be requested by government or national partners to programme on a specific issue.

Make sure that challenges to access to justice are defined in clear terms, regardless of whether the challenge is dealt with by UNDP or by its partners. The clearer the problem, the more systematic the analysis will be. Concrete problems also facilitate setting clear strategies and targets.

Access to justice can be approached in two distinct and complementary ways:

- **Within the context of the justice system**
Sector-based justice initiatives seek to develop the country's capacities for democratic governance by improving accountability and resolution systems. These types of initiatives reflect a human rights approach to democratic governance and are a necessary component of development strategies, although their impact is often only evident in the long-term.
- **Within the context of a particular development problem** – Cross-cutting initiatives seek to address the access to justice dimensions of specific development problems. Such an approach aims to enhance the human rights aspect of development strategies, and can be linked to livelihoods initiatives such as micro-credit schemes or expansion of health services. Cross-cutting strategies on access to justice can provide meaningful results in the short- to medium-term, although they usually require sector-wide strategies for sustainability.

The choice of one starting point over another, or of a combination of both, depends on the programme focus. For instance, programmes can focus on the justice system as a whole or on one or more of its components (e.g., courts), on the access to justice dimensions of a general development problem or on the situation of specific vulnerable groups (e.g., their health), or on a combination of both (e.g., situation of indigenous peoples involved in court processes). It is important to state what the specific problem is, for example, insufficient independence of the courts, increasing poverty and marginalization of indigenous peoples, or disproportionate number of indigenous peoples incarcerated.

TABLE 2: STARTING POINTS FOR APPROACHING ACCESS TO JUSTICE PROGRAMMING

| STARTING POINT | OPPORTUNITIES/CHALLENGES | COUNTRY EXAMPLES |
|--|--|---|
| JUSTICE SECTOR-BASED STRATEGIES | <p>Pluses:</p> <ul style="list-style-type: none"> ■ Can highlight inter-linkages of institutions and their problems ■ Can generate ownership/political will of vital stakeholders ■ Resource mobilization potential ■ Strategic in comprehensive governance reform processes <p>Minuses:</p> <ul style="list-style-type: none"> ■ Impact usually felt only in the long-term ■ Focuses typically on institutions, often at the expense of focus on disadvantaged groups ■ Time and resource constraints ■ Raising of expectations for follow up | <p>The Viet Nam CO conducted a comprehensive legal sector assessment to identify strategic entry points.</p> <p>In Bangladesh, the CO recognized several serious malpractices in the police that triggered the programming process.</p> <p>In the Philippines, the CO supported a Blueprint for Judicial Reform that later triggered reforms in the Police and the Department of Justice.</p> |
| CROSS-CUTTING STRATEGIES (WITHIN THE CONTEXT OF AN EXISTING DEVELOPMENT PROBLEM) | <p>Pluses:</p> <ul style="list-style-type: none"> ■ Highlights inter-linkages of access to justice with other poverty-related problems - strategic to support other outcomes in the Country Programme ■ Early identification of disadvantaged groups, and easier to obtain their participation in analysis and strategy setting ■ Facilitates disaggregation of data ■ Can be more focused and produce impacts in the short- to medium-term <p>Minuses:</p> <ul style="list-style-type: none"> ■ Requires sector-wide strategies for sustainability of access to justice outcomes ■ Requires multi-sectoral collaboration and political will | <p>The Asia-Pacific Regional Environmental Governance Programme supports pilot projects in the region that seek to build access to justice components into environmental management initiatives.</p> |

PROGRAMMING STEP 3: SECURE ADEQUATE CAPACITIES FOR PROGRAMME DESIGN



OBJECTIVES

To find and secure time, financial and technical capacities prior to designing a project or programme

The programming process requires different capacities at different stages. Key capacities include funding, time and technical skills (such as analysis, planning, budgeting). Programme officers need to assess the minimum capacities required to complete the task, including capacities to conduct participatory processes.

UNDP country offices can maximize their programming capacities through internal coordination and external outreach.

UNDP country offices can enhance their technical capacities by bringing together people from different programme areas within the office (such as local governance, gender, poverty or conflict), or through the UNDP electronic networks and regional offices.

Obtaining a broad overview of an access to justice issue through networking and conversations can be a useful way to find out what available local capacities for programming exist. In this regard, mapping local partners in government and civil society may be a necessary first step.

PROGRAMMING STEP 4: ENSURE PARTICIPATION

OBJECTIVES

- a) To identify the level and means of participation for those affected by the problem
- b) To identify obstacles and incentives to participation
- c) To develop strategies to increase participation
- d) To establish mechanisms to ensure participation is incorporated into all stages of the programme cycle

Participation is a means to improve development programmes, and a vehicle for empowerment. From a technical point of view, the value of participation is in enhancing the knowledge base of access to justice programmes, thereby increasing the relevance and effectiveness of development initiatives. Participatory methods can vary from consultation to decision-making. Access to justice programmes need to build on participatory processes primarily for two reasons:

- **The most knowledgeable people about a particular problem are generally those experiencing it.** Both users and providers of the justice system know what specific obstacles they face, and what type of strategies they use to deal with them. This type of information is necessary for capacity development strategies that build on existing strengths and solutions.
- **Apart from objective indicators, access to justice, or the lack thereof, is often based on personal perceptions.** Therefore, it is necessary to draw together people's perceptions on the meaning of access to justice in a particular context to fully understand the problem (see next point on "analyzing the access to justice problem").

The UNDP Asia Pacific Rights and Justice Network has developed *Guidelines for Participatory Consultations on Access to Justice*. This is a tool which can be used in consultative processes for programming purposes.

As a vehicle for empowerment, however, not every participatory process is equal. Empowerment requires meaningful participation – that is, one that involves a degree of decision-making and control over the final outcomes. In a truly participatory process, participants make all key decisions on goals and activities; UNDP's role is limited to that of a facilitator. Similarly, the process should enhance participants' capacities to analyze access to justice problems and seek solutions.

Empowerment requires "meaningful" participation – that is, one that involves a degree of decision-making and control.

Participatory approaches have contributed to the conceptualization of a rights-based approach to development. A human rights perspective brings two added values to participatory development:

- **The meaningful participation of those being affected by a problem is considered as a right in itself.**
- **A human rights perspective helps to recognize that power imbalances influence participatory processes.** For instance participatory processes may be vulnerable to corruption and control by one group at the expense of another. Vulnerable and marginalized groups are likely to be the ones with the least control, and therefore the least able to influence decision-making. Therefore, a human rights approach requires the participation of those who are most excluded.

Although participation is a right, meaningful participation is not always feasible, particularly if it involves poor and marginalized groups. Meaningful participation requires capacities such as information gathering, organization, and analytical skills to assess the problem and possible solutions. Political constraints to ensure participation of certain groups may exist too. Consequently, when only some groups can participate meaningfully, while others are left out, participatory processes can result in discrimination.

When only some groups can participate meaningfully, while others are left out, participatory processes may result in discrimination.

Although meaningful participation may not always be feasible, participation is a fundamental right, which requires as a minimum, that access to justice programmes:

- **Undertake, where possible, capacity building activities with disadvantaged groups as part of a preparatory phase to programmes.**
- **Adopt a medium-term perspective to enhance the capacity for participation of those who are most disadvantaged in influencing decision-making.**

It is necessary to assess the obstacles that marginalized groups encounter to meaningful participation. Programme Activities need to address these obstacles. For instance, by strengthening organizational capacities and access to information, future initiatives on access to justice (by government, UNDP or other development actors) can benefit from the participation of those who are now being excluded. These types of activities should ensure follow-up to assess whether these capacities have an impact in the medium-term.

- **Review how programme decision-making takes place so as to ensure non-discrimination.**

This should be done even when participatory processes are possible, but it becomes particularly critical in their absence (see Step 9: Establishing an Implementation Framework).

- **Where political considerations may not allow participation of all groups at the same time, parallel capacity building initiatives may need to be considered.**

The following box provides some tips on how to establish a strategy for participation. These strategies can be developed prior to designing a programme, within the context of the implementation of the programme, or for monitoring and evaluation purposes.

Designing a Participation Plan

1) Identify level and means of participation of those affected by the problem

The scope of participation depends on a number of factors, including political constraints, and time or financial resources. For instance, participation may be politically feasible in analyzing the problem, but not in deciding the type of solutions to deal with it. Similarly, financial and time resources may limit the number of stakeholders that can participate, or the extent of their participation.

Different groups of stakeholders need to be involved in different ways. For example, policy-makers and NGO representatives may be part of consultative or steering committees, while poor and marginalized people may be more effectively involved by using community networks and organizations. It is important to identify what existing channels of participation can be used, prior to establishing new ones.

2) Identify obstacles and incentives to participation

Once the potential scope and channels of participation have been identified, a participation plan analyzes (a) what type of obstacles inhibit stakeholders' engagement in the process, and (b) what type of incentives would ensure their sustained commitment to the task.

The assumption that everybody would like to participate in a programming process if given the opportunity is not necessarily true. Participation requires stakeholders' commitment of time and resources, and the difficulty of making such commitments should not be underestimated. Obstacles to participation may include elite capture of key positions, intimidation, geographical distance, and lack of time, information, skills or organization capacities.

When providing incentives, UNDP programme officers should make sure not to promote a culture of nepotism and corruption, particularly among policy-makers.

Lastly, programme officers need to be aware that participation may create conflict, particularly when there are contradictory perspectives on the same issue. Conflict is natural and should not be avoided, but its potential scope should be clearly identified so conflict-management strategies can be prepared in advance.

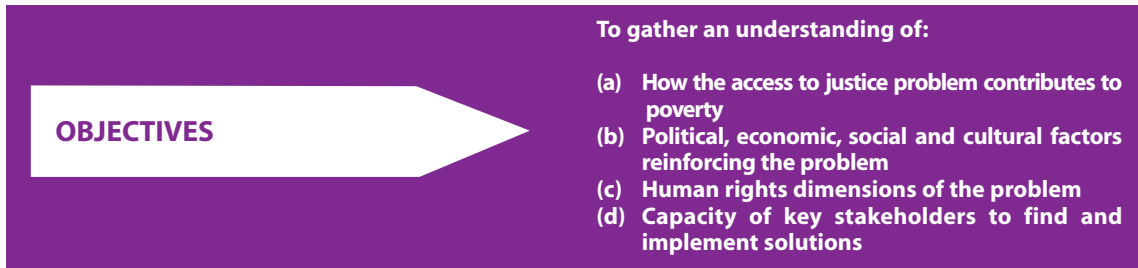
3) Develop strategies to strengthen capacities for participation

Strategies should be put in place to address any critical capacity gaps in stakeholders. For instance, training sessions, assurances of confidentiality, outreach to community-based organizations, etc. can serve to overcome problems of lack of skills, intimidation or lack of organization.

4) Establish mechanisms to incorporate participation into all stages of the programming cycle

Mechanisms for participation vary depending on the context. They may include the assignment of specific tasks and functions, as well as the establishment of committees, public audits, discussion groups, etc. Specific mechanisms should be incorporated into four stages in the programme cycle: (a) analysis, (b) formulation, (c) implementation and (d) monitoring and evaluation.

PROGRAMMING STEP 5: ANALYZE THE PROBLEM AND ITS CAUSES AND EFFECTS



The main objective of programme analysis is to provide a clear understanding of the access to justice problem that can then be used as a basis for action. This requires identifying cause-effect relationships and assessing capacity gaps.

Sound analysis requires adequate data, and gathering these data is time-consuming and costly. There is also a need for technical skills and participatory processes, as desk research or secondary data are insufficient to bring out all key dimensions of access to justice problems.

Some tips regarding assessment and analysis:

■ **Think in terms of issues, not institutions.**

The entry point is the issue or problem, the question is who is entitled to the solution for this problem (claim holders) and who is obliged to solve the problem (duty bearers). Don't be confined by the boundaries of individual institutions. Instead, see justice as a sector with an array of institutions, whose functions complement each other. Problems are usually interrelated and may need interventions or strategies that target a number of players.

■ **Use baseline data when available.** To specify the access to justice problem it is important that assessments identify quantitative and qualitative baseline data that can be cost-effectively monitored to assess impact (see section on Monitoring and Evaluation – Step 10).

■ **Use participation to complement analysis of secondary data.** The problem assessment needs to be conducted through a participatory process, using appropriate techniques for

To gather an understanding of:

- (a) How the access to justice problem contributes to poverty
- (b) Political, economic, social and cultural factors reinforcing the problem
- (c) Human rights dimensions of the problem
- (d) Capacity of key stakeholders to find and implement solutions

involving poor and disadvantaged groups (for guidance on using a rights-based approach to participation refer to the Guidelines on Participatory Consultations).

■ **Identify the most disadvantaged groups at an early stage.** The most disadvantaged groups should be identified in relation to the goal. From a rights-based perspective this step is essential in order to keep a clear focus on the groups who will gain the most from the achievement of the goal. Without this step there is a risk that programmes and projects will lose sight of the most disadvantaged people and instead concentrate on groups that are easier to work with.

■ **Think in terms of the duality of rights and responsibility.** Where there is a right, there is also a responsibility. Correspondingly, where there are claim holders, there are also duty bearers. Both capacities need to be strengthened if an effective solution is to be found.

■ **Avoid analysis deadlock.** A comprehensive rights-based analysis can be very time consuming and complex. To avoid analysis deadlock keep the analysis simple and focused on the important issues and the bigger picture. Do not try to solve all aspects of the analysis right at the beginning. Instead, do a preliminary analysis and then improve on it.

This following section explains the major objectives when analyzing an access to justice problem. In addition, Annex 3 provides a sample mapping framework on access to justice with general information on each stage of the justice process.

Major Objectives in Analyzing an Access to Justice Problem

Consider ways in which the problem is contributing to poverty

In what ways does the absence of justice remedies increase a person's vulnerability to poverty?

The justice system is a means to ensure accountability, but it is not the only one. Sometimes justice remedies are not adequate or sufficient to bring people the sense of “justice” they demand. Other remedies – administrative, political, or social – may be necessary. Further, different groups may have different perceptions on the role of formal and informal justice systems; perceptions may also be different for users and providers of justice services.

Political, economic, social and cultural factors can reinforce the problem

What factors contribute to the problem?

This step seeks to identify the direct causes and effects of the access to justice problem. Remember that development problems are complex; they are not trees with distinctive root causes, but rather, they resemble webs of factors that impact on and reinforce each other.

Access to justice programmes need to adopt a multidisciplinary approach to explore these factors. For example, lack of independence of the judiciary may be favoured by bureaucratic cultures, or economic factors may lead to the growing number of women incarcerated. Look beyond the legal and institutional reasons underlying the problem. Those who are experiencing the problem are in the best position to identify the main causes.

Situate the problem in a human rights/legal context

What human rights are at stake and what type of remedies are needed?

Once the access to justice problem has been broadly identified, it needs to be interpreted in terms of human rights. To do this, compare the actual situation to how it should ideally be according to international human rights conventions and treaties and the national legal framework.

The reason for situating the problem in a human rights context is to determine a basis of accountability that people can claim, and which institutions and other actors should strive to comply with. The human rights framework relevant for UNDP's action in a particular country is based on the Universal Declaration on Human Rights². It also includes human rights recognized by international conventions ratified by the State, by the Constitution and by national legislation, or supported by the State in UN bodies or conferences (such as the UN Guiding Principles on the Treatment of Prisoners).

² UN. 2002. "UN Common Understanding on a Human Rights Approach to Development." Stamford, Connecticut.

The human rights framework provides guidance on access to justice problems in at least three ways:

- **It provides a broad roadmap for development goals (e.g., equality before the law).**
- **It provides detailed guidance on specific obligations for selected duty-bearers (such as the police and prisons).**
- **It helps to define the scope of remedies (e.g., there is a right to free speech; hence there should be a remedy when that right is not respected).**

Human rights are interrelated. Therefore, there will be a number of rights at stake in any particular situation that demand accountability. In line with the access to justice framework, the focus should be on those to which the justice system is best positioned to provide a remedy to. This will depend on the type of right, and on the situation. For instance, the justice system is likely to be the most appropriate mechanism for human rights claims related to the process of justice (e.g., fair trial), but it can also play a key role in other rights (e.g., the right to remedies for medical malpractice or discrimination which restricts access to health).

The focus of access to justice programmes should be on those rights to which the justice system is best positioned to provide a remedy

Sample questions:

- Who are the duty bearers that need to fulfil their obligations in order for the claim-holders to effectively secure their rights?
- Who are the duty bearers most able to provide a solution to the root causes?
- Who are the duty bearers that are absolutely necessary to achieve a solution?
- What specific duties are the duty bearers responsible for?

A human rights approach views stakeholders as bearers of claims and duties

Conventional stakeholder analysis considers stakeholders as any person, group or organization that has an interest in the solution of the problem. A human rights approach views programme stakeholders as bearers of claims and duties.

Rights-based analysis establishes a distinction between claim holders (those who hold a right), and duty bearers (those who have a corresponding obligation to act in defending such a right). Human rights claim holders are always people, individually or collectively. The major duty bearer of human rights is the State, including national as well as local government in all the branches of state power (executive, legislative and judicial).

UNDP access to justice programmes prioritize as claim holders the poor and other disadvantaged people. Poverty and discrimination (e.g., on the grounds of gender, ethnicity or caste) can disadvantage those seeking justice remedies through existing institutions.

Duty bearers in access to justice programmes include state and non-state actors at national and local levels. Non-state duty bearers are key actors that may affect people's capacity to access justice (e.g., universities, civil society organizations, religious leaders and the media).

The analysis should bear in mind that legal pluralism of societies implies that rights recognized at one level may be denied because of norms operating at another level³. For instance, judges may have contradicting duties to refuse bribes under national law and an unwritten right to accept them under bureaucratic "living law". Women may have the right to reproductive health under customary norms, but it may be denied by legislation, etc. Thus the analysis needs to identify whether and where contradictions exist, and whether justice systems can play a role in resolving such contradictions to ensure respect for human rights.

Dealing with sensitive human rights language

In some countries reference to international human rights can be very sensitive. Don't get overly constrained about human rights language – you can carry out a rights-based analysis without necessarily referring to international human rights. You may find it more compelling for national partners if the argument of why the problem needs to be addressed is based on the Constitution or on national law.

Sample questions:

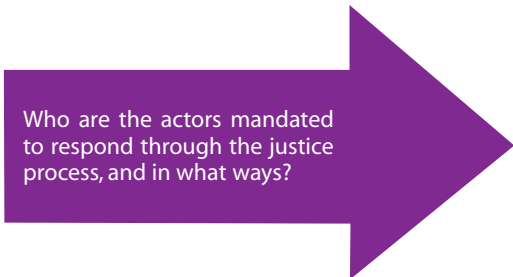
- How does the situation compare to the international human rights framework?
- Is the national legal framework in line with international human rights? Is a legal framework in place at all?
- If no legal framework is in place, is there political support for establishing a legal framework or is there a need for prior constituency/coalition building for legal reform?
- How do regulations, customary laws or other informal cultural norms promote or hinder respect for legally recognized human rights?

³ Moser, C. and A. Norton. 2001. "To Claim Our Rights: Livelihood security, human rights and sustainable development." Overseas Development Institute, United Kingdom.

Identification of key stakeholders in the problem

The next step is to identify what type of remedies justice institutions could provide for the situation. This requires the assessment of which specific actors could be involved in the solution and what specific role they should play. Table 1 in Chapter 1 can be used as a guide to the key actors in each of UNDP’s access to justice support areas.

Most actors will have a duty to provide a solution according to human rights, others may have a duty under other locally accepted frameworks (e.g., customary norms or legislation). Those that critically impact on people’s capacity to access justice (e.g., universities) also have a duty to contribute to the realization of this right.




Sample questions:

- Who are the duty bearers that need to fulfil their obligations in order for the claim-holders to effectively secure their rights?
- Who are the duty bearers most able to provide a solution to the root causes?
- Who are the duty bearers that are absolutely necessary to achieve a solution?

Key duty bearers with regard to access to justice problems are identified in Chapter 4. Duty bearers in relation to legal protection are mapped in Chapter 3 and those in relation to legal literacy and legal aid are detailed in Chapter 5. Each section explains the typical obstacles and capacity development strategies facing duty bearers and claim holders.

Example – rights at stake and key actors:





What persons are least able to claim their rights when they need them?

Rights are fundamental interests protected by law (e.g., education, work, freedom of religion and opinion), therefore all human beings are claim-holders of human rights. Not everybody needs to use legal claims to defend their interests. Some people are able to use for instance their financial, human or social capital instead. Others, however, may have no other means than invoking their rights.

Programme analysis should identify the people who are least able to claim their rights in a particular situation. They may be referred to as “disadvantaged groups” in a particular context. Groups may suffer disadvantage as a result of different causes. Therefore, disadvantaged groups need to be disaggregated (see Chapter 6 for relevant obstacles and capacity development strategies for some disadvantaged groups).

Discrimination can also result in some people being unable to claim their rights. For this reason, disadvantaged groups are likely to include the poor and other groups who are discriminated against in a particular context.

Sample questions:

- Who among the claim holders are most affected or unable to obtain remedy?
- Who are least able to rectify the situation without assistance?



⁴ “Willingness”, however, can also be seen as a “capacity” constraint. Where “capacity” is analysed as authority (“may” a duty bearer act?), responsibility (“should” a duty bearer act) and human and financial resources (“can” a duty bearer act?), “willingness” is included within the concept of “capacity”.

TABLE 3: SAMPLE ANALYSIS OF AN ACCESS TO JUSTICE PROBLEM

| ACCESS TO JUSTICE PROBLEM: Female offenders are disproportionately incarcerated for long sentences for minor offences | |
|--|--|
| IN WHAT WAYS DOES THE ABSENCE OF JUSTICE REMEDIES INCREASES PEOPLE'S VULNERABILITY TO POVERTY? | <ul style="list-style-type: none"> ■ Women that are incarcerated may be discriminated against in the future when trying to gain employment, or they may suffer from social ostracism ■ Families of women prisoners, particularly children, may suffer as women often play a critical role in poor families in income generation, care and education, etc. |
| WHAT FACTORS CONTRIBUTE TO THE PROBLEM? | <ul style="list-style-type: none"> ■ Legal factors - Penal law assigns unreasonably high sentences for minor offences ■ Attitudinal factors - Judges often give higher prison sentences because it will "teach women a lesson" ■ Economic factors - Even if fines are imposed instead of imprisonment, women are often too poor to pay ■ Institutional factors - Women are "forgotten" in prison ■ Human resource factors - Access to lawyers is difficult because the number of lawyers is insufficient ■ Human factors - Women are ignorant about the law and don't know how to appeal ■ Social factors - Women are afraid to speak out |
| WHAT HUMAN RIGHTS CLAIMS ARE BEING IGNORED AND WHAT TYPE OF REMEDIES ARE NEEDED? | <ul style="list-style-type: none"> ■ Penal/Procedural Code ■ Prison Act (national law) ■ Body of principles for the Protection of All Persons Under Any Form of Detention or Imprisonment |
| WHO ARE THE ACTORS MANDATED TO RESPOND THROUGH THE JUSTICE PROCESS, AND IN WHAT WAYS? | <ul style="list-style-type: none"> ■ The judiciary ■ The prison administration ■ The Ministry of Justice ■ Other providers of legal services |
| WHAT PERSONS ARE LEAST ABLE TO CLAIM THEIR RIGHTS WHEN THEY NEED THEM? | <ul style="list-style-type: none"> ■ Illiterate women ■ Indigenous women ■ Commercial sex workers |
| WHAT OBSTACLES PREVENT DISADVANTAGED PEOPLE FROM CLAIMING THEIR RIGHTS THROUGH THE JUSTICE PROCESS? | <ul style="list-style-type: none"> ■ Illiteracy ■ Fear and social stigma |
| WHAT OBSTACLES PREVENT DUTY BEARERS FROM FULFILLING THEIR OBLIGATIONS? | <ul style="list-style-type: none"> ■ Attitudes of judges ■ Women prisoners not a priority ■ Insufficient number of lawyers ■ Deficient records ■ Demotivation of prison staff because of low wages ■ Lack of awareness of women's rights, prison standards |
| WHICH OF THESE OBSTACLES REFLECT A LACK OF CAPACITY, AND WHICH ONES LACK OF WILLINGNESS? | <ul style="list-style-type: none"> ■ There is a general unwillingness to deal with the rights of prisoners as this may be considered as being 'lenient' towards crime ■ Some women prisoners are unwilling to seek help because of fear of being punished by prison staff |
| WHAT OPPORTUNITIES ARE WITHIN THE REACH OF DISADVANTAGED PEOPLE TO OVERCOME SUCH OBSTACLES? | <ul style="list-style-type: none"> ■ A number of NGOs working in prisons are starting paralegal services for women |
| WHAT OPPORTUNITIES ARE WITHIN THE REACH OF DUTY BEARERS TO OVERCOME SUCH OBSTACLES? | <ul style="list-style-type: none"> ■ National Human Rights Commission and Ministry of Labour are champions of women's rights ■ Media are paying attention to the situation of prisons ■ Some donors have expressed willingness to assist the Government in improving prison conditions |

PROGRAMMING STEP 6: SET OBJECTIVES/SELECT OUTCOMES

The changes that UNDP aims to bring about in the lives of disadvantaged people are the general objectives, or outcomes, of UNDP support. UNDP projects are not sufficient on their own to achieve meaningful changes in people’s lives, but they can contribute to them in a measurable way.

Outcomes cannot be achieved by UNDP programmes on their own, but the outputs of UNDP programmes can contribute to the achievement of outcomes

Outcomes of UNDP programmes should focus especially on positive changes for disadvantaged groups. “Positive changes” in access to justice are those that reflect a greater ability to obtain the type of justice remedies disadvantaged people need to improve their well-being.

The following questions may be asked to assess whether the programme outcome is consistently formulated:

- Does the outcome describe a change in people’s lives?
- Will the change be in accordance with human rights standards?
- How does the outcome reflect a greater capacity to obtain justice remedies by people who could not previously obtain them?
- Does the outcome lessen people’s vulnerability to poverty?
- Will the outcome enable a baseline to be established against which improvements can be measured?

Outcome – an example

The problem identified in the assessment stage was:

Female offenders are disproportionately incarcerated for long periods for minor offences.

If the outcome does not take a human rights-based approach, such as:

Prison system significantly strengthened.

It will not (a) reflect a change in people’s lives, (b) specify in what direction the change will take and (c) is difficult to measure.

Alternatively, an access to justice programme that applies a rights-based approach and seeks to address this problem may have as its outcome:

All women prisoners are able to secure their release after completing a reasonable prison term that is in accordance with international and national human rights standards and principles.

PROGRAMMING STEP 7: DEFINE AND PRIORITIZE STRATEGIES

OBJECTIVE

To define what needs to be done, how, in partnership with whom and when, to produce results on access to justice that are pro-poor and promote equity

Outcomes are general objectives, which development programmes can contribute to achieving. While there may be more than one strategy to achieve the desired result, prioritization of strategies requires the selection of the strategy likely to be the most effective. UNDP defines “development effectiveness” as a process that

produces results that are pro-poor and promote equity⁵.

This following section provides some tips to assist in prioritization. It is necessary to keep in mind however that many other important factors may prevail at the country level, which need to be considered.

Identify would-be “spoilers” and potential “champions”

Assess the political space for action

Who is interested in solving the problem and has the capacity to act? Is there anybody with the capacity to act who is interested in sustaining the status quo?

Come up with a number of potential strategies

Define outcomes as concretely as possible. Access to justice is a process in which an array of institutions are involved, and whose functions complement each other. Generally problems will require simultaneous strategies, and from the analysis it should be possible to identify more than one strategy.

Think in terms of issues, not institutions

Focus on accountability

Develop mechanisms that enable accountability

Accountability strengthens legitimacy and it is critical for good governance. It also helps to reduce poverty and violent conflict. Access to justice is basically about accountability and redress. Programmes should attempt to strike a balance between enhancing the capacities of claim holders to seek a remedy, and the capacities of duty bearers to provide such remedies; an exclusive focus on either the supply or the demand side risks ineffectiveness and frustration. At the same time, justice systems cannot adequately ensure accountability if they are not accountable themselves.

⁵ UNDP. 2003. UNDP Development Effectiveness Report.

Adopt multiple timeframes

Programme analysis should enable the identification of a number of short, medium and long-term strategies to address the problem. Thinking of how these strategies can reinforce each other can provide a useful basis for selection.



Seek immediate benefits for poor and disadvantaged people



One of the major obstacles that disadvantaged people face when trying to access justice is the insecurity in which they live. Access to justice is often an urgent matter to them. Medium- and long-term strategies are not cost-effective if they are not also able to be responsive in the short-term. Without immediate results there may be further human rights violations. At the same time, even small, but tangible, benefits can have a significant impact on poverty (e.g., the release of one hundred poor women prisoners can affect thousands of people because of their income-generating and/or care-giving role in their families). Equally, cross-cutting activities on access to justice can produce an immediate impact on people's livelihoods.

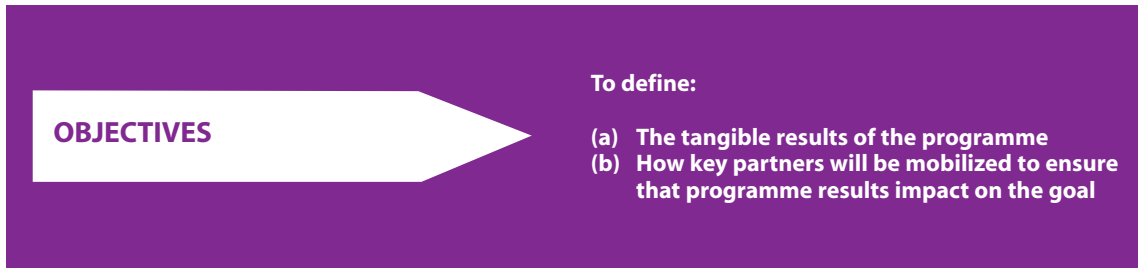
After identifying potential strategies, the following questions may be posed to assess whether a particular strategy is suitable for UNDP's action:

- Can the strategy help to enhance accountability and produce immediate benefits for disadvantaged groups?
- Does the strategy build on existing strengths and solutions?
- Can the strategy make a significant and measurable contribution to potential UNDP strategies in the medium-term?
- Is there sufficient space for action – in terms of existence of champions, political will, ownership, etc.?
- Does the strategy build on UNDP's comparative advantage – including in-house capacity, involvement of other donors in this field, etc.?
- Is the strategy realistic for the timeframe and the resources available?
- Is there potential for mobilizing resources for more expanded support?

Ways to enhance accountability through access to justice strategies

- Through internal mechanisms (e.g., putting internal oversight mechanisms in place; complementing these mechanisms with incentives such as performance-based promotion, etc.)
- Through external oversight mechanisms (such as building NGO coalitions to monitor performance, strengthened media, complaint mechanisms, etc.)
- Through enhancing the capacity of the user side to demand accountability
- Enhancing accountability of the development programme/project itself (see section on M&E for this)

PROGRAMMING STEP 8: DEVELOP OUTPUTS AND A PARTNERSHIP STRATEGY



Access to justice programmes make a contribution to their stated goals through a combination of outputs and partnerships. These may not be sufficient on their own to make a change in people's lives (outcome), but they can contribute to change.

Outputs indicate the tangible results of development strategies at the end of the project period.

Defining outputs

Outputs should be directly connected to the outcome being pursued by the programme. Generally the factors that influence the problem that the output is hoping to address connects it to the outcome. For instance, an outcome that seeks to "eliminate the incidence of torture," may include a project output such as "drafting penal code provisions on the prohibition of torture".

When establishing programme outputs the following questions may be asked:

- Do the outputs make a critical contribution to the achievement of the outcome?
- Are there outputs that could increase the accountability of justice providers?
- Are there outputs that could strengthen the ability of disadvantaged groups to seek justice?
- Will the achievement of certain outputs in the absence of others increase the vulnerability of disadvantaged groups? If so, can the project ensure all outputs will be achieved?

Designing a partnership strategy

A partnership strategy identifies how key partners will be mobilized and what results they are expected to contribute to the programme outcome. While the outputs are to a large extent under the programme's control, the results of the partnership strategy are less certain.

A partnership strategy identifies how key partners will be mobilized and what results they will be expected to contribute.

When establishing partnerships, adopt a capacity development orientation. For example, who are the actors that have already attempted to solve the problem? Try to involve such actors to build on their efforts.

Ideally, partnership strategies should include all partners that are in a position to ensure that outputs have an impact on people's lives— as well as all actors who are in the position to limit such an impact.

Partnership strategies should be results-oriented. They should ask, what is expected to result from a specific partnership? As with outputs, the development of partnerships should be monitored.

Partnerships can be established at the programme design stage, or they can occur as the programme develops. Partnerships can be pursued formally, such as in joint committees or in formal networks or they may occur informally – e.g., as a result of personal contact with counterparts, or within the context of other projects. To the extent possible however, UNDP should attempt to institutionalize such partnerships since access to justice initiatives may outlast the involvement of these particular individuals.

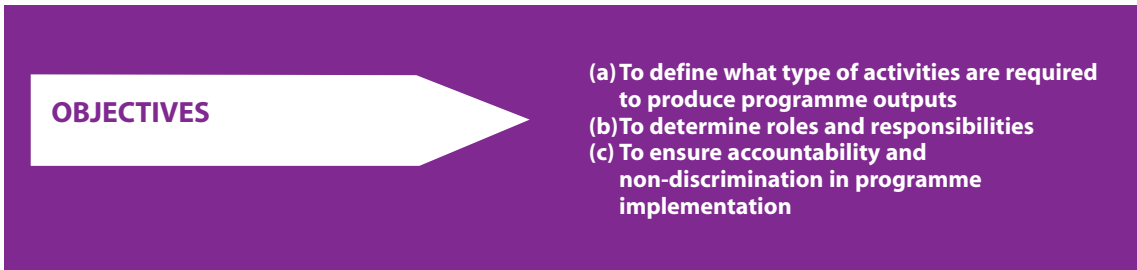
Outputs – an example

During the problem assessment and analysis it was concluded that the main reasons female offenders were disproportionately incarcerated for long periods for minor offences was because of (a) their own legal illiteracy, (b) the ambiguity in the law, and (c) because institutions charged with protecting their legal rights lack the administrative capacity to do so.

To address this, access to justice programme outputs could include:

- a) Review and revision of sentencing laws so that they are in accordance with human rights standards and principles (CEDAW, ICCPR, minimum standards, constitutional provisions etc.).
- b) Preparation of sentencing guidelines that take into account human rights.
- c) Institutionalization of legal literacy programmes for women prisoners.
- d) Provision of legal aid services to women prisoners.
- e) Strengthening of prison registries, prisoner tracking systems established and information flow about prisoners – especially women – to relevant actors in the justice system significantly improved.
- f) Establishment of a civilian oversight mechanism for prisons and detention centres that particularly focus on the conditions of women inmates and detainees.

PROGRAMMING STEP 9: ESTABLISH AN IMPLEMENTATION FRAMEWORK



Activities transform programme inputs into outputs. An implementation framework establishes what key activities (including actions and decisions) need to be performed during programme implementation, who will perform

them, when and on what basis. For instance, a survey may need to be conducted to decide how to select participants, or to determine the specific contents of an advocacy campaign.

Define a timeframe for key activities and decisions

Think of the sequence of activities that are necessary to contribute to a particular output (e.g., legal aid services made available to women prisoners), and set a realistic timeframe to pursue the sequence, e.g., initial discussions with bar associations, Supreme Court and prison officials; establishment of baselines on trial sessions postponed for lack of a lawyer (design of study, conduct of study, recruitment of study team), etc. The process of preparing an indicative work plan will help you to assess whether the outputs set are realistic.



Define roles and responsibilities and establish decision-making systems

Who will be responsible for each task? How will collective decisions be taken? Programme stakeholders need to agree on roles and responsibilities during implementation. Committees and other mechanisms can be established for decision-making – there may be consultative committees, steering committees, etc. Make sure they are representative of the different perspectives that are relevant to the problem in question. Try to use existing mechanisms when available to avoid overburdening national and local administrations, and to ensure sustainability of coordination.



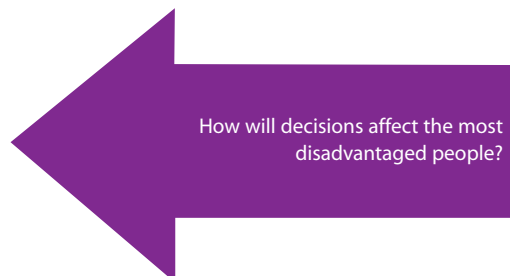
Establish mechanisms to demand accountability

For accountability to occur, it needs to be demanded. Establish ways in which actors responsible for particular tasks (e.g., procurement, recruitment, provision of data, preparation of technical reports) can be asked to report on their activities to other programme stakeholders and to the public at large (e.g., through focal points for information and requests, peer review systems, involvement of NGOs and independent parties in monitoring activities, public hearings, etc.). Mechanisms to demand responsibility from UNDP should also be made clear. Determine what mechanisms will be used to deal with potential complaints about the process and the results of the programme (e.g., on recruitment, corruption, lack of transparency, etc.). Make sure the mechanisms to demand accountability are known to their potential users throughout the implementation of the programme.



Ensure non-discrimination

Non-discrimination does not necessarily mean treating everybody equally. When deep inequalities exist (e.g., in human and financial capacities, or capacities for organization and representation) equal treatment may sustain and reinforce inequalities. It is important to make additional efforts to ensure those who are in a disadvantaged position are put at the centre of decision-making. Non-discrimination may require reviewing recruitment, funding and other operational criteria. Ensuring non-discrimination is especially necessary in the case of disadvantaged groups who are not able to participate in the programme process, or who are not within the focus of the programme. Non-discrimination calls for assessing how key decisions impact on affected groups who have not been involved in decision-making. For instance, in the case of the illustrative outcome on women prisoners mentioned before, it would be important to ensure that the programme does not result in longer periods of incarceration for men as a consequence of the prioritisation of women.



PROGRAMMING STEP 10: DESIGN A MONITORING AND EVALUATION SYSTEM

OBJECTIVES

To define, with respect to process and the results of a development strategy:

- (a) What to measure?
- (b) How to measure?
- (c) Who will do it?
- (d) With what frequency?
- (e) With what purpose?

Monitoring and Evaluation (M&E) consists of tracking and assessing the actual results of the programme as compared to the ones that were planned or expected. This is essential to determine the results-orientation and effectiveness of development initiatives.

Evaluations are in-depth assessments selectively undertaken at specific stages in the project cycle. Monitoring is a continuous process that lasts for the whole implementation of the project. This section explains the major components of a M&E system, and provides some tips on how to introduce M&E into programme design.

A sound Monitoring and Evaluation system is a fundamental pillar of UNDP's accountability. For this reason, M&E systems should be transparent and accessible, and be explicit about the reasons for restricting the timing and scope of information they provide (e.g., confidentiality of sources, etc).

Once the programme strategy is clear, and goals, outputs and partnerships have been defined, you can come up with an M&E system by answering some key questions:

What to measure?

- Outcomes – what are the expected changes to people's lives (see Step 6)?
- Outputs – what are the tangible results of the programme (see Step 8)?

- Partnership Strategy - how key partners will be mobilized to ensure outputs have an impact (see Step 8)?
- Participation Plan - how will stakeholders be involved (see Step 4)?
- Implementation Framework – is implementation taking place in a non-discriminatory and accountable manner (see Step 9)?

Establish general parameters for assessment

The first step towards establishing an M&E system is to define what parameters in each of these areas will be measured. When the expected result in each area (outcome, process, etc.) is adequately defined, the parameters to measure it will be few and simple.

Parameters are general categories that clarify where change should occur

Parameters may describe a situation, a condition, the level of knowledge, an attitude, or a behaviour, etc. For example, "All women prisoners able to secure their release after completing a reasonable prison sentence and in conformity with human rights principles and standards". In this outcome there are two key parameters: (1) reasonability of the period of incarceration for female offenders, and (2) conditions under which the prison sentence and release are conducted.

Characteristics of a programme indicator:

Direct: Measures as closely as possible the type of results the parameter describes.

Objective: Has no ambiguity about what is being measured and it is operationally precise.

Adequate: Groups of indicators should be able to measure a given parameter. Avoid using too many indicators.

Quantitative: They facilitate comparison through time and projects where possible.

Disaggregated: May be necessary to assess whether the results of the project impact differently on different groups of people.

Practical: An indicator is practical if data can be obtained in a timely way and at reasonable costs.

Reliable: Can sufficiently reliable data for confident decision-making be obtained?

Parameters should relate directly to what is being measured. For instance, in the case of a partnership strategy with a parliamentary body to ensure feedback on the legislative process, the parameter should relate to the occurrence of such a feedback. When the outcome or result is defined concisely, parameters would be stated similarly and there may be only one or two. General statements of outcomes, outputs or partnership strategies (such as “strengthened administration of justice” or “partnership with the Supreme Court”) make the establishment of parameters difficult, or require too many parameters.

Set indicators

Indicators define the data that measures a given parameter. Indicators only indicate, they do not explain. They can be seen as snapshots of a small part of the reality that the parameter is referring to.

A parameter will generally require more than one indicator. Try to be strategic in setting indicators: some indicators can serve to measure more than one parameter. Where possible, choose those indicators that have more than one purpose. The best indicators are those that are clear and simple.

For instance, indicators for a parameter like “coherency of the legal framework regulating the functioning of the justice system” may relate to the existence of legal vacuums/legal contradictions in laws, regulations and ordinances in three areas: (a) distribution of competencies among the judiciary, prosecutors and police, (b) distribution of competencies among civil courts, religious courts, military courts, and traditional systems of justice, and (c) legal provisions on the independence of the judiciary, prosecutors, police and lawyers. These indicators can serve to measure other parameters, such as the independence of the justice system.

Indicators should refer directly to the parameter being measured. When this is not possible (e.g., because the phenomena is not directly observable or it is only observable at a very high cost or after long periods of time) programmes can use proxy (indirect) indicators. For instance, “public confidence in the justice system” is a proxy indicator of a “fair administration of justice”.

Indicators may be qualitative or quantitative. Quantitative indicators facilitate comparisons, but they are insufficient on their own to assess parameters, which will normally include important qualitative dimensions.

Define means of verification

The means of verification are the sources of data and the methodology used to obtain that data. For instance, if the indicator is “reduction in the prison sentence period for minor female offenders”, the source of data may include prison and court records, and the method of collecting data may be conducting a survey of 150 cases in five regional courts.

The accessibility, cost and reliability of data are central criteria in selecting one type of indicator rather than another. However, as access to justice problems are new to development and often invisible, secondary data may not always be available or may be insufficient.

Finding accessible and reliable sources may be difficult, often the programme will need to invest in data gathering. Participatory processes may be cost-effective means of doing this as they can also serve to expand capacities

On occasions, access to justice programmes will need to invest a certain amount of time and resources in data gathering. The use of rapid appraisal methods, which are quick, low-cost ways to gather data systematically, should be taken into consideration. On the other hand, using participatory processes may take more time but be more cost-effective, as these processes can also serve to expand capacities in critical groups (see Step 3 to develop a participation plan).

TABLE 4: SETTING PARAMETERS AND INDICATORS – AN EXAMPLE

| WHAT TO MEASURE | HOW TO MEASURE | | |
|--|---|--|---|
| | Example of a parameter: | Example of indicator: | Means of verification: |
| OUTCOME: ALL WOMEN PRISONERS ABLE TO SECURE THEIR RELEASE AFTER COMPLETING A REASONABLE PRISON SENTENCE AND IN CONFORMITY WITH HUMAN RIGHTS PRINCIPLES AND STANDARDS | (1) Reasonability of the period of incarceration | (1) Percentage of minor female offenders granted alternative prison sentence or conditional release <i>Target:</i> 30% increase in alternative prison sentencing/conditional release for female offenders for minor offences in 3 years. <i>Baseline:</i> 5% female minor offenders with alternative prison sentencing, 2% conditional release | (1) Prison and court records – survey of 150 cases in five regional courts |
| OUTPUT: LEGAL AID SERVICES MADE AVAILABLE TO WOMEN PRISONERS | (1) Poor women prisoners' receiving legal aid services during revision of sentence | (1) Percentage of women prisoners whose trial sessions have been postponed due to the absence of a lawyer <i>Target:</i> Decrease to 40% of total postponements in 3 years <i>Baseline:</i> 75% of total postponements | (1) Court records – survey of 150 cases in five different prisons |
| PARTNERSHIP STRATEGY: PARTNERSHIP WITH THE SUPREME COURT, TO ENSURE IT PRIORITIZES REVIEW OF SENTENCES FOR WOMEN | (1) Priority revision of sentences of women prisoners incarcerated for long periods | (1) Existence of Court Guidelines on priority revision of cases of women incarcerated for long period <i>Target:</i> Guidelines established within 3 years. <i>Baselines:</i> No prioritization criteria in place | (1) Supreme Court orders |
| PARTICIPATION PLAN: WOMEN PRISONERS TO DEFINE QUALITATIVE PARAMETERS OF LEGAL AID SERVICES | Qualitative parameters of legal aid services respond to expressed concerns of women prisoners | (1) Number and nature of suggestions from women prisoners incorporated into the legal aid scheme | (1) Qualitative assessment of legal aid scheme against records from workshops, meetings, etc. |
| PROCESS: NON-DISCRIMINATION ACCOUNTABILITY | Male prisoners released after completion of sentence remains equal or improves (1) Functioning of complaint mechanisms | Rate of male prisoners release before and after the project period (1) Programme adjustments occasioned by complaints | Prison records – 50 cases in five different prisons (1) Programme reports |

Set baselines, benchmarks and targets

Indicators require a baseline (starting point before a programme), a target (situation expected at the end of the programme) and benchmarks (observations taken at specific points in time or within a given period of time).

Targets and benchmarks should be realistic, and they should be agreed to by all programme partners.

For instance, for the indicator used in the previous pages a baseline could be “5% of total female minor offenders with alternative prison sentencing, 2% granted conditional release”; the target could aim for an increase to “80% of total female minor offenders granted alternative prison sentencing or conditional release in five years”; and benchmarks could be set at 5% for the first two years and 20% for the rest.

Who will be involved?

A human rights approach calls for involving those who are experiencing the problem in Monitoring and Evaluation (see Step 3). A plan for participatory monitoring can be prepared to decide who will participate, and how the capacities of those participating will be strengthened so that their involvement is meaningful. Participatory processes may risk being captured by more educated or better positioned groups or individuals. To counter the risk of elite capture, efforts should be made to involve those who are in a disadvantaged position as well.

Participatory monitoring can become a learning process and a process of social negotiation if done well. This can produce additional capacity results for the project.

It is useful to involve independent actors (e.g., NGOs, agencies not related to the programme, other donors) in monitoring activities, as this usually increases the reliability of findings.

Monitoring processes that facilitate learning and social negotiation can produce additional results to the project in terms of capacities.

What will be the frequency of the assessment?

Set a timeframe for Monitoring and Evaluation. Will data be collected monthly, every six months, or annually? With what frequency will reports be prepared? A specific timeframe responds to the purposes and the nature of what is being measured. Certain information may be needed regularly to ensure programme adjustments; especially data related to the process such as data on participation or non-discrimination (see Step 10).

Secure funding and time to collect and analyze data, even if collection happens after completion of the project, such as in evaluations.

What are the purposes of the data?

How will the information gathered in Monitoring and Evaluation be used? It is easier to set parameters and indicators that are relevant by being explicit about what specific decisions M&E data aims to support, during and after programme implementation. For instance, will particular sets of data help to design a training course in the later stages of the project? What type of data will serve to conduct a mid-term programme adjustment? Which data can be used for advocacy purposes?

Some methods of data collection

Commonly used methods include:

- *Desk research.* Involves collecting secondary data (from previous surveys, reports, etc.).
- *Key informant interviews.* Involves interviews with 15 to 35 individuals selected for their first-hand knowledge about a topic of interest. Interviews are qualitative, in-depth and semi-structured. Interview guides and listing topics can be used.
- *Focus groups interviews.* Involves several groups of 8 to 12 participants. Each group discusses issues and experience among themselves. A moderator introduces the topic, stimulates and focuses the discussion, and prevents domination of discussion by a few.
- *Community interviews.* These usually take place at public meetings. Interaction is between the participants and the interviewer, who presides over the meeting and asks questions following a carefully prepared interview guide.
- *Direct observation.* Teams of observers record what they see and hear at a programme site, using detailed observation forms. Observations may be of physical surroundings, ongoing activities, discussions, etc.
- *Mini-surveys.* Involves interviews with 25 to 50 individuals, usually selected using sampling techniques. Structured questionnaires that focus on a limited number of closed-ended questions are used.

NORMATIVE PROTECTION

CHAPTER



CHAPTER 3

Overview of the Chapter

- 3.1 Normative Protection and Access to Justice
- 3.2 National and International Framework of Normative Protection
- 3.3 Challenges to Achieving the Full Benefits of Normative Protection
- 3.4 Capacity Development Strategies to Enhance Normative Protection

OVERVIEW INTRODUCTION

This chapter examines the normative framework that is in place at the national and international levels and the areas of intervention that protect the rights of the disadvantaged. In certain cases, the legal framework within the country does not take into consideration the particular barriers faced by disadvantaged people nor does it address their needs. As a result, the justice system becomes an entity that is often inaccessible to them, thus perpetuating exclusion and sometimes displaying gross discrimination.

Normative protection in access to justice encompasses formal and informal sets of norms, addressing both substantive and procedural aspects of protection. Normative protection provides us with standards in relation to access to justice within a human rights framework. It also provides us with remedies to pursue when those standards are violated. The presence of both standards and remedies are critical to normative protection.

3.1 NORMATIVE PROTECTION AND ACCESS TO JUSTICE

Norms are socially generated and as such reflect the conflicts/tensions of a society. Thus, norms can be positive or negative and the repercussion of the norms can be either good or bad. While norms have the capacity to provide protection, it is first necessary to evaluate whether certain norms perpetuate injustice rather than justice.

Norms are classified as both formal and informal. Thus, they can be referred as formal or informal law. Formal law are those promulgated by designated state organs, such as the legislature. In many cases, this evolves in response to social demand. Informal law on the other hand, "evolved through social interaction and are either internalized or enforced informally" primarily by non-state actors. Informal institutions govern social groups from village communities to networks, among others.¹

In a discussion on normative protection, the elements of legal systems include:

- The existence of rules, which can be international or domestic, constitutional or 'ordinary', procedural or substantive, formal or informal in nature;
- Processes through which rules are made, applied, interpreted and enforced in practice (i.e. rule-making, rule-enforcing and rule-changing); and
- Relevant actors and institutions involved in them².

Whatever the nature of these elements, the impact of legal systems depends largely on how disadvantaged groups interact with the law, and whether institutions operate according to what the rules establish (see Chapter 4 and Chapter 5).

Normative protection and behavioural change

Legal norms and institutions are socially generated and are always evolving. They are instrumental in generating and stimulating change where there is underlying social consensus. Whilst fostering access to justice, the law can either lead or follow. Therefore, interventions aiming to bring justice to disadvantaged groups by influencing the normative framework must go beyond simply creating the right conditions for the disadvantaged groups to channel their demands (reactive normative setting) and also work towards influencing the normative framework by setting progressive norms that will lead to changes in society (pro-active normative setting). For instance the development of rules to induce or discourage certain types of behaviour – e.g., provision of incentives to encourage environmental protection,

criminalization of child pornography or sexual harassment, or the setting of minimum quotas for women in parliament.

Human rights and normative protection

The concept of human rights is based on the recognition of specific fundamental and inalienable rights essential to the human being. To the extent that these inherent rights of each human being are recognized and formalized within the normative framework, whether national or international, they offer normative protection of disadvantaged groups. However, formal recognition within the normative framework alone may not be sufficient for the protection and enjoyment of rights of the most disadvantaged groups. In some cases additional or more specific laws need to be enacted to flesh out the contents of the right, claim holders and duty bearers. Complementing norms (legislation) to enhance the normative framework for the protection of disadvantaged groups may be developed/enacted either within the national or international legal system.

It is important to work on both creating the right conditions for disadvantaged groups to channel their demands (reactive normative setting) and to influence the normative framework by setting progressive norms that would lead to changes in society (pro-active normative setting).

For instance, even though non-discrimination against women is embodied in all human rights related instruments pertaining to the international legal system, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was drafted to specifically deal with the issue of women's rights and to ensure that they are protected under all circumstances. Likewise, even though there are a number of laws to generally protect the population against violence, specific laws, such as anti-sexual harassment laws, anti-domestic violence laws and anti-rape laws, are necessary to ensure that women are protected from violence based on their own experiences of it. (Also see Chapter 6).

Stigmatization of disadvantaged groups

It is also through the normative framework that we define what is and is not a crime within a given society or legal system. Often, disadvantaged groups are marginalized or stigmatized by the law when it does not recognize their legal status or practices (e.g., indigenous peoples' usage of land and natural resources), or even worse, their behaviour can be criminalized due to lack of understanding or sensitivity (e.g., women victims of trafficking and forced prostitution are treated as offenders and provided with limited access to justice).

¹ *The Evolution of Legal Institutions and Economic Regime Change.* Katharina Pistor, Max Planck Institute for Foreign and Comparative Law. Paper prepared for the annual Bank Conference on Development Economics in Europe on Governance, Equity and Global Markets, 21-23 June 1999, Paris. Preliminary Draft dated June 1999)

² Ann Seidman, Robert B. Seidman and Thomas W. Walde, W. (eds.) 1999. "Making Development Work: Legislative Reform for Institutional Transformation and Good Governance." pg. xviii-xx. Hereinafter Seidman.

Public scrutiny and accountability

The normative framework defines the “rules of the game” by defining as well as limiting state powers (and the powers of its organs), establishing processes to monitor states’ compliance with the law and by recognizing of the rights and duties of citizens vis-à-vis the State. The enactment of statutes protecting judicial independence, the establishment of judicial oversight bodies and watchdogs such as ‘Councils of Magistrates’, or the development of additional systems such as Ombudsmen, Human Rights Commissions, etc., are additional tools provided by the law to ensure proper application of the law and professionalism within the judiciary (see Chapter 4).

3.2 NATIONAL AND INTERNATIONAL FRAMEWORKS OF NORMATIVE PROTECTION

In general, normative protection may either derive from a State’s legal system or the international normative framework. Usually, both complement each other, i.e. the international framework spells out principles of normative protection to be incorporated into the national normative framework. Moreover, there is an increasing tendency for the international normative framework to surpass its inter-State conception and to address specific areas of normative protection within a State, such as human rights.

National Framework of Normative Protection

The Constitution

The Constitution is the basic law of the State. It provides the general framework and principles by which a state is run and on the basis of which its organs are entitled to act. It also prescribes how the State should be organized by specifying the duties and linkages between the different functional units within the State. In almost all cases, the Constitution is the supreme and most sovereign law of the land from which no other national law

can depart. As a consequence, it is the standard by which other national legal instruments and governmental actions or omissions within the country are measured.

As the Constitution is the highest norm of the State, it is important for human rights (and as a consequence access to justice principles) to be incorporated within the Constitution to provide a basic framework with which the State and its citizens are required to comply.

Provisions relevant to access to justice generally present in Constitutions include:

- Bill of Rights³
- Directive Principles (also known as Basic Principles or State Principles)
- Separation of power between the executive, legislature and judiciary
- Establishment of monitoring bodies such as the National Human Rights Commissions

Constitutional reform is a difficult process. Under rare circumstances, for example due to changes in government or as part of a peace agreement, an entirely new Constitution may be drafted. However, any change to the Constitution, no matter how small, provides an opportunity to improve the normative standards on access to justice.

Due to the sovereign position of the Constitution within the legal system, it is of strategic importance to have rights recognized and protected through the Constitution. Thus, whenever possible, when advocating for the protection of a right, a formal constitutional provision should be sought.

Another way of ensuring a constitutional guarantee in cases where an amendment of the actual constitutional text is impractical is to obtain a favourable judicial reading of the Constitutional text. This can be particularly useful when the constitutional text is ambiguous or outdated. (see discussions below on legislation and court decisions). In such cases, there is also an added value of the international normative human rights framework since this is a classic case where the

Challenges to Constitutional Reform

Often, constitutional reform and amendments are a difficult process. For example:

- In Japan, amendments can only be initiated by a vote of two-thirds or more of all the members of each of its parliamentary organs (House of Representatives and House of Councillors) and the amendments must be submitted to the people for ratification in a referendum (The Constitution of Japan, Art. 96).
- In Vanuatu, an amendment may be introduced either by the Prime Minister or any other Member of Parliament. It will come into effect if supported by two-thirds of all the members of Parliament at a special sitting of Parliament at which three-quarters of the members are present. If there is no such quorum at the first sitting, Parliament may meet and make a decision by the same majority a week later, however, two-thirds of the members must be present. Certain parliamentary amendments such as to the electoral system or to the parliamentary system require a national referendum. (Vanuatu Constitution, Arts. 84-86)

³ In some countries the bill of rights is limited to a listing of civil and political rights but increasingly, countries are expanding this list to include economic, social and cultural rights.

high courts may refer to international “precedents”, such as the jurisprudence of international and/or regional human rights courts, as well as charter-based and treaty-based bodies.

However, there are also risks involved in pushing for constitutional reform. In particular, there is the risk of opening up a whole range of controversial issues which may have been settled through cumbersome compromises in the constitution. Additionally, it may be important to evaluate the role and jurisprudence of the Constitutional/High/Supreme Court on human rights before moving ahead with constitutional reforms, which may otherwise override valuable precedents.

Legislation

Legislation is generally statutory law that has been enacted by the legislature (i.e., the Parliament or National Assembly). Legislation can be referred to as legislation, statutes, codes, acts or legislative decree. In some cases, the term law is used to refer to legislation.⁴ Legislation serves to elaborate on the general framework and principles of the Constitution and must comply at all times with the Constitution. In exceptional cases, the President or the Executive branch can be given the power to enact legislation in certain circumstances, such as in emergency situations or in situations of transition.

■ Law reform through legislation for the enhancement of the normative framework.

The process of creating and reforming legislation varies from country to country, depending on the mechanisms provided within the Constitution and legislative practice. However, there are many over factors beyond the Constitution, and the processes it mandates, that can lead to law reform. It is critical to ensure that both legal and extra-legal methods are pursued and that both the capacity to provide remedies and the capacity to seek remedies are targeted.

Formulating specific legislation to address the needs of a particular (generally disadvantaged) group is often seen as unnecessary and as “catering to minority interests.” For example, in Costa Rica (see box on page 43), efforts to provide specific legislative protections and incentives to support women’s political participation were initially met with questions of why it was necessary to legislate for women in particular when a law already existed providing no distinction between men and women running for political office. This type of attitude reflects a lack of conceptual clarity about substantive equality. It fails to recognize that the existence of a gender-neutral law does not necessarily mean that equality is achieved.

■ **Neutrality leads to discrimination.** In Zambia, for example, under the government land policy 10 per cent of all advertised land should be given to women. However, the effectiveness of this policy is undermined by the requirement of a collateral of ZMK 100,000 (about US \$21) which is non refundable and is required upfront. As women are generally poorer than men, many women cannot afford this amount and therefore are precluded from benefiting from the policy. The law thus discriminates against women by failing to ensure their equal access to and enjoyment of the land policy.⁵ In cases such as this, a gender specific standard is necessary to ensure that women have the same rights to access and enjoy the same opportunities provide to men. One way to counter de facto discrimination is to have an explicit provision and legal guarantee in favour of disadvantaged groups.

■ Implementation of legislation through administrative rules and regulations.

Secondary rules and regulations are written by the executive branch to implement primary legislation. They reflect the institutional interpretation of legislation by executive branch as well as specification of measures to be undertaken in the implementation of the primary legislation. The executive branch decides how it will implement the policies forged into law. In some cases, such rules and regulations are also promulgated by a functional unit of government to govern its own functioning. In these instances they may be called guidelines, circulars or secondary laws.

Indirect Discrimination

An aquaculture project in Bangladesh was found to discriminate against women because it required that all those aspiring to participate had to own ponds. Since women did not inherit their parent’s property or those who did, did not have access to the pond because they had moved to their husbands’ village, they could not participate in the project.

IWRAW Asia Pacific. Building Capacity for Change: A Training Manual on the Convention on the Elimination of All Forms of Discrimination Against Women (2001).

Administrative rules and regulations or by-laws are of critical importance to the implementation of laws, while also being common causes of non-implementation. Excessive rules and regulations may in fact limit remedies established by law to the point of making them ineffective. However, they can also be used to fill legal gaps and respond to urgent needs while primary norms are being developed.

⁴ Statutes, codes and acts are all legislative enactments and therefore are legislation. They have the same weight as they are promulgated by the same body. A code though is a more exhaustive kind of law on a specific area and thus comes from the legislative intention to cover all dimensions of a specific theme in one law. In many countries, the designation of a law as code is the popular name given to a law, e.g. Criminal Procedure Code (Malaysia) is Act 593; the Local Government Code of 1991 (Philippines) is Republic Act 7160.

⁵ International Women’s Rights Action Watch Asia Pacific. 2003. “The Principle of Non-Discrimination.” (Hand-out) derived from the Lawyers Expert Group Meeting, Bangalore, March 19-21, 2003. IWRAW Asia Pacific.

Enactment of rules and regulations aims to remove the arbitrariness from the process, ensure predictability and consistency and to avoid discriminatory practices. By supporting the process of development of regulatory frameworks, largely by working closely with line ministries, rights enshrined in law can be expanded by detailing the duties and responsibilities of different actors.

Changes at this level are generally easier to obtain as interventions can be made by working only with specific governmental units, yet the effects can be as far reaching as primary legislation in some cases.

In the Philippines, the Supreme Court in 2000 promulgated rules governing the treatment of child witnesses in court proceedings to guide lawyers, law enforcers, judges and other relevant actors. Advocates who lobbied for these rules stated that it was a quicker process to get immediate protection for children instead of waiting for legal reform.

Unlike legislation however, rules and regulations can be challenged as being unlawful (against the law) or unconstitutional (against the Constitution). Further, the process to enact administrative and secondary norms can lack transparency and does not usually benefit from the involvement of disadvantaged groups.

Court Decisions (Jurisprudence)

Acting as the link between the normative framework and the individual, the decisions of courts and tribunals form part of the framework of normative protection. Court decisions can provide protection through the application of national and – depending on the legal system in relation to the international legal framework - international human rights standards. They can also develop further or elaborate on existing human rights standards. In cases where the national statutory framework is lacking basic standards for rights protection, a progressive judiciary can expand domestic normative protection to protect disadvantaged groups.

Some examples of creative judiciary in action include:

- **Paschim Banga Khet Majoor Samity v. State of West Bengal (India).** This case involved a petition based on the right to life of an agricultural labourer who suffered severe head injuries and was taken to seven different government hospitals, all of which refused him

treatment on the grounds that there was no vacant bed. The Indian Supreme Court “carved out” the right to emergency medical care for accident victims as forming a core component of the right to health, which in turn was recognized as forming an integral part of the right to life, a right guaranteed under the Indian Constitution. Following this decision, the State was required to formulate a blue print for primary health care with particular reference to treatment of patients in an emergency.⁶

- **Grootboom Case (South Africa).** In 1999, the Grootboom community was forcibly evicted from private land and was forced to move to a nearby shanty town outside Cape Town on the perimeter of a sports field with no sanitation, electricity and water. In response, the community travelled daily to the High Court to seek a remedy to their forcible eviction. The Constitutional Court held that Article 26 of the Constitution (right of access to adequate housing) imposes an obligation on the State to formulate and affect a coherent, coordinated housing programme. The Court felt that, by failing to provide for the vulnerable members of society, the Government had failed to take “reasonable measures, within available resources.” The Court ordered the Government to “devise, fund, implement and supervise measures to provide relief to those in desperate need.”⁷

- **People’s Union for Civil Liberties v. Union of India (India).** In April 2001, despite of the tons of food stocks in the country’s warehouses, there was a food scarcity in states affected by drought. The People’s Union for Civil Liberties applied for relief from the shortage in the courts based on the right to food derived from the right to life, the latter a right guaranteed by the Constitution. The Court upheld this right by specifically stating that food must be provided to the aged, infirmed, disabled, destitute women, men and children and pregnant and lactating women. Several other orders were made by the court including: (a) ration shops must remain open and give grains to families below the poverty line; (b) the Government should publicize the right of the families below the poverty line to grain; (c) grain allocation for the Food for Work programme must be doubled; (d) all individuals without means of support (including older persons, widows, persons with disabilities) are to be granted a ration card; and (e) implementation of the mid-day meal scheme in schools.⁸

⁶ 4 SCC 37 (1996) as cited in Dr. S Muralidhar. 2004. “Economic, Social and Cultural Rights: An Indian Response to the Justiciability Debate”, in *Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights*. Yash Ghai and Jill Cottrell (eds.) pg. 26. Hereinafter Muralidhar.

⁷ *Government of South Africa & Ors. v Grootboom & Ors (2000)*. www.esccr-net.org.

⁸ *Centre on Housing Rights and Evictions (COHRE)*. 2003. “Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies.” Hereinafter COHRE, pg. 35 and Muralidhar, pg. 26.

Reforming Legislation – An Example from Costa Rica

In Costa Rica, during the 1985 and 1986, women's rights were brought to the fore during the presidential campaign, when presidential candidate Oscar Arias, openly sought women's votes and declared that his government would have the "soul of a woman". He went on to win the elections and announced on taking up office that he would give a very high priority to women's issues. The women who had supported Arias's campaign, and those who now held positions in Government, moved quickly to ensure that the Arias and his government kept its promises. They drafted legislation to implement Costa Rica's commitments under CEDAW, initially focusing on political participation, proposing that political parties should nominate male and female candidates in proportion to the percentage of male and female voters in the electorate. They also proposed that 25 per cent of the public funds parties received must be spent on improving women's political participation.

A broad coalition of women's groups began work on a multi-dimensional strategy for the passage of the bill. Among the various activities employed were:

- Town hall meetings convened on the need for and contents of the bill;
- Awareness raising "cultural fairs" directed at women and children;
- Media lobbying by politically prominent women;
- A public demonstration and march;
- A meeting with over 300 priests to discuss the bill and gain their support for it, convened with the permission of the Archbishop of the Catholic Church;
- Conducting of a public opinion survey at the close of the campaign.

The results of this last activity found that 63 per cent of the public was aware of the bill and that 73 per cent approved of measures for male and female representation in the nominations for government elections. It became obvious then to the legislators that direct opposition to the bill would be highly unpopular. Those who had been critical of the bill were forced to refocus their energies on amending some of its provisions. At the same time, those who supported the bill made some changes to it based on their consultations over the course of the campaign with a wide range of women's groups. Two new sections were added:

- An introductory section on State obligations to guarantee real equality in political, economic, social and cultural life and to remove obstacles to real equality; and
- Reforms required in relation to Costa Rica's civil penal, procedural, labour and family laws.

The bill was passed into law in 1990 as "The Law of Promotion of the Social Equality of Women". The provision relating to women's participation was watered down to political parties being encouraged to increase women's nominations and for an unspecified amount of public funds to be spent on improving women's political participation. However, most of the bill's other provisions remained intact and made substantive changes to women's equality:

- The State must share in the cost of child care for all working parents of children aged under seven years;
- Property titles must be registered under the names of both spouses and single women's property must be registered in their own names;
- Women are entitled to three months maternity leave following adoption;
- Mothers and fathers are given equal rights over children;
- Women in common law relationships are entitled to inherit the property of the relationship;
- In the prosecution of rape offences, female officials must be available for investigation; women are entitled to be accompanied to forensic exams; justice personnel are to be given trainings and programmes to combat sex crimes are to be developed
- Abusive spouses can be ordered by the court to leave the home and provide economic support;
- A women's legal defence office is to be instituted;
- Gender stereotypes should be eliminated from educational materials and practices.

From United Nations Development Fund for Women, Bringing Equality Home: Implementing the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1998) Ilana Landsberg-Lewis (ed.) 29-30.

Seeing the potential of court decisions opens up more possibilities for work in this area, especially for the protection and enforcement of economic, social and cultural rights. However, court decisions should be used with caution as the judicial introduction of norms may also divert the community from a more open and democratic process of norm making through Constitutional or statutory amendments.⁹ Courts, however, can serve to clarify legal ambiguity and can prompt legislative bodies to review or enact adequate legislation.

Customary Practices (Informal Laws)

In addition to the formal legal frameworks, informal law also provide normative protection. This is often referred to as customary law or traditional law. Both formal and informal legal frameworks have positive aspects and their effectiveness varies depending on the nature of the dispute and the relationship of parties. In many developing countries, traditional and customary legal systems account for an estimated 80 per cent of total cases.¹⁰ Customary law can be either written or unwritten law (see Informal Justice Systems in Chapter 4 and Indigenous Peoples and Minority Groups in Chapter 6). In many instances, customary norms and practices are the main sources of customary law.

Informal law is in some cases also called traditional law. It is not a body of precepts that remains static over time, but the result of long historical processes of interpretation and adaptation to changing environments, thus reflecting the values of a given society. Wherever traditional law is compatible with international human rights and basic considerations of justice, "allowing diversity and customary practices to flourish is a way to improve the quality of governance and to democratise both the form and the content of legal regulation."¹¹

Therefore, in order to work through complementary normative frameworks (formal and informal), careful consideration should be given to whether or not to institutionalize or formalize informal set of norms and justice systems depending on country specificities. However, before making this decision it is necessary to examine whether existing customary norms are in conformity with human rights standards and are inclusive of disadvantaged groups as well as the disadvantaged sectors within disadvantaged groups (see discussions below under Duality of Norms).

In countries such as the Philippines and Rwanda, traditional justice systems have been formalized through the enactment of legislation. While in countries such as South Africa, the traditional

justice systems have remained within the informal realm, which is characterized by its flexibility, community focus, accessibility to the poor, and rapid response to dispute settlement.

Discriminatory Norms

A discriminatory norm that is entrenched in the customs and traditions of a society can counter work on access justice, perpetuating violations rather than protection of the vulnerable. The case of *Magaya v. Magaya* (Supreme Court of Zimbabwe, Judgment No. C.S. 210/98 (1999) 3 LRC 35) illustrates how upholding a discriminatory customary norm which is protected under formal laws can have a serious impact on normative protection for access to justice of disadvantaged groups. In this case, Venia Magaya, the daughter of the first wife of Shonhiwa Lennon Magaya was unable to claim her inheritance as it was contested by the son of Mr. Magaya's second wife. The community court stated that Venia, being a woman, cannot inherit her father's estate when there is a male heir, a decision in keeping with African custom. The Supreme Court upheld the community court's decision. In this case, the denial of a woman's right to inheritance was upheld by African custom, by legislation through the Administration of Estates Act and by the Constitution. The Constitution states an exception to the rule of non-discrimination where the application of African customary law is made in any case involving Africans. As a consequence of the decision, the case is also now a precedent for future court decisions.

Interventions to increase access to justice should work with informal structures, as well as with the formal sector. Informal and tradition institutions should not be seen as a substitute or replacement of formal justice institutions but rather viewed as a complementary system to reinforce the provision of justice to the majority of citizens.

In some countries, mechanisms to link the formal and informal justice systems include:¹²

- **Applicability of traditional law by the courts.** This is usually applicable within certain limits such as only in civil cases or consistency with other existing written laws.
- **Creation of bodies of traditional leaders.** Such bodies (e.g., councils) can have an advisory role on matters related to traditional laws. These bodies may be complemented by judiciary committees with powers of adjudication on matters affecting traditional institutions (for an example of how this works, see Ghana).
- **Verdicts from traditional courts can be appealed to higher courts.** However, traditional dispute resolution mechanisms are

⁹ Michael Kirby, *Domestic Implementation of International Human Rights Norms, a paper presented at the Conference on Implementing International Human Rights (December 6, 1997)* accessible at: http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_inthrts.htm hereinafter Kirby.

¹⁰ Department for International Development. July 2002. "Safety, Security and Accessible Justice: Putting Policy into Practice." DFID. pg.58.

¹¹ Julio Faundez. 2001. "Legal Reform in developing and Transition Countries: Making Haste Slowly." In *Comprehensive Legal and Judicial Development: Towards an Agenda for a Just and Equitable Society in the 21st Century*. Rudolf V. Van Puymbroeck (ed.) pg.376. Hereinafter Faundez.

¹² The examples are taken from Foster Mijiga. 1998. "The Role of Traditional Leaders in a Democratic Dispensation: A Selection of International Experience." pg. 15-18.

usually based on mediation and reconciliation, whereas formal courts use adjudication. This difference in process creates certain incompatibilities in the relief or remedy requested. Some countries (e.g., Papua New Guinea) have tried to address this difference by allowing for traditional processes of mediation and compromises rather than the enactment of binding judgments.

International Framework of Normative Protection

The international legal framework operates on top of the national framework. Initially conceived as a means to govern the relations between (sovereign) States, it provides for rights and obligations of States vis-à-vis each other. These rights and obligations derive from the sources of international law the main sources being: international treaties, customary international law, and general principles of law.

However, with the growing understanding for the need to ensure the respect, protection and enjoyment of human rights, the international framework has developed standards and mechanisms reaching well into the national normative framework.

The relationship between these the national and international spheres of normative protection is usually defined in the Constitution, which may either consider international norms as part of the national legal framework or require legislative acts for their applicability within the domestic realm. In both cases, States (its organs) remain bound by the international obligations and failure to implement them will trigger specific consequences under the international normative framework. They may thus serve as important benchmarks against which to measure the extent to which normative protection is provided for and to hold governments accountable accordingly. They may furthermore serve as authoritative standards to be referred to when pursuing reform in furtherance of the normative protection of disadvantaged groups. Last but not least, remedies provided for under the international normative framework may directly be available to individuals who feel that their human rights have been infringed by the State.

The international legal framework also provides normative protection for access to justice by providing:

- International obligations for states through human rights treaties and customary law;
- Other human rights standards that are not binding on States as such but give normative guidance on specific issues (e.g., resolutions, declarations, guiding principles etc.) and may be indicative of a growing international consensus to further develop the international legal framework;

- An additional forum for access to justice, (e.g., communications and inquiry procedures initiated through treaty bodies and regional courts and commissions, in cases where national mechanisms are ineffective);
- Mechanisms to monitor states compliance with human rights and access to justice obligations; and
- An additional forum to create or influence national norm making.

Treaties

A treaty is an international agreement concluded between states in written form and governed by international law.¹³ Treaties may either be concluded between a number of States (multilateral treaty) or between two States only (bilateral treaty). Multilateral treaties are frequently referred to as Charter, Convention or Covenant, whereas bilateral treaties are often termed Agreement. Treaties may be supplemented by so-called Protocols. A treaty (and its protocol) is binding among the States that ratified or acceded to it, in which case the State is called a State Party or a Member State in the case of treaties establishing international organizations, such as the United Nations. Mere signature does not bind a State to follow the terms of the treaty in its entirety, but merely to refrain from conduct which would render the treaty obsolete (or defeat its object and purpose).

The relationship between the national normative framework and international treaties is normally determined by the Constitution. While States enjoy discretion as to the normative value they afford to international obligations within their normative framework (i.e. the applicability of treaties), they cannot use provisions of the national normative framework as an excuse for the failure to meet the international obligations deriving from the treaty. However, they may enter into reservations in order to render certain treaty obligations inapplicable. In general, there are two approaches concerning the relationship between international treaties and the national legal system depending on whether the international normative framework is considered as part of the national legal system or as separate, thus requiring legislative acts within the national normative framework to become part of it:

- **International treaties are directly applicable, provided that they are sufficiently specific** (in wording), i.e. self-executing. In this case, they can be directly applied after ratification without further legislative action,¹⁴ i.e., rights and obligations can be relied on by individuals and/or courts. In many of these cases, it involves a situation when Constitutional texts provides for its direct application, thus settling any ambiguity regarding its application; or

¹³ Vienna Convention on the Law of Treaties, Article 1.

¹⁴ See examples of the Constitutions of the Republic of Korea and Nepal in the section on Recommendations on Using International Law at the national level.

- **They require further legislative action to “introduce” (transform or incorporate) international norms into the domestic legal system.** This can be achieved by the adoption of specific legislation corresponding to or duplicating (if sufficiently specific in wording) the obligations set out in the international treaty. In contradistinction to the previous approach, individuals and courts will not primarily rely on the text of the international treaty but on the legislation specifically enacted to meet the State’s international obligations. (For further discussion, see the section on ways to use international law at the national level).

International human rights treaties provide the basic normative framework for access to justice. The seven main UN human rights treaties that help establish this framework are:

- International Covenant on Civil and Political Rights (ICCPR) and its two Optional Protocols
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- International Convention on the Elimination of Racial Discrimination (ICERD)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol (CAT)
- Convention on the Elimination of All Forms of Discrimination Against Women and its Optional Protocol (CEDAW)
- Convention on the Rights of the Child (CRC) and its two Optional Protocols
- International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW)

Treaties are legally binding for states that have ratified them. In addition, the human rights treaty system has developed a mechanism to continuously generate normative standards and expanding normative protection through the monitoring of compliance with each treaty by a specialized body, also known as a “treaty body” (e.g., the Committee on the Rights of the Child monitors compliance with the CRC, the Human Rights Committee monitors compliance with the ICCPR etc.). Members of treaty bodies are independent experts selected by States Parties from different regions of the world.

The treaty body fulfils its monitoring functions in the following ways:

■ A system of reporting

Each treaty has a provision that obligates States Parties to report to the treaty body at regular intervals. Once the State Party’s report has been submitted a constructive dialogue between the State Party and the treaty body then takes place on the State Party’s compliance with the treaty concerned. The report is used as the primary, but not the sole, basis of consideration.¹⁵ As a result of this dialogue, the treaty body drafts a set of Concluding Comments or Concluding Observations in relation to the State’s compliance with the treaty. These comments or observations set out the positive areas of implementation, factors impeding implementation and areas of concern, and provides recommendations for better application of the convention.

The value of the reporting process rests in the fact that it measures progress in a State’s compliance with its human rights obligations. As reports are periodically submitted, the initial report acts as the baseline from which succeeding reports are to be assessed in terms of progression or regression. It allows States to avail of the expertise of the members of the treaty bodies who can advise on the appropriate ways to address obstacles in implementation. Thus, it creates and builds a better understanding of a State’s obligation under the treaty as they are being held accountable for compliance.

NGOs also submit additional information (alternative or shadow reports) to the treaty bodies whenever their country reports to the treaty body. For example, IWRAW Asia Pacific since 1997 through its ‘From Global to Local Programme’, has facilitated the participation of women from countries reporting to the CEDAW Committee by providing guidelines on writing alternative/ shadow reports and mentoring them through the reporting process. The project has focused on building better understanding among its participants on the relevance and usefulness of CEDAW in their advocacy at the local level. It has worked to create a space for NGOs within the CEDAW reporting process especially in providing Committee members more information and data to assist the Committee in constructive dialogue with governments. This can lead to increased Government transparency and Government-NGO interaction, e.g. national dialogues after the reporting process.¹⁶

■ General Recommendations or General Comments

General Recommendations or General Comments are authoritative interpretations of the treaty made by the relevant treaty body. They allow the treaty body to elaborate further on a particular article of

¹⁵ Treaty bodies also use reports from the UN Special Reporters, the Concluding Comments of other treaty bodies, reports of specialized agencies, NGO shadow reports, journals, newspaper articles, and other reliable sources of information as a basis of their consideration of a State Party’s report. H.Steiner & P.Alston (eds.), *International Human Rights in Context* (2nd ed. 2000); P.Alston & J.Crawford, *The Future of UN Rights Treaty Monitoring*.

¹⁶ From ‘Assessment of From Global to Local: A Convention Monitoring and Implementation Project’, UNIFEM, June 2004.

the convention or to address emerging or urgent issues of concern. For example, Article 12 of the ICESCR guarantees the right to the highest standard of physical and mental health. The Committee on Economic, Social and Cultural Rights in its General Comment No. 14 on the Right to the Highest Attainable Standard of Health further elaborates on the Article by providing for the essential elements and components of the right.

General Recommendations and Comments can provide protection of rights not explicitly mentioned in the body of the treaties, thus broadening the scope of the application of the application of the Convention. For example, the CEDAW Committee in its General Recommendation No. 19 interpreted violence against women as a form of discrimination and therefore States Parties are bound to eliminate it based on their obligation under CEDAW.

In using human rights treaty law, reference should always be made to the General Recommendations and Comments that form part of the treaty bodies' interpretation of the Convention and provide authoritative clarification on the scope and the meaning of provisions therein.

■ Complaints (or Communications) Procedure

Among the key international human rights treaties, four have individual complaints procedures. Through these procedures, an individual may bring a complaint before the treaty body concerned claiming that she or he is a victim of a right guaranteed under the relevant treaty. Provision of an individual complaint mechanism is optional. For states to be bound by it, they must make open acceptance of it either by declaration (in the case of ICERD and CAT) or by ratification of a special

optional protocol (in the case of ICCPR and CEDAW). The procedure is subsidiary in nature and thus, all domestic remedies must be exhausted before one can avail of these international procedures. Decisions by treaty bodies can provide states with a better understanding of their obligations under the treaty concerned. Although not entirely a court, the treaty body acts in a quasi-judicial authority as it makes a finding of compliance or non-compliance with the treaty concerned.

Some treaties have inter-state complaint procedures. However, there has been no instance of any case filed under this procedure.

■ Inquiry procedures

CAT and CEDAW (through their optional protocols) have inquiry procedures. An inquiry procedure can be initiated by a treaty body when it receives reliable information of grave or systematic violations of the rights protected under the convention concerned. In an inquiry, the treaty body can decide to conduct a field visit in the country concerned with the consent of the State. The recommendations arising from the inquiry further highlight how the treaty should be applied and elaborates on the normative protection of the treaty.

Other treaties

It is important to note that there are also other treaties which can be used as a basis for advocacy work on access to justice. Thus, in addition to the human rights treaties mentioned earlier, there are other treaties that can also be used in advocacy work on access to justice. These include:

- Rome Statute of the International Criminal

The Use of the Reporting Process by NGOs to Further the Rights of the Disadvantaged

For the last 50 years, women's groups in Nepal have been working on equal inheritance rights for women. Among the many discriminatory provisions in the law, is the provision that for a daughter to inherit, she must be single and at least 35 years old. If she marries afterwards, the property has to be returned. No such restrictions are made on the son's right to inherit. In 1993, a case was filed to challenge this provision on the grounds that it was discriminatory. As a result, the court issued a directive order to the Government to submit a Bill calling for the investigation of family law on property from the perspective of gender equality. A number of advocacy initiatives were launched by the Nepali women's groups, including a baseline research focusing on the impact of unequal inheritance rights on women, gender-sensitization training, grassroots advocacy, media campaigns and dissemination of advocacy materials, among others.

In 1999, Nepal was scheduled to report before the CEDAW Committee. Women's NGOs in Nepal in preparing a shadow report included inheritance rights as a priority issue for the country. Nepali NGOs attended the CEDAW review process of their government in New York and highlighted in their meeting with the CEDAW Committee the urgency for law reform on inheritance rights. The CEDAW Committee in its Concluding Comments urged the Government to amend the present law. These Concluding Comments were used by NGOs as a basis to further strengthen their advocacy work before the Government on equal inheritance rights. In February 2002, a national conference on equal inheritance rights was organized in Nepal and attended by over 2,000 women from all over Nepal. As a result of these effective and interlocking strategies, the Parliament passed the Eleventh Amendment to the Country Code of Nepal, in March 2002. It became law after royal assent in October 2002 and entitles daughters, like sons, to inherit property from birth.

From Inheritance Rights of Nepali Women: Journey Towards Equality, Sapna Pradhan Malla, FWLD and IWRAW Asia-Pacific, 2000.

Court. This treaty creates an international criminal court with jurisdiction over individuals charged with genocide, aggression, war crimes and crimes against humanity. It aims at ensuring that perpetrators of these crimes under international law are brought to justice, particularly in cases where national court are either unable or unwilling to try them.

- The four Geneva Conventions and the two Additional Protocols, which relate to the Treatment of Prisoners of War and Civilians in Times of War and the Protection of Victims of International and Non-International Armed Conflicts.
- Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children and the Protocol against Smuggling of Migrants by Land, Sea and Air, which supplement the United Nations Covenant against Transnational Organized Crime.
- Convention on the Status of Refugees and its additional Protocol; Convention on the Reduction of Statelessness; and Convention Relating to the Status of Stateless Persons.
- The many conventions furthering labour standards, drafted by the International Labour Organization Conventions (for example, the Convention on the Worst Forms of Child Labour, the Maternity Protection Convention, the Minimum Wages Convention).
- The UN Charter. The UN Charter provides that all members of the UN pledge themselves to take joint and separate action in co-operation with the organization to promote universal respect for and observance of human rights without distinction as to race, sex, language or religion. The Charter also created the Economic and Social Council to make recommendations for the purpose of observing human rights for all. In view of this, the Council set up the Commission on Human Rights and its sub-commission. These commissions issue resolutions and recommendations on various human rights issues. They have also established the system of the special rapporteurs and experts who issue a variety of recommendations on better observance of human rights based on information, research and country visits.

Many bilateral treaties (treaties between two states usually regulating a specific matter) also provide human rights protection and enhance access to justice. For example, there are bilateral treaties governing migrant workers which provide a high degree of protection for the nationals of the sending country.

Regional human rights systems

Normative protection at a multilateral level can also be derived from regional human rights treaties. These regional systems provide another layer of protection in the regions concerned in cases where national protection is lacking or inefficient. In Europe, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) provides normative standards which are safeguarded by a European Court of Human Rights, which can act on both individual and inter-state complaints procedures. In the Americas, cases can be filed by individuals and states with the Inter-American Commission on Human Rights and Inter-American Court of Human Rights for breach of the American Declaration of the Rights and Duties of Man or the American Convention on Human Rights. The African Charter on Human and Peoples' Rights is monitored by the African Commission on Human and Peoples' Rights. In January 2004, an African Court of Human Rights came into existence.

The existence of the regional courts and commissions is an additional mechanism enabling individuals to access justice after they have exhausted all possible domestic remedies at the national level. Should their countries be unable or unwilling to protect their human rights, individuals can file cases against their countries before the relevant regional courts or commissions. These treaties and the judgments made by regional courts and commissions are also useful resources in expanding normative protection. However, applicability of the regional systems depends on ratification by a State within the respective region. Asia and the Pacific are now cited as the only regions without regional human rights systems.

However, although there are no regional human rights mechanisms in Asia and the Pacific, it should be noted that the decisions of regional bodies are important sources of standards for the international community as a whole and are useful examples of the universality of human rights norms. See for example, the *Velasquez Rodriguez*¹⁷ Case and its elaboration on the obligations of the State to respect and ensure human rights.

International Custom

Customary international law is an important source of the international normative framework as it has the ability to bind States even without express consent as required for the conclusion of international treaties. Traditionally, customary international law has complemented or even modified rights and obligations flowing from treaty law and vice-versa. It plays a particularly important role in instances in which States have not ratified binding human rights instruments and thereby ensures the universal applicability of international human rights standards

¹⁷ *Veldsquez-Rodriguez v. Honduras, Inter-American Court of Human Rights, Judgment of July 29, 1988, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988)*. Available at http://www1.umn.edu/humanrts/iachr/b_11_12d.htm This case documents numerous disappearances in Honduras from 1981 to 1984. This case also illustrates the development of a major human right case in the courts and the difficulties associated with it and the role that an international court can play when access to domestic remedies is precluded.

For a rule to evolve into a norm of customary international law, it has to fulfil very stringent requirements i.e. meet the following two requirements: (1) a general practice of states and (2) as the conviction that this practice is required under the international normative framework. The first element requires a sufficient number of states must pursue conduct in a general and consistent manner. The second element, which involves a certain degree of tautology (also referred as *opinio juris*), means that a "State regards a particular customary rule as a norm of international law, as a rule legally binding on the international plane."¹⁸ In other words, States follow the rule because of a sense of legal obligation.

The relationship between customary international law and the national normative framework follows the same pattern as described above with regard to international treaties: depending on the mechanism adopted (in the Constitution), customary norms may either be directly applicable (as part of the national legal system), or require an (legislative) act of "introduction" into the national legal system.

However, frequently, there is no easy way to measure whether a standard has reached the status of an international custom, or whether it is accepted by states especially in view of their resistance to become legally obliged to follow a certain conduct. In the absence of an international "legislator", States frequently consider different rules as having evolved into customary international law. However, the following norms have generally and firmly been recognized as having attained the (binding) status of customary international:

- Prohibition of genocide
- Abolition of slavery and the slave trade
- The murder or causing the disappearance of individuals
- Torture and other cruel, inhuman or degrading treatment
- Prolonged arbitrary detention
- Systematic racial discrimination
- Systematic religious discrimination
- Gender discrimination
- Consistent pattern of gross violations of human rights

Thus, even in the absence of treaties, states are bound to observe these customary norms, and individuals as well as courts may rely on customary provisions provided that they are directly applicable or have been properly "introduced" into the national normative framework. Most recently, customary international law has evolved to extend to holding perpetrators of international crimes – such as genocide, crimes against humanity and war crimes - directly accountable.¹⁹ In the cases of the former Yugoslavia and Rwanda, both States and the individuals who perpetrated genocide cannot hide behind the curtain of non-ratification of relevant treaties. An international criminal tribunal in each of these countries have been instituted to prosecute the crimes of genocide, war crimes and crimes against humanity.

Jus Cogens

Jus cogens can be defined as a set of norms "accepted and recognized by the international community of States as a whole as norms from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"²⁰ The primacy of *jus cogens* in the hierarchy of international law is important in access to justice advocacy. *Jus cogens* prevail over and invalidate international agreements and other rules of international law conflicting with them. No act done contrary to *jus cogens* can be legitimated by means of consent, acquiescence or recognition.²¹ For example, the prohibition on genocide is not only considered customary international law, it has also attained the status of *jus cogens*. Any treaty which allows genocide is invalid. Any waiver in favour of genocide is void. No law or even local custom can allow genocide. In relation to normative protection, *jus cogens* embodies a supreme norm which guarantees the most urgent human rights protection.

Because of its primacy, only a few norms have attained the status of *jus cogens*. Among the customary norms that have been elevated to *jus cogens* are:²²

- Prohibition of the use of force
- Prohibition of the trade in slaves, piracy and genocide
- Observance of human rights
- Equality of states
- The principle of self-determination

¹⁸ Louis Henkin, Richard Crawford Pugh, Oscar Schachter and Hans Smit, *International Law: Cases and Materials*, 3rd ed. (1993) at 74, hereinafter Henkin.

¹⁹ S. Ratner & J. Abrams. 2001. *Accountability for Human Rights Atrocities in International Law – Beyond the Nuremberg Legacy* 2nd edition.

²⁰ Vienna Convention on the Law of Treaties, Art. 53

²¹ Henkin, pg. 92

²² *Ibid.*, pg. at 92 citing the records of discussion of the International Law Commission in relation to the drafting of the Vienna Convention on the Law of Treaties

In addition, it can be argued that equality and non-discrimination is jus cogens.

Declarations, resolutions, principles and guidelines

General norms of international law and practices are often stated in declarations, standards, rules, guidelines, recommendations and principles. While they are often dismissed as having no binding legal effect on states, and therefore being “soft law”, they are documents that represent broad consensus by states and therefore they have a strong moral and persuasive force. Therefore, their value as such must be recognized.

In some instances, a declaration is the initial steps towards the drafting of treaty. For example, the Declaration on the Elimination of All Forms of Discrimination against Women was a stepping stone towards the eventual drafting of CEDAW. Further, declarations themselves can become customary international law and therefore, binding on states even without their express acquiescence. The Universal Declaration of Human Rights, for example, though not a binding treaty has provisions which are now considered as customary international law and therefore binding on states.

In terms of access to justice, the following “soft laws” provide some guidance in the administration of justice:

- Basic principles on the Independence of the Judiciary
- Basic principles on the Role of Lawyers
- Guidelines on the Role of Prosecutors
- United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)
- United Nations Standard Minimum Rules for the administration of Juvenile Justice (The Beijing Rules)

Recommendations on Using International Law at the National Level

International standards are not solely for use at the international level – in fact, the international normative framework is increasingly addressing the individual within the national sphere. International law also has many potential uses at the domestic level to ensure normative protection is provided in its fullest.

There are many different ways of using international laws. Therefore, practitioners and advocacy groups should exercise creativity in exploring opportunities and possibilities.

In countries where international law form part of national law

In some countries, treaties ratified by the State form part of the national law and may override conflicting national laws. Their exact placement in the hierarchy of national laws may vary from being superior to the Constitution, to having constitutional status or being superior or equal to national laws. They can also be used to declare laws and administrative practices as inconsistent or in breach of the treaty’s provisions. The extent of which this can be done depends on the treaty’s status and the existing rules of interpretations of statutes in the countries concerned.

This mechanism also makes possible reference to international treaty provisions as a direct source of rights and responsibilities in domestic law. For example, Section 9 of the Nepal Treaty Act (1991) provides that any treaty to which Nepal is a State Party to is enforceable as national law. When there is conflict between a domestic law and a treaty, the latter will be given effect. This was reinforced in the case of *Reena Bajracharya*,²³ where the Supreme Court held that a rule on the early retirement of female flight attendants was inconsistent with the Constitution and with the CEDAW Convention. The court ruled that an international convention ratified by the country prevails over domestic law.²⁴ Similarly, in the Republic of Korea, Article 6 of its Constitution provides: “Treaties duly concluded and promulgated under the Constitution and the generally recognized rule of international law have the same effect as the domestic laws of the Republic of Korea”.

In countries where international law does not form part of national law

The position of many countries is that international law does not form part of the law of the land unless there is specific legislation that incorporates or transforms it into national law. The first line of advocacy in such cases is to work towards the incorporation or transformation of the treaty. This has been done, for example in Hong Kong, where the Hong Kong Bill of Rights Ordinance of 1991 was a direct enactment into domestic law of the ICCPR.

However, even in cases when international human rights treaties have not been incorporated into the domestic legal framework they can on occasions still be used to support arguments in domestic courts.

Some potential uses of international treaties in countries where they have not been transformed or incorporated include:

- **As a source of standards**

²³ *Reena Bajracharya v HMG, Writ No. 2812 of 1999, Supreme Court of Nepal*

²⁴ *Forum for Women, Law and Development, Baseline Study on Inheritance Rights of Women. August 2001 (unpublished paper), pg. 42*

Where there are no laws or where the laws are deficient, international law can fill in the lacunae by providing standards. These standards in many cases are the results of global consensus or the work of experts, such as UN treaty bodies. For example, in the case of *Vishaka vs. State of Rajasthan* (India), a group of women's NGOs brought a petition before the Supreme Court of India to address the pervasive problem of sexual harassment as there were no laws protecting them from this in India. The NGOs relied on India's constitutional provisions on equality, CEDAW and CEDAW General Recommendation No. 19 on Violence against Women. The court ruled that by ratifying CEDAW and by making official commitments to the 1995 Beijing World Conference on Women, India had endorsed women's human rights and thus, must undertake to protect women from sexual harassment as part of its stated commitments to gender equality. The court prepared guidelines to define sexual harassment and called on the State to regulate to actions of private and public employers. The court's definition in the guidelines closely follows that of CEDAW General Recommendation 19.²⁵

■ As a tool for interpreting the Constitution and national laws

If an issue of uncertainty arises, a judge may seek guidance in the general principles of international law, as accepted by the community of nations.²⁶ In the same case of *Vishaka*, the Court decided that CEDAW should be used to elaborate further and give meaning to the Constitutional guarantees. It stated that international covenants can be used by the Courts to interpret national laws.²⁷

■ As a catalyst for changing discriminatory laws and standards

In the case of *Mabo v State of Queensland*, the Australian High Court used international law to condemn discrimination against indigenous people, even if international treaties are not directly applicable in Australia. The Court argued that discriminatory doctrine that denies recognition of the rights and interests of indigenous inhabitants can no longer be upheld. It stated that such a discriminatory doctrine demands reconsideration: "the opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the ICCPR brings to bear on the common law the powerful influence of the Covenant and the international standards it imports." The Court stated that it was "contrary both to international standards and to the fundamental values of

common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional land".²⁸

■ As a guide for policy and rule-making

International instruments are useful in identifying what factors should be taken into account in policy making. CEDAW, for example, was specifically mentioned as one of the guiding principles of the 28 April 2001 draft of the National Policy for the Development and Empowerment of Women in India.²⁹

In some cases, even treaties not applicable in a given State (for a lack of ratification) and 'soft' standards have been used as a resource to help in implementing the Constitution and national laws and as a guide for rule and policy-making.

Duality of Norms: Not all norms are good norms

In working with norms, it is critical to note that not all norms are just and in conformity with human rights. Thus, there is a need to evaluate norms in terms of whether they further access to justice and human rights. There are many examples of norms that violate of access to justice principles:

■ **Constitution.** In Nepal, the Constitution states that women cannot transmit nationality to their husbands and children. There is no such restriction on men. This violates the principle of gender equality. Women who married foreigners are discriminated against as their husbands and children are not provided equal rights of citizenship and the rights and privileges recognized or granted to the wives and children of the Nepali men.

■ **Legislation.** In many cases concerning illegal migration and trafficking, victims are immediately deported per the governing legislation even prior to the pursuit of a case against the trafficker in the receiving country.

■ **Court decisions.** In Malaysia, the Court of Appeals decided to uphold a women's dismissal by her employer on account of her pregnancy because the Constitution only applies to violations by State authorities on private actors. A case involving violations by a private entity is not within the purview of the Constitution and thus, no constitutional remedies are applicable.³⁰

²⁵ *Bringing Equality Home: CEDAW pg. 18-20*

²⁶ *Bangalore Principles. These principles can be accessed at 14 Commonwealth Law Bulletin 1196 (1988) or in Kirby.*

²⁷ *Bringing Equality Home: CEDAW pg. 18-19*

²⁸ *COHRE pg. 54-55*

²⁹ Available at http://www.logos-net.net/ilo/150_base/en/init/ind_2.htm [e m0] Please clarify how can the constitution not apply to individuals that are citizens of that state.

³⁰ *Beatrice Fernandez v. Sistem Penerbangan Mal & Anor, Court of Appeals, Civil Appeal No. W-02-186-96, 5 October 2004* [e m0] Please clarify that we are talking about informal laws/systems

■ **Customary practices.** In Pakistan, a village council as a collective body ordered the rape of a woman as a punishment for her when her brother eloped with a woman of a higher status.³¹ The order, which was carried out, violated her right to be protected from violence, among others, and is a consequence of non-recognition of the right to choice in decisions concerning marriage, as well as sexual and reproductive rights. The case has been elevated to the criminal courts of Pakistan and is waiting a final resolution at the Supreme Court, especially after a lower court's decision to acquit members of the council for their decision.

Many of these norms have been formulated without the participation of the disadvantaged groups. In some instances where members of disadvantaged groups have participated, they may not have sufficient understanding or power to negotiate their terms. For example:

- In many countries the participation of women in politics is extremely low compared to men, and can even be non-existent.
- With the caste system, the Dalits (or the untouchables) have systematically been discriminated and excluded from political and public life.
- A certain tribe in Rajasthan has been considered "criminal" and thus, they have been refused entry into the villages and its members are forced to live under trees without any basic support from the government.³²

This duality in norms poses a considerable risk to disadvantaged groups. Norms that reflect access to justice and human rights must be upheld. Those that violate these principles must be modified or abolished. When working in normative protection, a critical eye is required. Every constitution, legislation, court decision and customary law must be measured against human rights standards. This is especially critical in dealing with customary laws and practices as cultural practices are often used as a justification for the non-application of human rights standards and thus, not only deny disadvantaged groups their human rights but also lead to impunity for those committing violations against them.

3.3 CHALLENGES IN ACHIEVING THE FULL BENEFITS OF NORMATIVE PROTECTION

There are many obstacles to achieving the full benefits of normative protection. Barriers may be actively or passively created or sustained and may be (a) legal, (b) institutional, (c) political or (d) social/cultural.

Legal barriers

■ Barriers in relation to international law.

There are several barriers relating to international law including non-ratification of treaties; ratified treaties that are not incorporated into national law; and lack of knowledge on how to apply international law to the domestic legal and judicial framework.

■ **Gaps in the legal framework.** Legal gaps in the protection of fundamental rights are commonplace and may be due to many factors, including:

- Non-recognition of the rights (e.g., non-recognition of indigenous people's title over their ancestral lands)
- Omission or refusal to provide protection (e.g., in some countries, there is refusal to legislate on marital rape)

■ Constitutional and legal discrimination.

Laws can discriminate against disadvantaged groups either directly or indirectly, adding to their marginalization. Direct discrimination occurs when the purpose of a law or regulation is discriminatory. Indirect discrimination occurs when although there is no explicit distinction, restriction or exclusion in the law (facially-neutral legislation), its effects are discriminatory. In some cases, indirect discrimination occurs when there is no legislation at all.

- In Indonesia, Marriage Law No. 1/1974 admits the legal capacity of women but also states that men (husbands) are breadwinners and head of households and women (wives) are managers of households.
- In Philippines, the law dictates that the inheritance of an illegitimate child is half the share of a legitimate child.

■ **The criminalization or non-recognition** of certain groups is another form of discrimination. By not providing them with identity cards, they are unable to access basic needs such as food, shelter, education and health. They are also unable to vote or to access the courts to express their grievances.

The lack of conceptual understanding on the need for specialized legislation to prevent discrimination is one of the main causes of indirect discrimination. At the formal legal text level, there may not be any discrimination against the disadvantaged groups. However, due to cultural or social attitudes towards the disadvantaged groups and the structural level of discrimination experienced by them, they may be unable to access and enjoy the benefits of a neutral legislation. Hence, specialized legislation is required and failure to provide such legislation can

³¹ Case of Mukhtar Mai case in Pakistan, see, for example, *The acquittal of five men convicted of gang rape throws doubt on Pakistan's criminal justice system* at http://news.bbc.co.uk/go/em/fr/-/2/hi/south_asia/4315491.stm.

³² *Interlinkages between Violence against Women and the Rights to Adequate Housing*, (2004) Yamini, Rea Chiongson, Mary Jane real and Tomoko K. (eds) at 45 hereinafter *Interlinkages*.

be an obstacle to accessing justice. For example, the right to run for public office is available to everyone. However, due to entrenched discrimination, those from disadvantaged groups are unable to run as candidates. If they do, they are unable to get elected. Although the law is neutral, as it does not provide measures to support and enable participation by these groups, and thus by not “levelling the playing field”; it indirectly discriminates against them.

■ **Laws that contradict human rights standards.**

There are many examples of laws which simply contradict access to justice and human rights norms. In addition to those highlighted above other examples include:

- Detention without trial for a lengthy period of time.
- The dropping of rape charges when the victim marries the accused.
- Acceptance of evidence obtained illegally in a court of law.
- Not providing people with mental disabilities with the proper health care and refusing standing in courts to redress their grievances.

Institutional barriers

Often, the institutional capacities required for drafting, reviewing, interpreting and implementing legislation are weak or lacking.

- **Lack of conceptual clarity.** In both legislation and case law-making, the lack of conceptual clarity on issues of discrimination pervades. Further, there is often little understanding of human rights norms, especially on complex and new issues in relation to international standards. Opportunities to create such understanding and conceptual clarity are also few.

- **Lack of independence.** Independence of the legislature and the judiciary creates an environment for participation and inclusion of disadvantaged groups as well as human rights-consistent laws and jurisprudence. The absence of such an environment not only transforms the legislature and the judiciary into rubber stamps, it also stifles their roles as mechanisms for the promotion and protection of access to justice norms and for redress of grievances (see also the Section on the Court System in Chapter 4).

- **Weak capacities to develop statutes and case law.** Another barrier can be the lack of capacity in the technical aspects of developing law. Often difficulties in implementing laws can reflect defects in drafting. These derive not only from a scarcity of drafting and assessment skills, but also

from a lack of clear guidelines governing drafting processes, overlapping drafting projects, non-review of the consistency of laws with the existing legal frameworks, or lack of detailed justification for the laws.

■ **Weak capacities to apply international norms.**

In a similar way, judges rarely exercise their ability to create jurisprudence due to their weak capacity in developing creative arguments in favour of access to justice norms. Often, domestic judges are reluctant to apply international norms for they are simply not familiar with their content and thus uncomfortable in referring to them, though legally binding – need for training, particularly in post-conflict countries with a record of human rights violations. In many cases, capacities also entail developing administrative and managerial skills such as managing the pool of court personnel, reducing the backlog of court dockets, among others (see The Court system section in Chapter 4).

■ **Lack of channels for participation.**

Disadvantaged groups are often times excluded from participating in norm-making because they are considered not be able to understand the process or not have an interest in the process. This assumption shifts blame from the State who is obligated to ensure that disadvantaged groups are provided with the tools, opportunities and environment to participate.

Persistent lack of participation by disadvantaged groups in the process of making laws affecting them is a powerful barrier, underlying inefficient protection. Obstacles to participation may arise from the absence of adequate channels to bring disadvantaged people’s voices into legal drafting processes – e.g., through public consultations, awareness campaigns, etc. These groups may also not have the necessary critical capacities for participation, such as organization, information and policy advocacy skills due to state omissions.

Political barriers

Understanding the political nature of reform is critical. Some obstacles reflect the unwillingness or refusal of the State to comply with access to justice and human rights standards. This is logical as normative reforms entails a shift in power relations and thus, in many cases, the status quo is sought to be preserved. For example, the development of a quota system or the reserving of seats to enable women to participate in parliament involves a shift in power in favour of women and has serious implications for those who are presently political power brokers. Reform leads to real benefits and redistribution of resources and power. It can also lead to the possibility of friction with special interest groups who are concerned to ensure they retain their positions in society.

Even where there is no open political resistance, low priority may be given to access to justice and human rights programmes. This can also be a political barrier. This may be explicit or it may be masked by invoking other barriers, such as lack of resources, lack of capacity, lack of incorporation of international laws, etc.

Social and cultural barriers

■ **Discriminatory social and cultural norms.**

The role of social and customary norms in discriminating against disadvantaged groups is well documented. Although customary practices can provide protection for vulnerable groups, they can also be a source of discrimination. The second-class status given to women in the social and customary norms of many societies is one such example. Other examples abound, especially in relation to violation of women's human rights through traditional, harmful practices, i.e., forced and early marriages, dowry, female genital mutilation, polygamy, to name a few. Many social and customary norms have permeated into the Constitution, legislation, rules and regulations, and jurisprudence.

Further, discriminatory social and cultural norms define the roles and behaviour of women. The value given to a chaste woman, for example, has influenced legislation and jurisprudence in dismissing complaints of sexual violence by women who are not seen as being of good moral character.

■ **Societal attitudes towards disadvantaged groups.**

Disadvantaged groups are often viewed through the lens of stereotypes and false notions of hierarchy. For example, urban poor communities, especially poor women, may be refused positions on school boards as they are stereotyped as uneducated, dirty, immoral and with possible criminal tendencies.³³

Also, despite huge efforts to change stereotypes of people with disabilities, they are still typically looked upon as being incompetent to make decisions and are most often the subject of guardianship and substituted decision-making. Their capacity to file complaints on their own is often challenged.

Other barriers in relation to claiming rights

■ **Failure of the State to increase the capacity of disadvantaged groups to understand and exercise their rights.**

Often, the State fails to raise the capacity of disadvantaged groups to ensure their full understanding of their rights. In many instances, the capacity of disadvantaged groups to claim their rights will depend on the following capacities that should be fostered by states:

- Awareness of rights.

- Understanding of the content and attributes of rights, including the principle of holding the State liable for acts of commission and omission.

- Knowledge of the appropriate tools and methodology necessary to claim rights, including the channels for participation, venues for redress of grievance, etc.

- Understanding of the process of making statutory and case law.

- Lack of environment to enable the exercise of rights. A supportive environment that encourages and enables the exercise and enjoyment of rights is crucial in developing normative protection. An environment of corruption, lack of respect for the rule of law, impunity and lack of accountability illegitimizes the legal framework and discourages engagement in it as a means of social transformation.

3.4 CAPACITY DEVELOPMENT STRATEGIES TO ENHANCE NORMATIVE PROTECTION

This section identifies potential strategies and areas of intervention to address critical obstacles or barriers in the normative framework preventing disadvantaged groups from full access to justice.

Addressing Legal, Institutional and Political Barriers

National normative frameworks can be strengthened by supporting (a) ratification and accession of international conventions, (b) incorporation of international human rights law treaties, and (c) harmonization of domestic legal frameworks with international obligations and commitments.

Ratification and Accession Strategies.

■ **Information on Treaty Obligations**

Create an understanding of the treaty and its usefulness in promoting, protecting and fulfilling human rights as well as its capacity to provide access to justice remedies at a supplemental level to domestic remedies.

■ **Develop Strategic Partnerships and Advocacy Campaigns**

Strategic advocacy campaigns targeting public officials, especially those involved with treaty ratification. This primarily involves the Foreign Ministry with the other ministries being part of a task force or team, e.g., the Justice Ministry, the Attorney General's Office, the Law Ministry and the Ministry on Social Development. This also entails

that lobbying strategies are employed within the country and outside, especially in international meetings and conferences.

Strengthening strategic partnerships with NGOs and universities, both within the country and outside. They are a rich source of information and resource persons on the impact of lack of ratification.

Hold consultations and discussions to elicit views on ratification, especially from disadvantaged groups.

Collect comparative information on the benefits of ratification from other states.

Public awareness campaigns and the distribution of campaign materials can accelerate a country's willingness to sign up and later ratify an international treaty. Influencing the media and bringing them in as allies is also critical.

Incorporation of human rights treaties and harmonization of national laws

■ Examine the Normative Framework

Identify inconsistencies in the normative framework and provide recommendations on ways to make it consistent with the treaty provisions.

■ Advocacy for Reform

Lobby the legislature for the enactment of new legislation and the review of existing laws. Advocacy conducted on the appropriate ministries and agencies of the State can ensure their support of legal reform and their development of appropriate rules and regulations.

Programmes of public dissemination and legal awareness and training must be launched in order to expose relevant state actors and institutions to the substantive and procedural aspects of emerging legislation. This is important so that legal reforms may enjoy widespread legitimacy.

It is important to ensure local/national ownership, i.e., develop the technical understanding of local population and government officials in order to ensure that the relevant stakeholders are able, capable and willing to sustain the reforms instituted.³³ Consultations and discussions also need to be held with disadvantaged groups to ensure that their views are taken into consideration and given weight.

■ Support Engagement with International Law and Reporting Processes

Engagement with international law and

international processes should be facilitated (e.g., the CEDAW reporting process which can increase awareness of women's human rights and open up opportunities for advocacy and reform).

Support can be provided for the preparation for the reporting process, i.e., the drafting of the State Party report, inter-governmental consultations on their compliance with the Convention, meetings with NGOs and government, the participation of government in the treaty body session for the reporting. Drafting of the NGO shadow reports and their participation in the treaty bodies' sessions to observe the governments reporting should also be encouraged. Also, resources and support for activities to be undertaken as a follow up to the reporting process should be provided.

Support work on raising awareness of the international complaints and inquiry procedures by identifying (through collaboration with disadvantage groups) situations which can be dealt with through international complaints and inquiry procedures and discuss the pros and cons of bringing it to the international level. Distributing materials to enhance understanding of disadvantage groups of such international procedures can also help the process. Additionally advocacy efforts can be made to encourage the State to ratify instruments or submit declarations that enable the use of such instruments.

Recognizing Indigenous Customary Law

In the 1996 Peace Accords of Guatemala, the existence of several ethnic groups and their identity, their practices of indigenous spirituality and the use of indigenous languages as official languages of the State was recognized as part of the negotiated agreement for constitutional reforms. The agreement also proposed recognition of customary law and indigenous justice systems ; reforms in the formal justice system to respond to the multi-ethnic and multilingual nature of the State, and acceptance of an alternative dispute resolution mechanism.

Yrigoyen, R. "El Debate sobre el Reconocimiento Constitucional del Derecho Indígena en Guatemala" accessible at <http://alertanet.org/ryf-americaindigena.htm>

Training of lawyers on international the complaints and inquiry procedures of treaties can support the process. As can providing ways for human rights advocates and members of disadvantaged groups to advocate for the ratification of such instruments.

■ Ensure Conceptual Clarity

Engage with the latest developments on international law in the area concerned. This can include ensuring conceptual clarity and

³³ See Fáunderz, pg 388.

understanding of the qualitative and substantive framework of access to justice and human rights. For example, training can be provided for NGOs to increase their conceptual understanding of access to justice.

Trainings and education programmes for national and local legislators, judges and administrators of ministries to increase understanding of access to justice, human rights and the key concepts on discrimination, equality, and accountability is critical.

Strategic work with universities, especially law universities, is important in changing legal biases towards legally inherited and unchallenged notions of justice, human rights, equality and other principles.

■ Support Reform of the Constitution

Support the development of new constitutions, or the review of existing constitutions to reflect changing realities and provide recognition to vulnerable groups such as indigenous peoples or minorities.³⁴ For example, rights and remedies for disadvantaged groups can be reflected in constitutional texts in the form of definition of fundamental rights or liberties (e.g., Constitutions of India, Hong Kong and Singapore), Bill of Rights, or with explicit reference to recognition of rights contained in core human rights treaties.

■ Monitor Laws and Their Impact

New challenges and rapidly changing environments make it necessary to monitor the impact of laws on disadvantaged people and how legal frameworks can help them. For example, in the context of globalization, market-friendly legislation is not necessarily pro-poor, and has limitations in addressing the major concerns of vulnerable groups – such as illegal arrest and detention, violence against women or protection of ancestral domains. Within the specific framework of access to justice, legal reforms should therefore be oriented towards protecting the fundamental rights of disadvantaged people, as necessary guarantees to prevent and overcome human poverty and empower their participation in decision-making.

Monitoring and reviewing should be undertaken constantly as who is disadvantaged varies over time, and new categories of disadvantaged people may arise.

It is critical to take stock of legal legacies when monitoring and to ensure that they are not blindly adhered to.

■ Promote Review of Existing Legislation

Promote and assist in the development of new laws, review or abolish existing legislation to further protect the rights of specific vulnerable groups.

Ensure the participation of disadvantage groups in legislative reform. Such participation should extend beyond the narrow structures of government and reach down to community-level participation.

Provide necessary technical expertise on for the reform process. Preference should be for local and internal experts. Consultants or experts from foreign legal systems have a supporting role to play in this process, but they are not a replacement for national capacities.

Ensure that all aspects of implementation and enforcement are considered. It is critical to ensure preparation of “good” laws that take into account cohesiveness, coherency and harmony in legal system so as to minimize dysfunction and contradictions that may be used as a basis of non-implementation of the law. This also requires ensuring that programmes that support the legislation must be planned even prior to the passage of the law, e.g., preparing subordinate legislation, allocating institutional resources, ensuring community awareness, and establishing clear accountability and reporting systems.

Strengthen the capacities of disadvantaged groups to evaluate pending bills, assess the social impact of legislation already enacted, and provide inputs to the formulation of relevant legislation (see also discussion on strategies to promote participation of disadvantaged groups).

■ Develop and Monitor Rules and Regulations

When intervening at this level, it is important to conduct a careful assessment of ministerial capacities and motivations, identify competent ministerial expertise, associate legal academics when feasible and devise continuous mechanisms for consultation and participatory processes, which are essential to develop coherent and effective rules and regulations (for specific operating regulations of courts, police and prisons, see capacity to provide remedy section in Chapter 4).

It is also critical to regularly monitor rules and regulations and to assess their impact.

■ Develop Progressive Judicial Decisions

Capacity building to develop progressive human rights jurisprudence. This may involve

³⁴ For instance, the Special Representative of the Secretary General for Human Rights in Cambodia in his report to the Commission on Human Rights of 18 February 1998 urged the Government of Cambodia to recognize officially the presence and citizenship of the Highland peoples, as well as their use of land, forests and other natural resources. The 1999 Constitution of the Kingdom of Cambodia only recognizes as citizens the Khmer, which are the largest ethnic group in Cambodia, ignoring the highland peoples, Khmer Loeu and the montagnards which represent 1% of the population.

interpreting the law vis à vis international and constitutional principles and is important to expand normative protection. In addition to trainings, capacity enhancement of the judicial profession through their exposure to discussions on the international development agenda and international law can play a catalytic role encouraging the judiciary to advocate from within. It is critical for judges to deepen their understanding of other critical issues such as the interfaces between formal and informal justice institutions, justiciability of economic, social and cultural rights, equality, and non-discrimination; that may lead to increased access to justice by disadvantaged groups.

A key component to developing progressive jurisprudence is the provision of training for lawyers on how to use progressive human rights standards and international law in their arguments before the court.

Providing support for public interest litigation cases, especially in the area of technical assistance is important. So too is building partnerships with legal NGOs especially those involved in public interest litigation.

Compilation of progressive local jurisprudence as well as from other jurisdictions can serve as a model for legal argumentation in one's own country.

■ **Capacity Development for National and Local Legislators.**

Training in legal drafting should include not only drafting techniques, but also building capacity on the development of legislation, analytical skills in assessing foreign and comparative law, social science research techniques and statistical methodologies, and inclusive processes to enable participation, among others.

Capacity development strategies to enhance the capacities of incoming or incumbent legal and judicial professionals may also include introducing specific legal subjects in relevant universities (such as comparative law methodologies, international law and customary law) as well as subjects on ethics and non-discrimination.

Support can also be provided for the establishment of specialised professional schools (e.g., National Centres for Training Lawyers, judicial academies or training schools) or specific programmes within schools (e.g., gender and legal awareness) or continuous (or refreshing) legal education programmes.

■ **Build on Customary and Traditional Law**

Monitor whether customary and informal laws restrict or widen opportunities for access to justice.

Assess whether customary or informal laws comply with human rights standards and are inclusive of disadvantaged groups.

Identify customary laws that discriminate against disadvantaged groups or are in violation of human rights standards.

Conduct public awareness campaigns to create the understanding of human rights standards and why there is a need to modify or abolish customary laws that are discriminatory or violative of human rights.

Increase access to justice through interfaces between formal and traditional systems by providing constitutional or legislative provisions. See examples in the earlier discussion on customary laws.

■ **Support Institutional Capacity Building**

Support institutional capacity development on a wide range of processes including knowledge development and skills transfer, change bureaucratic cultures through advocacy efforts and exposure to best practices and strengthen internal accountability mechanisms – a necessary pillar of institutional development, and attitudinal change.

Support legal reform processes that improve existing institutions or create new institutions to ensure accountability (i.e. Ombudsman, Human Rights Commissions, judicial oversight/watchdogs such as councils of magistrates, legal aid systems, women's commissions, equality commissions).

■ **Encourage Judicial Independence and Diverse Representation Within the Judicial Branch**

Work towards the development of clear provisions on non-partisan appointments, judges' conditions of tenure, removal or dismissal of judges and regular state budgetary allocations.

Ensure that the judicial branch has the tools to operate independently and apply the law.

Advocate for diverse representation within the judiciary, i.e. in terms of hiring judges from various sectors of society (e.g., women, minorities)

Addressing social and cultural barriers

■ **Gather and Disseminate Information on Discriminatory Practices**

Research and document the discriminatory impact of compiling with cultural and social norms that discriminate against disadvantaged groups and are in violation of access to justice and human rights standards.

Use public information campaigns to encourage behavioural changes. Legal awareness campaigns at different levels can stimulate debate for normative changes and support for advocacy campaigns.

Address changing stereotypes through evaluation and reform of school curricula and textbooks.

Work with educators and trainers to ensure that stereotypes against disadvantaged groups are corrected.

Work with the media to sensitize them and to use them to create broader sensitisation.

■ Challenge Discriminatory Provisions

Support the challenging of discriminatory provisions in courts and human rights tribunals. Care should be taken to ensure that proper preparatory work has been initiated to build an environment that will be able to accept the decision of the court.

Work with progressive customary and religious leaders to enable the modification and abolition of incompatible norms.

Form partnerships with NGOs, especially women's NGOs, to address the discriminatory effects of culture and customary practices.

Assist in identifying and instituting temporary special measures to ensure equality and to enable groups to access and enjoy their rights.

Addressing other barriers to the claiming of rights

■ Raise Awareness and Improve Skills

Raise the awareness of disadvantaged groups of their rights, their contents and their attributes, especially on the principle of holding the State liable for acts of commission and omission.

Increase knowledge on the appropriate tools and methodology necessary to claim rights, including the channels for participation, venues for redress of grievance, etc.

Increase understanding of the process of law and jurisprudence making. For example, by raising the awareness of the providers of justice of the needs of disadvantaged groups.

■ Encourage Focus on Disadvantaged Groups

Poor people's survival often depends on certain behaviours (e.g., street vendors, squatters, immigrants, etc.) that are discouraged by the legal system, but dictated by social and economic needs. The mismatch between the reality of the poor and the legal prescriptions affecting them is created and reinforced by the invisibility of disadvantaged groups in legislative processes.

Promote the participation of disadvantaged groups in the political debate. Truly participatory processes require time and are a necessary condition to generating a socio-political debate and understanding on issues in many areas, but they may also be used by governments as delaying tactics.

Strengthen and enhance effective legislators-constituent relationships with a special focus on disadvantaged communities. By enhancing people's connection with their representatives, "real life" experiences can influence the development of new legislation.

Support initiatives to increase the participation of disadvantage groups in the legislature through different systems such as setting aside specific seats, (e.g., Uganda), quotas for political parties running for parliamentary elections (e.g., Argentina) and the creation of temporary measures to accelerate de facto equality.

Support formal or informal processes which allow for regular exchanges between legislators and the community (facilitating participation of disadvantaged groups) including public hearings, informal town hall meetings (or open meetings), and public interest forums to generate public awareness and debate.

Support formal or informal processes for exchanges with legislative officers and staff. In understanding the challenges faced by disadvantaged groups in existing legislation, legal assistants may be better equipped to advise legislators on concrete legal measures or pieces of legislation to improve issues related to disadvantaged groups. In addition, disadvantaged groups will be provided with a wider network to advocate their rights.

Build strategic partnerships with NGOs and community-based organizations to develop the capacities of others.

Create an enabling environment for the exercise of access to justice, including supporting work against corruption, impunity and the lack of respect for the rule of law.

Participation and Political Will

Participation and political will are two key elements to advance critical changes in the normative framework. As in any legal reform process, adequate understanding of the local context and of the potential focus of resistance may well be critical factors for success. Legal vacuums and discrimination in the recognition of the rights of disadvantaged groups are not coincidental legal gaps. They reflect the type of social processes involved behind the creation of the law itself. Even if laws are written in response to inputs and feedback rather than in response to particular interests, the critical factor is who are those in the position of providing such inputs, and who are left voiceless.

CAPACITY TO PROVIDE JUSTICE REMEDIES

CHAPTER



CHAPTER 4

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4.2.1 The Courts

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OVERVIEW OF CHAPTER

This chapter deals with the capacities required by duty bearers or institutions of the justice system to provide a remedy for grievances through formal and informal mechanisms in accordance with human rights principles and standards. In line with the rights-based approach, the chapter discusses how to support the justice system so as to ensure it works for those who are poor and disadvantaged.

As explained in previous chapters, justice systems include formal institutions and procedures, such as the judiciary, public defence and prosecution. However, from an access to justice perspective, a number of other actors also play a critical role. In the Asia-Pacific region, alternative dispute resolution (ADR) mechanisms and traditional justice systems often deal with the bulk of cases, especially for disadvantaged groups, and therefore, cannot be overlooked. Ministries of Justice are often responsible for the policies and procedures that affect the management and administration of the national justice system. Quasi-judicial institutions, such as National Human Rights Institutions and Ombudsman offices complement the Courts and undertake oversight, advocacy and investigative functions. In addition, the important role of civil society and parliamentary oversight must be taken into account, as they can play a critical role in strengthening institutional accountability for the provision of remedies. Police and prisons complete the cast of actors in the justice system, providing the enforcement mechanisms, which are key to access to justice and a precondition for the elimination of impunity.

The chapter is divided into five sections:

- Ministries of Justice as the policy setting institutions for the justice system
- The court system and prosecutors
- Alternatives to formal justice
- Oversight mechanisms, and
- Enforcement mechanisms

Given the magnitude of the task to reform the performance of a justice system, this Guide offers a number of different entry points and strategies for capacity development to address the obstacles often faced by justice institutions. The aim is to enable the system to become more responsive to the expectations and needs of claim holders by improving access to justice. The extent of how strategic such interventions will be, or how much impact they will have, will depend on the careful analysis and assessment of the context as per the rights-based approach to programming. Some suggestions on how such analysis should be undertaken is provided in Chapter 2 of this Guide.

4.1 The Ministry of Justice

4.1 THE MINISTRY OF JUSTICE

This section discusses capacity development strategies that may improve the Ministry of Justice's capacity as a duty bearer and, in turn, improve access to justice by disadvantaged groups.

The Ministry of Justice (MOJ) is responsible for the administration of justice and for ensuring that the justice system is effective, fair and accessible. The Ministry of Justice plays an important role in strengthening normative protection, as well as implementing and enforcing justice. The Ministry is a service provider dispensing information and services to other governments departments, legal professionals and the population at large. Therefore, it is important that the Ministry ensures that these services are sensitive to the needs of disadvantaged groups.

While the tasks of the Ministry of Justice may differ from country to country, in general the Ministry is responsible for:

- Policies and procedures that affect the management and administration of the national justice system, i.e., to ensure that the justice system functions effectively and efficiently in the country;
- Advising Parliament on legal policy and constitutional matters;
- Drafting of bills and laws for the Government;
- Reviewing laws and recommending modification based on the Constitution and international standards and treaty obligations;
- Reviewing and presenting legislation to the Parliament;
- Managing legal aid schemes and programmes;
- Representing the public interest in all its dealings, including litigation;
- Representing the Government in legal matters and in government litigation;
- Ensuring principles of justice, equity and fundamental fairness when representing the public interest.

In some cases, the Judiciary, the Public Prosecutor's Department, the Department of Prisons/ Corrections, the Office of the Ombudsman, the Attorney General's Office, the Law Commission, Mediation Boards, Anti-Corruption Commission, Judicial/Legal Training, etc. all fall under the Ministry of Justice. The Ministry may also represent the State in international legal disputes, as well as

civil cases against the Government, and facilitate international efforts in the justice sector.¹

The Ministry is normally headed by a minister who is either an elected representative of the people or appointed as minister by the President or Prime Minister. The minister is supported by a vice or deputy minister. The administration of the Ministry is in the hands of a Secretary who is supported by a number of deputies, assistants, and a full complement of staff.

The Role of the Ministry of Justice in Sri Lanka

In Sri Lanka, the Ministry of Justice (MoJ) is part of the executive branch. Although infrastructure, such as court buildings and judges' houses, are the responsibility of the MoJ, the administration of justice in Sri Lanka comes under a separate Judicial Services Commission headed by the Chief Justice of Sri Lanka. Although UNDP works with the Legal Aid Commission (under the MoJ), which is mandated to provide legal assistance to economically disadvantaged persons, the primary partner in strengthening access to justice through the judiciary is the Judicial Services Commission.

As the Sri Lanka case points out, the tasks of the MoJ are context specific and it is necessary to understand the particular responsibilities of the MoJ in the country in order to find ways to work with it.

UNDP Sri Lanka

Role of the Ministry of Justice in Strengthening Access to Justice

The Ministry of Justice plays an important role in maintaining the standards of the justice system throughout the country. While representing the public interest, the Ministry should endeavour to ensure that the interests of justice are served. It should include access to justice for the disadvantaged as a core standard for the justice system.

The Ministry of Justice can be instrumental in drafting laws that protect and promote the rights of disadvantaged groups, and in advising the Government to put in place normative frameworks for the protection of disadvantaged groups. It can set policies and establish procedures for the justice system to ensure access to justice. It can also help in creating strategic plans to strengthen judicial institutions and to encourage them to focus on improving access for all.

At a local level, dissemination of legal information to increase the awareness of people about their

¹ In some cases, the Ministry of Foreign Affairs takes the lead in representing the State in international disputes and the Ministry of Justice may be consulted in the process. In the case where there is no legal department within the Foreign Ministry, the Ministry of Justice takes the lead.

their rights, providing legal aid for those who can't afford it, and ensuring access to mediation as an alternative to lengthy and costly court processes are some ways that the Ministry of Justice can improve the ability of people to access justice (also see Chapter 5 and the Informal Justice Systems section in this chapter).

Legal Aid and the Ministry of Justice

In many countries, legal aid services are also handled by the MoJ. In Viet Nam, for example, UNDP has been involved for the past 10 years in assisting the MoJ in law education and legal dissemination at the local level – including for those living in rural and mountain areas. These legal awareness campaigns provide people with basic legal information that can have an impact on their daily lives. More recently, UNDP Viet Nam has been working with the MoJ in assessing the seven-year implementation of the legal aid service in order to determine areas for future intervention and development. It is also assisting in the drafting of the first 'Ordinance on Legal Aid'. Support for mediation groups and local justice officials is also being provided so that they can fulfil their role in enhancing access to justice at the grassroots level.

UNDP Viet Nam

Challenges Faced by the Ministry of Justice in Ensuring Access to Justice

Inadequate capacity of staff

The Ministry of Justice faces many of the same problems other government departments and ministries often face, including under/over-staffing, inadequate pay and structural deficiencies. Specific problems can include:

- **Insufficient capacity of officers to understand new processes.** Some lack the capacity to respond positively and promptly to requests for information or services by disadvantaged groups.
- **Low morale due to low pay and poor working conditions.** Officers may have low morale making it difficult to get them to do anything extra for disadvantaged groups or in new areas.
- **Lack of expertise.** Staff may not have the necessary skills to conduct the work of the Ministry, such as legal drafting.
- **Corruption.** Corruption can hinder the work of the Ministry in providing justice as this can limit the access of the poor and disadvantaged because of their inability to pay bribes.

Lack of awareness of access to justice principles and the rights-based approach

The capacity of staff may also be limited in terms of understanding access to justice related issues. For example:

- **Lack of attention to disadvantaged groups.** Ministry lawyers may not be focused on improving access to justice to disadvantaged groups.
- **Lack of awareness of the rights-based approach.** Officers at the Ministry may be unaware of human rights-based approaches or that they have a role to play in increasing access to justice for all.
- **Inadequate prioritization of access to justice issues.** If justice issues are not prioritized by the Government, the Ministry may get inadequate funding, making it difficult to train staff in new areas.

Insufficient infrastructure

The Ministry of Justice also needs adequate funding so that it can operate and maintain court facilities and judicial offices at national and local levels and introduce new technologies that can expedite court processes. Increasing the presence of court facilities and judicial offices (including mediation services) at the local level can facilitate access to court services for disadvantaged groups (especially those who live in remote areas).

Insufficient legal dissemination

The Ministry of Justice may be responsible for legal dissemination and ensuring adequate access to legal information. It is important to ensure that efforts are made to make legal information easier to access, so that people (especially from disadvantaged groups) are able to use the information produced by the Ministry. UNDP programme officers should make sure that these communication projects focus on providing information and awareness and are not used as a tool for government propaganda.

Inadequate political support

For the Ministry of Justice to fulfil its role in improving access to justice it is necessary to gain political support from a variety of different areas, including government and civil society, as well as from within the Ministry itself. Some obstacles to building support could include:

- **Resistance to change by bureaucratic officials.** Some officials may resist changes in the way they work and may be reluctant to promote the inclusion and participation of disadvantaged groups in their programmes.

It is important to secure top-level support for reform and address any institutional culture that may perpetuate resistance to change.

- **Political rivalry.** Rivalries between different ministries can be detrimental to the work of the Ministry of Justice. Activities may be blocked, progress may be hindered, or projects may be halted for political reasons.
- **Lack of coordination between different government branches.** The coordination between different branches of the Government is crucial when addressing access to justice issues. Lack of coordination between the Ministry of Justice and other governmental agencies (e.g., the Home Ministry or the Ministry of Women and Social Affairs, etc.) can cause delays and duplications, which pose serious obstacles to achieving reform.
- **Lack of budgetary support.** Lack of political support often translates into inadequate funding. This can severely limit the number, type and quality of the activities that can be conducted by the Ministry.

Safeguarding Judicial Independence

The MoJ's primary function is to ensure that the administrative aspect of the justice system functions smoothly. If there is undue interference by the MoJ with the actual justice process, the independence of the judiciary can be seen to be compromised. For example, the MoJ may have vested interests in seeing legislation interpreted a certain way and may be able to exert inappropriate influence over the judiciary. Putting the judiciary under the authority of the highest court of the land rather than the MoJ is a means to safeguard judicial independence. As a result, there is often tension (especially in civil law countries) between the MoJ and the highest court of the land or the Supreme Council of Magistracy regarding the role and the influence of the MoJ over the judiciary.

Capacity Development Strategies for the Ministry of Justice to Enhance Access to Justice²

Build justice values

The most important task of the Ministry of Justice is to build values - including access to justice and human rights - into all aspects of its work. This means building and reinforcing the internal commitment of Ministry staff and management to human rights, as well as creating a sense of entitlement to justice among the people, i.e., improving their capacity to demand justice. In order to achieve this, the Ministry of Justice should:

- **Scrutinize government activities.** The Ministry can play a role in monitoring the activities of the Government to ensure the principles of human rights and access to justice are adhered to. A Minister of Justice must ask justice questions as routinely as the Minister of Finance asks, "Do we have a budget for this?" The Justice Minister should ask, "Is this the most 'just' decision?" Such simple questions need to become a regular part of cabinet deliberations as well.
- **Act as a government watchdog.** The Ministry of Justice should work with other Ministries and hold them accountable in terms of the justice and human rights dimensions in their work. Ministry of Justice officials should ensure that justice values are adequately protected in all government programmes. This includes not just asking, "Is this programme/policy legal?" But also, "Is there access to justice?"; "How will this affect women, minorities and other disadvantaged groups?"; and "Will justice and the public interest be served if this course of action is taken?"
- **Improving justice values within the Ministry of Justice.** The Ministry of Justice also needs to be the promoter of justice values in its own activities. For example, the Ministry should ensure that its programmes in legal aid, juvenile justice, witness protection, etc., incorporate and promote justice values. This will help to build an awareness of rights and a sense of entitlement among citizens and create the synergies that build justice values.

Encouraging the MoJ to Develop a Strategy for the Legal Sector

In 2003, UNDP Lao PDR undertook an evaluation of the legal sector in Lao PDR (Legal Sector Outcome Evaluation), which assessed the challenges and capacity gaps facing the justice sector. As a result, UNDP formulated a strategic programme of assistance for the legal sector. The centrepiece of the programme was the development of a legal sector strategy led by the Ministry of Justice. To motivate the Ministry and overcome resistance from the Government, a study tour to Viet Nam was organized to learn about similar undertakings in a neighbouring country. In early 2002, the Vietnamese Ministry of Justice approached UNDP Viet Nam to request technical assistance in carrying out a comprehensive legal needs assessment. Lessons could be extracted from Viet Nam's experience and applied to the Laos PDR context. In addition to the study tour, a visit from the UNDP Viet Nam CO to Lao PDR (to share the lessons learned from the Viet Nam study) and several consultations were held over the year, which also encouraged the Ministry of Justice to be more supportive of the project.

UNDP Lao PDR

² The strategies in this section apply to the officers and workers of the Ministry of Justice only, not its other specialized departments. Specific strategies need to be developed for other specialized services such as the police, prisons, public prosecutors departments and others. These services are addressed later in the chapter. For training materials see the OHCHR website which includes handbooks and manuals on human rights for judges, prosecutors, lawyers, police, and prisons officials. [<http://www.ohchr.org/english/about/publications/training.htm>].

Improve the capacity of ministry staff

- **Training in rights-based approaches and access to justice.** Ministry officials should be given basic training on rights-based approaches which take into consideration their role as duty bearers who are expected to provide information and services to people. Training should include how to talk, listen, and respond to people, especially those who are disadvantaged. Anti-corruption training (e.g., ethics) should also be provided.
- **Increase staff motivation.** Motivation is extremely important for the success of capacity development strategies. Study tours to enable staff to learn from and replicate best practices of other countries can be useful. In addition, motivational retreats, workshops and seminars can be conducted. Peer reviews and cross-training with officers from other countries can also help maintain high levels of motivation.
- **Use IT to improve the efficiency and effectiveness of staff.** New technologies can assist ministry officials in case management. For example, computerization of court offices can help in tracking court information and setting up legal databases can assist staff in

their work. Training needs to accompany technological enhancements so that it is used effectively.

Strengthen the legal drafting process

Harmonizing domestic legislation with international human rights and global environmental obligations can be a way to ensure that international commitments are reflected in the laws that are drafted. This process can be done in collaboration with the Law Commission, the Human Rights Commission and the Ministries of Environment and Foreign Affairs. In addition to providing technical expertise on the drafting itself, the Ministry of Justice can also increase public involvement in law-making by inviting public comments and participation on proposed new laws.

Improve accountability of the Ministry of Justice³

- **Establishment of an Ombudsman-like office.** In addition to the setting up of help desks where people can report complaints, an ombudsman office could be established where citizens could take complaints about ministry officials. This could help improve accountability of ministry officers as duty bearers.

Modernizing the Justice Sector

Modernizing the justice sector and introducing new technologies is key to improving access to justice as it can help expedite court cases and provide the means to monitor the court system as a whole. A good example of this is UNDP Yemen's project in modernizing the justice sector. The project includes the following components:

1. *Establishment of an Electronic Legal Database.* The database is accessible via the Internet and contains updated Yemeni Laws and the latest precedents set by the Supreme Court. An English webpage has also been created with information about Yemeni laws. An Internet Legal Research Unit is available for judges/lawyers who cannot afford a personal computer. CD-ROMs with the laws have also been created and disseminated.
2. *Launching of the Automated Court/Case Management System (CMA).* When fully operational the CMA will be:
 - A method to monitor judges/court staff performance and productivity by tracking case processing time, deferrals, etc.
 - An anti-corruption tool by eliminating "judge shopping" and curbing administrative corruption i.e., forged, lost, stolen, misplaced case files, etc.
 - An early warning system that will detect problems related to workload/judges/court distribution.
 - An effective management tool for the semi-annual distribution of judges to courts nationwide.
 - A tool for recording court judgments/prosecution office decisions, streamlining court procedures and alerting residing judges and staff to certain actions and deadlines.
 - A means to control litigant traffic within the court building through colour-coded cards.
3. *Court Hotline and Help Desk.* Yemen will also launch its first in-house Court Hotline and Help Desk for legal assistance and case information. The Hotline will be staffed by trained lawyers who can respond to the questions of court callers and provide case-related information for litigants using the automated CMA. These services will provide much needed legal assistance for the poor, as well as other vulnerable groups such as women and those who are illiterate.

[See <http://www.pogar.org/countries/yemen/judiciary.html> for additional information on UNDP Yemen and Judicial Reform]

UNDP Yemen

■ **Establish external oversight requirements.**

To counter corruption, requirements such as double signatures, disclosure of personal finances of persons with significant responsibility, and monitoring mechanisms for activities of officials or other departments within the Ministry can be effective.

■ **Improve transparency.**

UNDP can assist the Ministry of Justice to undertake administrative reforms where needed to improve the transparency of its operations. UNDP can also play a role in streamlining the interface between the judiciary and Parliament and improve the Ministry's coordinating role in relation to other actors of the executive branch. For example, a comprehensive legal sector strategy can be developed with the participation of different agencies and aligned with the country's development policies.

Encourage legal dissemination to improve awareness

Part of the role of the Ministry of Justice is to ensure that the public have access to comprehensible, timely, accurate and relevant legal information. The Ministry should provide information on both substantive law as well as procedures to access the formal system. UNDP could support the Ministry to set up communication units with communication strategies and guidelines, and provide communication tools and training to government communication officers.⁴

■ **Awareness campaigns.** Claim holders, especially those from disadvantaged groups, should be made aware of the services they can obtain from the Ministry. This can be achieved through poster campaigns targeted at disadvantaged groups, through media

campaigns (TV and radio shows, newspapers), etc. The Ministry of Justice could also collaborate with parliamentary commissions, the Ministry of Education, and the media and civil society in broader civic education initiatives (also see Chapter 5).

■ **Dissemination of legal information.**

Legal information should be easily and readily available for those who need it. In order to ensure access to legal information, the Ministry of Justice could prepare support materials to assist in the implementation of laws and regulations at the national and local levels. These materials could include: explanatory commentaries, memoranda, or compliance guides on key laws and regulations.

■ **Public access to information.**

Library and law research centres with Internet access and holding all statutory instruments and legal texts could be established. Such centres should be accessible to both legal staff and the general public. In addition, special help desks or hotlines could be established within the Ministry to respond to those seeking information and services.

Build coalitions within and outside of the Ministry of Justice

To bring about change, it is necessary to have political will. One way to enhance political will is to build coalitions – both within and outside the Ministry of Justice:

■ **Identify catalysts and change-agents.** It is an effective strategy to identify within the system catalysts committed to the principles of a rights-based approach and access to

The Justice Systems Project in Timor-Leste – Building Coalitions

For comprehensive justice reform, it is necessary to have the support of key leaders across the justice sector. Often the biggest obstacle is overcoming political rivalry and building coalitions between different agencies. Unless these rivalries can be overcome, it is almost impossible to mobilize the political will necessary for reform.

In Timor-Leste, for example, for constructive institutional development, it is necessary for the Ministry of Justice, courts and prosecution to work together and support a common strategy for the justice sector. Through a well-prepared shuttle diplomacy effort in late 2002 and the first half of 2003, UNDP sought to smooth over potential disagreements between the different groups and to get the Justice Minister, the highest-ranking judge and the Prosecutor-General to consider a series of cross-sectoral proposals. Through this process, the three officials were able to reach an agreement on the proposals and eventually, begin to meet. As a result, the Justice Systems Project (JSP) emerged and the three officials formed the "Council of Coordination (CoC)" to supervise the implementation of the UNDP-sponsored project and to coordinate all other external assistance in the sector.

The JSP is primarily about guiding the institutional development of the emerging justice system in a positive direction in its early years. UNDP provides implementation support, mobilizes resources and approves funding, while the CoC decides on the priorities and work plans. UNDP facilitates CoC meetings, but holds no vote on the Council. In addition to serving as a Board of Director for the UNDP-sponsored project, the CoC provides a forum for the three agencies to meet regularly and discuss all kinds of issues of mutual relevance. One year into its implementation, the Justice System Project is widely acknowledged as a big success – largely due to the strong sense of national ownership the project has engendered.

UNDP Timor-Leste

⁴ UNDP Latvia, for example developed a project to build institutional capacity of the judiciary in Latvia by preparing and implementing a communication policy. [http://www.tm.gov.lv/str/962_UNDP_projekts.doc]. UNDP Indonesia is also working with the Minister of Justice to develop their Communications and Public Relations Department for better dissemination of legal information.

justice. Strengthening their capacity through targeted technical assistance is an effective way to bring about desired changes. Top-level support is also key to reform efforts and to counter resistance.

■ **Building external coalitions.** Building coalitions with partners outside the Ministry of Justice is also necessary. With the support of institutions such as other ministries, National Human Rights Commissions as well as civil society organizations, the pressure on the Ministry of Justice to undertake necessary reforms can be increased. These coalitions are also important in carrying out activities such as human rights sensitization of the police or educating public officials on their responsibilities under the Constitution.

Encourage civil society and civilian oversight of the Ministry of Justice

Where there is a strong civil society movement, or programmes are in place to increase civil society capacities, development of mechanisms for civil society monitoring and feedback to the Ministry could be a strategic undertaking.

- **Lobbying and Advocacy.** Civil society representatives can make presentations before parliamentary oversight committees.
- **Involving the media.** The media could be encouraged to report on the activities of the Ministry of Justice to raise public awareness and access to information.
- **Civilian participation.** Citizen participation could be increased via suggestion boxes, complaint hotlines and other such methods to obtain citizen feedback. The feedback could be used to further strengthen or refocus training and awareness programmes for Ministry officers, which could improve the MoJ's responsiveness to the needs of citizens.

4.2 The Court System

4.2.1 The Courts

4.2.2 Prosecutors

4.2 THE COURT SYSTEM

This section examines the critical elements and capacities required for the court system to provide access to justice for poor and disadvantaged people.⁵ It provides a basic overview of the institutions in question and the obstacles they face, as well as possible entry points for capacity development interventions. This following section focuses specifically on the courts, the judiciary and prosecutors.⁶

A court consists of an official, public forum, which a public power establishes by lawful authority to adjudicate disputes and to dispense justice according to the law. Courts are intended to offer a forum where the poor and powerless can stand with all others as equals before the law. The courts should also protect the rights of people who can't protect themselves.

A trial court or court of first instance is the court in which most civil or criminal cases begin. A trial court is different from an appellate court. An appellate court is a court that hears cases in which a lower court has already made some decision, which at least one party to the action wants to challenge.

Criminal Cases

A criminal case is when the Government brings an action against an individual for offences against society whereas civil disputes are between private parties. In criminal cases, defendants can lose their lives and freedom, as well as property. Therefore, protecting the rights of criminal defendants is an important consideration for access to justice programmes.

The judiciary consists of judges and magistrates as well as administrative staff such as clerks, bailiffs, translators and security personnel. Under the doctrine of the separation of powers, it is one of the three branches of government. The primary function of the judiciary is to adjudicate legal disputes and to ensure the provision of a remedy sought for a grievance through the application of law. The judiciary is also responsible for determining who has violated criminal laws and to assess punishments or other remedies. The judiciary also serves to check and balance the power of the executive and legislative branches of the Government.⁷

The prosecution is the legal party responsible for presenting the case against an individual suspected of breaking the law in a criminal proceeding.⁸ Crimes are offences against the social order and government officials are responsible for the prosecution of offenders. In some legal systems, prosecutors will advise or supervise the work of the police or other evidence-gathering institutions, and they will also enforce the judgments of a court. Prosecutors can hold a wide variety of statutory positions, some are private lawyers and prosecute public cases, others are civil servants under the executive, and still others enjoy the independence of a quasi-judicial status.

In the Asia-Pacific, there are many different types of legal systems. In many countries hybrid systems have also evolved where different legal systems have been merged in order to reflect the local context. Also, in some cases, traditional and indigenous systems of justice that follow customary law may be used more than formal court systems (see Section 4.3 Informal Justice Systems).

No matter which legal system is in place, judicial reform efforts should be in accordance with international human rights and rule of law standards. The Universal Declaration of Human Rights provides basic guiding principles for all legal and judicial systems. Numerous international human rights instruments recognize as fundamental the right of all persons to due process of law, including to a fair and public hearing by a competent, independent and impartial tribunal established by law. The importance of this right in the protection of human rights is underscored by the fact that the implementation of all other rights depends upon proper administration of justice.⁹

4.2.1 THE COURTS

Court reform strategies traditionally focus on enhancing operational efficiency and developing human resource capacity. While these approaches are critical, if the court system is approached from an access to justice perspective, additional principles, which underpin the provision of access to justice by the court system will need to be addressed. These principles are accountability, accessibility and independence. It is important to recognize that all three principles need to guide any programming intervention aiming to enhance access to justice within the court system and enhance public confidence and trust in the justice

⁵ *Alternative Disputer Resolution and traditional and indigenous justice systems are covered in a separate section. See Section 4.3. Informal Justice Systems.*

⁶ *Public defence systems are also part of the judiciary and are established for those who are accused of criminal offences but cannot afford a lawyer. Public defence systems are discussed in detail in Chapter 5.*

⁷ *The judicial branch of the Government and the legislative and executive branches are Constitutional Partners. However, the critical constitutional notion is that they are separate and independent branches of government while at the same time they are also interdependent. Therefore, it is important that the judicial branch pursue efforts and establish programmes to acquaint the legislative and the executive branches with the duties and functions of the judicial branch.*

⁸ *In some legal systems, prosecutors will advise or supervise the work of the police or other evidence-gathering institutions, and they will also enforce the judgments of a court.*

⁹ *These international principles and guidelines also specifically mention protection for disadvantaged groups – for example, children, people with mental disabilities, etc should be provided with the protection they need.*

system.¹⁰ The application of these principles also contributes to improving public perception of the justice system – the judicial system not only needs to deliver justice, but needs to be seen by the public as a just system.

The following sections examine the five key areas of intervention:

- A. Operational Efficiency
- B. Human Resource Development
- C. Integrity and Accountability
- D. Independence
- E. Accessibility

A. OPERATIONAL EFFICIENCY

Operational efficiency is usually associated with timely trials and delivery of judgments. It also refers to efficient courtroom management, case-flow and efficiency in the service process and effective and efficient rules and procedures.

Operational inefficiencies can serve to hide corrupt or discriminatory practices or behaviour by judicial and administrative staff.¹¹ An inefficient justice system will result in delayed decision-making. Such delays can have a greater impact on poor and disadvantaged people. For example, undue delays in solving property or commercial issues involving a poor citizen are likely to deprive them of their livelihoods. In addition, a disorganized and uncoordinated court system can in many cases

suffer from communication problems between the centre and the periphery and between the different levels of courts, thereby producing inconsistent and unpredictable decisions. It can also negatively impact other institutions within the justice system. An overly bureaucratic, complicated and inefficient system is also less accessible to all and less likely to be accessed by those who don't trust or understand it.¹² Another key obstacle to operational efficiency can be the inability to enforce judicial decisions (see the section on Enforcement later in this chapter). Operational inefficiency may impede the enforcement of court orders and decisions, and could encourage individuals to use alternative means of resolving disputes (e.g., violence, bribery, etc.), further weakening the justice system.

Challenges to Operational Efficiency

Lack of necessary resources and capacities

The lack of necessary resources and capacities (human and financial) within the court system impacts on the ability of judges and support staff to effectively administer justice. The lack of material resources (such as office furniture, stationery supplies, telephones, etc.) can also constrain operational efficiency.

In many developing countries there are inadequate structures for court administration, coordination and management, and structures for

Typology of Legal Systems

Listed below are some of the main legal systems found in the Asia-Pacific region. In many countries, hybrid systems have emerged where different legal systems have been merged to make the legal system more relevant for the local context.

Common law is a legal tradition in which common law rules and principles co-exist with statutes and in which the judiciary plays a central role in developing the legal system through its power of statutory interpretation and judge-made precedent. Common law systems in Asia and the Pacific have usually developed through the influence of British law (see e.g., Brunei, India, Sri Lanka).

Civil law is a legal system that relies heavily on the codification of laws into criminal or civil codes and statutes, which are left for judges to interpret and apply. In civil law systems the judicial process traditionally follows an inquisitorial model, by which judges, particularly in criminal cases, can take on an investigative role. The civil law tradition developed in continental European countries. In Asia and the Pacific, the legal system of Thailand and Viet Nam, for example, are largely based on the civil law tradition.

Socialist law is the legal system that is used in Communist states. It is based on the civil law system, with modifications to suit the Marxist-Leninist ideology. Most important of these modifications is providing for most property to be owned by the State or by agricultural cooperatives, and having special courts and laws for state enterprises. Courts generally have less power than the other two branches of government and are not considered an equal branch of government.

Islamic law is called Syariah or Shar'ia. It is a set of rules based on Islamic scripture and jurisprudence potentially applicable to all forms of legal interaction. Traditional sources of Islamic law are derived from the Qur'an (the Islamic holy text which sets out general principles that guide Muslim communities) and the Hadith (the recordings of the practices of the Prophet). Most countries that practice Syariah/Shar'ia, for example Indonesia, Pakistan, Brunei, and Afghanistan, maintain a dual system of secular courts and religious courts, in which the latter mainly regulate marriage and inheritance. Iran maintains religious courts for all aspects of jurisprudence. Though predominantly applied to Muslims, it may at times be applied to non-Muslims as well.

¹⁰ The widely adopted Court Performance Standards (CPS) include as fundamental principles for courts: access to justice, expedition and timeliness, equality, fairness and integrity, independence and accountability as well as public trust and confidence. See the World Bank site on 'Measuring the Performance of a Legal System', <http://www1.worldbank.org/publicsector/legal/performancebrief.htm>.

¹¹ Including personnel involved in filing, typing, translating as well as security guards, bailiffs, summons runners, court inspectors, etc.

¹² The rate of appeal can, for example, be an indication of the dissatisfaction with the trial level.

effective record and case management are absent. As a result records can be lost or misplaced, prolonging and delaying court proceedings. In addition, the lack, or destruction, of the means for timely delivery of court documents, such as postal services, roads and transport systems can be an obstacle.

Lack of streamlined procedures

A lack of streamlined procedures for filing and disposing of cases can result in delays, corruption, mishandling of records, and arbitrariness. Complex or unclear procedures can be confusing and discouraging for potential claimants. Claims which could be dealt with through other means but which go to court can result in an endemic backlog of cases which puts unnecessary strains on the court system. Further, the slow pace of legislative reform often does not address the needs of the court system for streamlined procedures.

Lack of laws, legal information and jurisprudence

A lack of laws, legal information and jurisprudence by courts, including law reports, law gazettes and other publications, can result in legal personnel often having only limited reference materials, and being at risk of not keeping up with new developments and interpretations of the law. Without access to such information, legal uncertainty, inconsistent law development and application, poor legal education and a high percentage of trial court decision reversals can occur.

Overly bureaucratic attitudes and behaviour

Bureaucratic attitudes and behaviour by judicial and administrative officials can also impede the delivery of justice as emphasis may be placed on overly bureaucratic procedures rather than on delivering justice. Resistance to change and adopting streamlined procedures that may enhance operational efficiency can prevent necessary reforms from being implemented.

Strategies to develop capacities for operational efficiency

Increase the human resource capacity of the justice system

In cases where a shortage of personnel leads to case backlog, strategies to increase the number of judicial personnel should be developed. This shortage is especially apparent in countries coming out of long periods of conflict. Strategies should aim to do more than simply increase the number of judges as this alone may not lead to increased efficiency. It may be more successful to find ways to increase the efficiency of the court

systems rather than increase the number of staff. For example, in some cases it may be advisable to reduce the number of judges and increase their pay or increase the number of court support staff instead. Strategies for interventions will need to be carefully assessed within the context of each country.¹³

Poor Pay for Court Support Staff

Poor pay for court support staff can affect staff morale and performance, in turn inhibiting the public's ability to access justice. Poor pay for court support staff can also foster corruption as underpaid staff may be more vulnerable to bribery or pressure from corrupt lawyers and judiciary.

Utilize available resources more efficiently

One of the ways to reduce case backlog is to systematically reduce the number of cases that enter the justice system. In appropriate circumstances, cases that enter the judicial system (or leave without trial) can be diverted to alternative dispute resolution (ADR) mechanisms which could reduce the number of cases requiring judicial adjudication. This can be achieved by law reform interventions affecting both civil and criminal law. Civil interventions can include the use of ADR and traditional mechanisms, limitations to court jurisdiction to cases above a certain value, and through the use of pre-trial settlements (also see section 4.3. on Informal Justice Systems). Criminal law interventions could include plea bargaining and other pre-trial settlement mechanisms.¹⁴

Use decriminalization, plea bargaining and simplified criminal and civil procedures to eliminate excess workloads for courts and reduce backlog

In some countries, criminal laws may be archaic and criminalize behaviour that is generally considered acceptable. Decriminalization repeals or amends statutes so that those acts are no longer subject to prosecution.

Plea bargaining is a negotiation between the defendant, his/her attorney and the prosecutor. In such a negotiation, the defendant agrees to plead 'guilty' or 'no contest' to some crimes, in return for the dismissal of other charges, a reduction in the severity of the charges, the prosecutor's willingness to recommend a particular sentence or some other benefit to the defendant. Plea bargaining may be conducted in private, but acceptance of a plea, and ensuring that the defendant understands the plea and its consequences should be done in open court and approved by the judge. There are several dangers with plea bargaining, including the danger

¹³ In the Solomon Islands, for example, the number of judges has been increased yet, arguably, well-qualified magistrates should be more of a priority.

¹⁴ In serious criminal cases, however, caution must be exercised in terms of using ADR, traditional mechanisms or plea bargaining or pre-trial settlements so as not to compromise the deliverance of justice.

that an innocent person will be pressured into pleading guilty out of fear of a severe penalty if convicted. There are also constitutional implications concerning the right to a fair trial, the rights of victims, and the possibility that the plea bargaining practice may lead to unequal treatment in contravention of the right to equality. Where plea bargaining takes place, it must be clearly monitored.¹⁵

Expand the role of alternative dispute resolution

Another method for reducing the strain on the justice system is to redirect cases to ADR systems when appropriate. For example, the National Law Commission in India has recommended expanding the role of ADR in India to address lesser value claims in property, trade disputes, local small business and family disputes (see section 4.3 Informal Justice Systems). However, it is important to carefully analyze the local conditions before establishing ADR mechanisms.

Improve court and case management, scheduling, and streamlining of procedures

Case prioritization, active case management and strict timelines can also reduce the backlog of cases and improve clearance times. General procedures for handling cases should be standardized and mechanisms should be created to ensure their adherence to these standards. However, aggressive and rigid scheduling may discourage thorough investigations, legal analysis, and case preparation. The application of category-specific time frames can mitigate this while ensuring greater injustices, such as the detention of persons without trial, is avoided. Procedures should be sufficiently flexible to accommodate the individual needs of a case.

Promote the use of information technology (IT) to improve the operational efficiency of courts

Automated case management and case tracking help to ensure that files are not lost and cases progress according to a set timetable. Automated documentation and certification systems can also aid the recording, printing and distribution of witness depositions as well as being useful for individuals obtaining copies of documents, especially in countries where the judiciary also performs notary/registry functions for property, births and personal status of citizens. However, IT approach should be carefully phased in, and any initiatives promoting the introduction of automated systems need to be accompanied by intensive capacity development initiatives.¹⁶ It can be expensive not just to install but also to maintain

and replace systems as well. It may, in some cases, be more effective to concentrate on administrative processes instead of IT.

Provide training for judges and court staff in operational efficiency techniques

The provision of training in IT, court ethics, non-discrimination, court management, and case management, as well as knowledge of substantive and procedural law is an essential component of any strategy focusing on improving operational efficiency of the court system. Such training should also target administrative and paralegal staff and can act as a vehicle for attitudinal change within the system.

Provide support to coordination mechanisms

Support should be provided within courts, between different levels of courts and with other actors and institutions of the justice sector. Effective coordination can identify and address blockages in the system and improve overall performance.

Streamline the organizational structure of the courts

Court bureaucracy is a significant barrier to those wishing to access to the court system. Court clerks should be able to explain the court procedures and filing requirements, and should try to limit unnecessary bureaucratic requirements. Clerks' offices could also be a good place for hosting legal clinics, especially for litigants needing only basic legal advice.

Restructuring the Judiciary

UNDP Afghanistan, as part of its 'Rebuilding the Justice Sector' programme, is supporting the capacity building of permanent justice institutions through support to the Priority Reform and Restructuring (PRR) scheme. Through this scheme ministries and other public institutions are restructuring and streamlining selected key departments and are compensated by a series of interim salary incentives for staff of the 'restructured' departments. While the justice institutions were not originally included in the PRR plan, the Civil Service Commission was asked by the Supreme Court and Attorney General that they be allowed to participate in the scheme. UNDP is supporting this plan by providing technical assistance and capacity development activities coupled with in-kind incentives for the departments willing to undergo reform.

¹⁵ Monitoring can be done by legal aid organizations or other civil society organizations. Though it is inappropriate for the court to involve itself in the actual bargaining process, it has the authority to reject plea bargains deemed inappropriate.

¹⁶ Basic computer skills cannot be taken for granted. In addition, there may be insufficient trained personnel to deal with breakdowns and to provide user support. Also, many office buildings may also not be air-conditioned or dust and humidity may affect equipment.

UNDP's approach to public administration reform (PAR) aims to create a well-managed, non-partisan civil service.¹⁷ While the judiciary is normally outside the scope of PAR,¹⁸ it shares some of the same concerns and its reform can also be considered as PAR. In some situations, especially post-conflict situations, a public administration/management approach can provide an important baseline for reforms that can increase access to justice through the development of transparent and efficient management of resources, streamlined roles for civil service/court personnel and judges, and through the provision of incentives such as an appropriate salary and in-kind incentives for judges. This type of intervention should aim to develop a culture of accountability, non-discrimination and abidance by the rule of law by both judges and court staff.

Support the creation of, and/or provide ongoing assistance to, national judicial management institutions

Institutions such as judicial services commissions and high councils of the judiciary can inform central administrative and procedural policies and ensure effective coordination between the different branches/ levels of the judicial system. They can also be mandated to present concerns and requirements (budgeting, training etc.) on behalf of the judiciary and can enact and enforce codes of conduct relating to discriminatory and corrupt practices. As in any other intervention attempting to regulate or manage the judicial process, special consideration needs to be given to maintaining judicial independence.

Availability of information for legal personnel

Information management and dissemination can serve to ensure consistency in decision-making through more predictable and transparent decisions and can reduce perceptions of corruption within the justice system. It can also protect vulnerable and disadvantaged groups from discriminatory practices as it can inform legal personnel about their responsibilities and the rights of disadvantaged groups. All courts should be able to access regularly updated litigation, court decisions and sentencing guidelines. A central legal documentation centre for judicial decisions within the country should be established and should be tasked with the systematic collection, collation and dissemination of all legislation and authoritative court decisions.

Support the development of and adherence to sentencing and evidentiary guidelines

Sentencing guidelines can ensure consistency by

promoting uniform and proportional sentences and can help to ensure that sentencing decisions are not influenced by factors such as race, gender, religion or economic status. Use of guidelines can provide a standard to measure how well the system is working. Specific objectives of sentencing guidelines are to: a) increase public safety, b) promote uniformity of sentencing, c) promote proportionality in sentencing, d) provide clarity and certainty in sentencing, and e) coordinate sentencing practices with correctional resources. However, sentencing guidelines should still allow for judicial discretion to ensure that sentences are fair and proportionate, and that factors particular to each defendant are considered.

Evidentiary guidelines are also necessary to specify the degree and nature of evidence required. For example, guidelines for confessions, credibility of witness, weight of evidence, etc. Sentences should also be monitored and filings and plea agreements should be reported to a central agency within the court system. A sentencing commission composed of interested parties and public members can be a way to monitor the process and identify problem areas.

Public access to information should be a priority

Some intervention in this area can include support for the creation of freedom of information legal frameworks to allow maximum transparency of court proceedings through the publication of orders and judgments; publication of the annual reports on the performance of courts; public outreach programmes informing people of court procedures and rules; awareness programmes about the law and rights; and setting up customer information booths/kiosks at the courts. Court support staff could be trained to facilitate public access to information. These measures can all serve to improve accessibility, familiarity and understanding, especially for the poor and disadvantaged.

Measuring Court Performance

Creating systems to measure court performance and setting indicators can assist in monitoring the judiciary. Care needs to be taken in pursuing this type of methodology, however, as it is difficult to quantify the performance of the judiciary, and this type of process could be misleading. Therefore, indicators need to be established to measure the quality of the programmes and services being delivered. These measurements can serve as 'report cards' for different courts and judges and can identify areas that need to be targeted for reform.

¹⁷ See UNDP Public Administration Reform Practice Note, 2004. [<http://www.undp.org/policy/docs/practicenotes/PAR-PN.doc>].

¹⁸ Reform of the judiciary can also be considered as PAR, but it is often not incorporated within general public administration reform.

Develop an internal monitoring system for judicial performance and link career advancement to performance

Such systems should not be based solely on the number of cases resolved, instead the system should also take into account the difficulty of the cases solved. Performance monitoring should be based on annual statistics, together with monitoring of performance indicators for integrity and non-discrimination. For example, the number of valid complaints regarding corrupt practices and evaluation of case disposition by disaggregated data on ethnicity, gender, and geographical origin.¹⁹ These interventions, however, should not compromise the independence of the judiciary nor influence judges to adjudicate based on the perceived preferences of those who have the power to intervene in their careers.²⁰

Support external monitoring mechanisms

Public oversight, discussion and debate are a necessary part of a democratic process, providing checks on the judiciary and ensuring impartiality, transparency and accountability. Such public participation can be encouraged while still maintaining judicial independence. For example, consultations between stakeholders in the court system (police, lawyers, legal aid, NGOs, etc.) on issues of concern regarding the operational efficiency of the court system could be

encouraged. As discussed later in this chapter, in the section on civil society oversight, ultimately, the judiciary, like other institutions of democratic governance, should be accountable to the public for both its decisions and its operations.²¹

The following table includes some critical lesson on increasing operational efficiency.²²

B. HUMAN RESOURCE DEVELOPMENT

An effective justice system requires a well-trained and educated judiciary. Judicial training helps produce an impartial, competent, efficient and effective judiciary and support staff. Judicial training is the foundation of judicial reform and a key component of human resource development in the judiciary as it is an instrument for introducing reform and new measures and practices, as well as instilling new values, attitudes and behaviours, and building a common agenda within the justice sector and beyond.

Judicial education has two divisions – (1) pre-service or orientation programmes, and (2) continuing judicial education and professional growth training throughout the judges' professional lives. The objectives of judicial training programmes are summarized in the following box. The targets of court education should include both judges and support staff.

Objectives of Judicial Training Programmes

- To prepare newly appointed judges for their duties through the provision of necessary information and tools.
- To enable greater consistency and predictability in judicial decision-making.
- To inform judges of new methods, laws, and related areas of knowledge required in their work.
- To introduce new concepts and approaches that may positively influence the values, outlooks and attitudes of judges.
- To screen candidates to the judiciary -- successful completion of entry level training may also be used to screen other judicial professionals and support staff.

In reform programmes, training may have additional purposes:

- To build a reform coalition within the judiciary or overcome resistance to reform.
- To identify problems that may need other interventions if they are to be resolved.
- To build solidarity and a sense of common purpose.

¹⁹ Bar associations and private citizen advisory groups can also provide input on performance of judges and court personnel. Also see Chapter 5.

²⁰ One way to monitor and provide feedback for judges is to establish judicial performance commissions in each judicial district comprised of both attorneys and non-attorneys. When judges are scheduled to go through a retention election, the performance commission can collect data by distributing questionnaires to litigants, attorneys, witnesses, jurors and court staff. The information can be compiled, the judge can be interviewed by the commission, and then the results of the process can be published.

²¹ Accountable in the broad sense of the Constitution, i.e. not just accountable to the majority, but also protecting minority rights and promoting the rights of the disadvantaged.

²² Lee, P. and P. Sharma. 2003. "Innovations in reducing case backlog." UNDP India.

Table 5: Critical Lessons on Operational Efficiency

| PROCESS ENTRY POINT | INTERVENTIONS | PROS | CONS |
|--|--|---|--|
| REDUCING INPUTS INTO THE JUSTICE SYSTEM | <ul style="list-style-type: none"> ■ Government litigation policy to reduce new cases ■ Reduce automatic appeals after the first appeal ■ Granting of time served to those in pre-trial detention | <ul style="list-style-type: none"> ■ Direct approach ■ Existing practices remain in place ■ Little training needed ■ Consistent with existing professional ethical guidelines ■ Granting of time served may be a HR obligation | <ul style="list-style-type: none"> ■ Current inefficient practice may actually lead to less litigation ■ Eliminating trials prevents closure for victims, accused, and society at large |
| EXPANDING THE ROLE OF ALTERNATIVE DISPUTE RESOLUTION ²³ | <ul style="list-style-type: none"> ■ Court-annexed ADR ■ Community-based ADR ■ Specialized ADR ■ Ethnically-oriented ADR ■ ADR clearing houses | <ul style="list-style-type: none"> ■ Best mechanism for reaching poor, marginalized, and illiterate populations ■ Consistent with local customs, norms, practices | <ul style="list-style-type: none"> ■ Not appropriate for serious criminal cases ■ May allow discriminatory biases ■ May become as slow, complicated, and expensive as traditional adjudication ■ Lack of accountability ■ Lack of appeals ■ Opposed by lawyers |
| CASE MANAGEMENT, TIME SCHEDULES, AND PROCEDURAL STREAMLINING | <ul style="list-style-type: none"> ■ Case screening and assignment to specific tracks ■ Specialization/clustering similar cases ■ Pre-set schedules depending on case type ■ Judicial management of cases | <ul style="list-style-type: none"> ■ Proven effectiveness ■ Large body of experience from many jurisdictions ■ Some interventions are relatively simple to implement | <ul style="list-style-type: none"> ■ Can compromise standard of justice ■ Discourages individualized treatment of cases ■ Demands significant changes from legal actors ■ Could lead to abuses |
| BUILDING THE CAPACITY OF THE EXISTING JUSTICE SYSTEM | <ul style="list-style-type: none"> ■ Hiring more judges, prosecutors, administrative staff ■ Hiring better qualified personnel ■ Building new courthouses ■ Improving judicial infrastructure ■ Ensuring steady supply of court materials, maintenance, simplifying reimbursement procedures for court inspectors | <ul style="list-style-type: none"> ■ Does not demand changes by legal actors ■ Would be popular among existing players | <ul style="list-style-type: none"> ■ Demands a high level of resources ■ Does not address underlying systemic/process inefficiencies |
| TEMPORARY MEASURES TO REDUCE BACKLOG | <ul style="list-style-type: none"> ■ Commissioning temporary judges and courts to reduce backlog ■ Mobilize retired judges on a short-term basis | <ul style="list-style-type: none"> ■ Effective for discrete, relatively small levels of backlog ■ Doesn't need changes in institutional culture ■ Demands fewer resources | <ul style="list-style-type: none"> ■ Does not address pervasive, deep-seated inefficiencies |

²³ Expanding the role of ADR needs to be carefully considered as ADR mechanisms can face many problems similar to the courts. Once ADR systems are established, they need to be monitored to ensure that human rights are not violated.

| PROCESS ENTRY POINT | INTERVENTIONS | PROS | CONS |
|---|---|--|---|
| INFORMATION AND TECHNOLOGICAL INNOVATIONS | <ul style="list-style-type: none"> ■ Providing electronic access to legal databases ■ Collecting and indexing judicial opinions and other texts ■ Video recording of evidence and video conferencing | <ul style="list-style-type: none"> ■ Popular and relatively easy to fund ■ Best mechanism for allowing access to information ■ Represents the direction in which legal systems are moving | <ul style="list-style-type: none"> ■ Does not address institutional inefficiencies ■ Requires substantial training ■ Victims may not want to come forward if private information is disseminated ■ May seem unfair if criminal defendants do not appear in court while the prosecutor and judge are in the same courtroom |
| LEGAL AND PROCEDURAL REFORM | <ul style="list-style-type: none"> ■ Decriminalization ■ Plea bargaining ■ Simplifying civil and criminal procedure ■ Standardizing local laws | <ul style="list-style-type: none"> ■ Most far-reaching and fundamental reform ■ High potential for long-term impact | <ul style="list-style-type: none"> ■ May incur lengthy, contentious political processes ■ May adversely affect public safety and human rights |

Challenges in Human Resource Development

Insufficient funding for training programmes

Limited funding results in an inadequate number of training programmes and institutions as well as a lack of qualified law schools and judicial academies. Often government funding is especially limited for entry-level and continuing training programmes for judges and support staff. Gaps in government funding can be bridged by NGOs, professional associations, academic institutions, etc., who can also provide funding and training opportunities. However, it is important that governments show political commitment to developing and supporting the judiciary by providing sufficient funds for training programmes.

Poor Donor Coordination

Often there is poor coordination of limited resources amongst donors seeking to assist in judicial training. This can lead to many problems as there can be significant difference in approaches, or there may be duplication of assistance in some areas and neglect in others.

Inadequate numbers of qualified, competent and committed teachers and lawyers

There may be a shortage of qualified trainers and teachers available to conduct training programmes for the judiciary. The numbers of lawyers and academics from disadvantaged groups (e.g., women, minority groups, etc.) are also limited.

Limited access to updated judicial and legal tools and text books

Access to legal tools and text books can be limited resulting in poor legal education. There might also be also limited availability of legal tools such as bench books, guidelines and standards for lawyers and judges to refer to.

Assessment of the needs of the judiciary is incomplete and inadequate

When assessments are not conducted properly, it can lead to the adoption of unsystematic or undesirable training techniques and tools. In addition, judicial training needs to be conducted at a pace that will not compromise judicial expediency.

Understanding of international human rights norms is limited

Judges and judicial staff need to understand the international human rights framework that protects the rights of individuals and the particular provisions that have been established to protect the rights of the disadvantaged. Training should include modules on international human rights instruments and how to apply international human rights norms in the national context.

Training for higher-level judges and administrative staff is limited

Judges from higher courts do not regularly participate in training programmes as they often perceive them as not being useful. Further, programmes may not be provided for appellate

judges as they require specific trainings for which resources may not be available. Hence, there is a limited participation of high ranking judges in trainings. Appropriate incentives or separate trainings specifically targeted to higher ranked judges need to be provided to encourage their participation.

Entrenched attitudes and behaviour that compromise reform initiatives

The emphasis of many training programmes tends to be on building knowledge and skills without sufficient emphasis given to changing behaviours, ethics and attitudes. For example, the judiciary can be very traditional and hierarchical; therefore, some judges do not wish to be trained by anyone who is not a lawyer or a peer. Such narrowing of associations may lead to the entrenching rather than the changing of behaviours, ethics and attitudes, as trainings may not address broader social values.

Strategies to Build Capacities for Human Resource Development

Engage the executive and legislative branches in providing an enabling environment and policies in support of training programmes for the judiciary

It is necessary to have political commitment in order to establish training programmes that enhance the competency, independence and efficiency of the judiciary, so that it is able to fulfil its mandate. Advocacy and sensitization programmes for the executive and legislative branches should be pursued to enhance their understanding of the role of the judiciary. For example, experiences and lessons from other countries on how the different branches of government can work together can be shared.

Start reforms in judicial education at the university level

The values, skills, attitudes and knowledge of students can be developed and strengthened at the university level by qualified and committed academics and lawyers. Awareness of, and interest in, access to justice, ethics, social responsibility and human rights could be introduced and reinforced at this level. In addition, local and national bar associations could support change, prepare guidance and sponsor training (also see Chapter 5).

Support the development of bench books

Bench books are essentially working aids and guides to judges as well as judicial support staff. Bench books may provide guidance on both procedural and substantive laws. They should be tailored to the everyday needs of the judiciary and targeted to specific needs of each jurisdiction.

Encourage attitudinal change in the judiciary

Attitudinal change is needed to enhance judicial integrity and independence and eliminate biases and discrimination. Consideration of how to eliminate biases based on gender, race, ethnicity, class or age should be an integral part of judicial training. Reforming the justice sector will only be successful if judges understand why reforms are necessary. Broadening the knowledge and competencies of judges will better equip them to resolve issues as well as advance reforms from within.

Emphasize the role of judges as the protectors of rights and freedoms and as impartial adjudicators

Training programmes should include components on integrity, impartiality, independence and accountability based on judicial codes of conduct. Judicial complaint mechanisms and disciplinary processes also need to be included in training programmes. Trainings should also prepare judges for the potential political dimensions of their rulings and should assist them to articulate the values that inform their decisions to ensure transparency. Judges should also be careful of taking an overly technical approach to the law, at the risk of ignoring the broader social goals of a law.

Judicial Activism

The law in some jurisdictions allows judges broad interpretation in public interest cases – courts have an important role in stepping in when evidence is not sufficient to convict, or if lines governing courtroom conduct are crossed. While such powers can enable more vigorous promotion and protection of human rights by courts, they can also be misused to violate the rights of disadvantaged groups if the court deems it to be in the general public (majority) interest. Generally, judicial activism should not be focused on issues within individual cases, but on broader social reform issues.

Train judges to act as conduits of the Constitution and promoters of basic human rights

Judicial education is necessary in this context to ensure appropriate interpretation of the law. The judiciary should be encouraged to develop the necessary skills to deliver disciplined judgements following rules of evidence and providing parties due process of law. Such training can limit corruption and manipulation of the judiciary and reduce the occurrence of inconsistent decisions.

Judicial training programmes should also train judges and support staff to interpret and protect fundamental rights and freedoms provided for in

national constitutions and legislation as well international human rights norms. National Human Rights Institutions (NHRIs) can assist in familiarizing judges and court personnel on human rights (see section 4.4.1 on NHRIs). Assistance can also be sought from international organizations (such as UNHCHR, UNODC, etc.) as well as foreign/international bar associations, academic institutions and NGOs.

Encourage specialized training and promote a diverse judiciary

Training programmes which encourage specialization with a view to developing a representative, educated and sensitive judiciary should be promoted once general training has been completed. Potential users of the justice system, especially those from disadvantaged groups should be consulted in developing the curriculum. Representatives from civil society organizations working with disadvantaged groups or representatives from the groups themselves should also be involved in the training. Their involvement could increase the awareness of lawyers and judges of the concerns of disadvantaged groups and could contribute to the changing of behaviours, ethics and attitudes of judges. Also, incentives should be provided to encourage members of disadvantaged groups to take part in judicial training. This could be accompanied by a public awareness campaign to educate the public about the need for diverse representation in the judiciary.²⁴

Prioritize the development a judicial faculty to assist in the establishment of judicial training mechanisms

This will enhance credibility as well as ownership of training initiatives by judges and students of law. Acceptance by judges can encourage academic exchanges with scholars and students of law. To undertake training, the judiciary could call upon law schools or judicial training academies, or develop their own training institutes. Capacity development strategies could include curriculum development, long distance learning, training-of-trainers, development of a network of trained judicial educators and building the capacity of training centres. Development of a judicial faculty should involve senior judges and qualified members of the judiciary.

To maintain a high level of knowledge within the judiciary, specialist trainers are needed. Judicial educators should work with professional educators and adopt a multi-disciplinary approach, using a variety of teaching methods such as case studies, focus group discussions, class presentations, study tours, videos and lectures. Training and education

activities should also include mentoring and training-of-trainers. Members of disadvantaged groups should be encouraged to take part in the training programmes to train and raise awareness as well as participate in training themselves.

Evaluating the Effectiveness of Judicial Training

Regular evaluation of judicial training programmes should be undertaken to assess the efficient and effective transfer of knowledge, including changes in attitudes and behaviour. The focus should not only be on completing the training programmes but on determining the impact training has on how judicial staff perform their jobs and whether it has made a positive difference for those seeking to access the justice system. It may therefore be useful to evaluate the performance of trainees not only during training, but also for a fixed time afterwards.

Base training programmes on an in-depth assessment of training needs

Judicial education should analyze weaknesses in the judiciary and design programmes to address these areas. It is also helpful to acknowledge existing strengths and build on them. Judicial training can include training in substantive law, especially in countries where the legal and judicial framework has been disrupted (e.g., Timor-Leste, Afghanistan, etc.). Training in contract law, commercial law, criminal law, family law, land and property law, immigration law, etc., along with procedural laws may be necessary. In other cases it may be necessary to focus training on enabling effective and efficient court management and case flow management and reform rules and procedures so that judges and court staff are equipped to institute such reform processes within the system.

Judicial training institutes or law schools can be effective monitoring and feedback agents on judicial performance

Monitoring systems could engage civil society, the media, alternative law groups (ALGs) and the public to help set training curricula as well as provide evaluation of training programmes – particularly in providing feedback on how trainings can serve the poor and the disadvantaged more effectively, efficiently and sensitively. An effective evaluation of the judiciary's performance can be beneficial in identifying weaknesses and gaps in the justice system to be addressed by training. Training programmes may need to be included as part of the job description or be required for the purposes

²⁴ In some situations members of the judiciary are expected to be composed of the elite. When efforts are made to promote diverse representation especially from disadvantaged groups, it may not be easily accepted (e.g., discrimination against court personnel who are of lower castes, lack of respect for female attorneys or judges from minority ethnic groups, etc.)

of promotion in order to provide incentive to take part in the trainings. Further, where not already the case, promotion based on performance rather than length of service should also be encouraged.

C. INTEGRITY AND ACCOUNTABILITY

The essence of an independent and impartial judgement depends on each judge's personal integrity. Further, an essential element of the right to a fair trial is an independent and impartial tribunal. In the absence of integrity, independence and accountability, corruption and corrupt practices are likely to take root. If the judicial system is corrupt, access to, and the outcome of, judicial decisions are likely to be affected. Corruption of the judiciary disproportionately impacts the poor and disadvantaged, as by definition they are less likely to be politically influential, affluent or have personal connections.

Corruption and responses to address or eliminate corruption can be grouped into two categories – institutional and attitudinal. Corruption can be perceived by the public as a number of different actions, including delays in the executing of court orders and delivery of judgements, unjustifiable issuance of summonses, conflicts of interest, lack of public access to records of court proceedings, unusual variation in sentencing, appointments perceived as resulting from political patronage and so on.²⁵

Challenges to Ensuring Integrity and Accountability in the Court System

Lack of a legal framework and the political will to combat corruption

There may not be any legal provisions or enforcement mechanisms to hold judges and other court staff accountable for corruption. Even where laws exist, they are often not enforced. Unless there is genuine political will to tackle corruption, little will be done to address the problem.

Tolerance of corruption

In some countries, corruption is seen as the only way to accomplish certain activities and the payment of a bribe is a normal and acceptable way of doing business. For instance, it may be acceptable for an otherwise law-abiding attorney to pay a bribe to a court clerk to expedite a case file. Such behaviour may be considered justifiable because the attorney is perceived as not interfering in the substance of the case. In other cases, there may be a sense of complacency when judges are threatened and intimidated (in order to influence their decision) as it may be seen that little can be done to hold accountable those who abuse power.

Lack of proper case tracking, monitoring and accountability within the courts

In the courts there is a vast array of administrative responsibilities, which if inadequately monitored, can create a climate for corruption. In many countries, administrative court procedures are bureaucratic, cumbersome and confusing, and are carried out by court personnel who have broad discretionary powers with little accountability.

As in any workplace, some court employees are willing to circumvent the administrative process for their private benefit. Where there is limited oversight of their wide ranging responsibilities, rules and procedures can be manipulated with little regulation. This may have the effect of accelerating or delaying a case without detection. Lawyers may request inappropriate support from court employees responsible for unsupervised administrative tasks, as they know there is a low risk of being detected. For those litigants who do not have legal representation and or who already have difficulty meeting the cost of legitimate fees, equal access to justice is denied, as they are unable to make the illicit payments required. Similarly, judges can also affect the procedural process of a case, e.g., by continually adjourning a case until a fee is paid.

Corruption also emanates from within the justice system

Chief police officers, prosecutors or judges can exert significant administrative authority over their subordinates. By the simple act of assigning an investigation to a certain police officer, or a case to a certain prosecutor or judge, the outcome of the investigation or case may be pre-determined.

Low salary levels of the judiciary/prosecutors

This can encourage the use of bribes as a source of income generation. However, while an adequate salary is important, it is not sufficient in itself to ensure judicial integrity. Yet if judicial salaries are so low that judges or support staff cannot reasonably support a family, this provides fertile ground for those wishing to resort to bribery to influence outcomes in their favour.

Lack of legal knowledge of prevailing laws and regulations

Lack of legal knowledge related to improper conduct and attempts to influence judicial rulings can inhibit a judge's ability to respond to inappropriate pressure or requests. Additionally, if judges are not well versed in the substance of the law, then they are also more likely to be influenced by improper internal and external factors.

²⁵ UNODC (United Nations Office on Drugs and Crime). 2001. "Strengthening Judicial Integrity Against Corruption." Global Programme Against Corruption, Vienna. <http://www.unodc.org/pdf/crime/gpacpublications/cicp10.pdf>.

Non-transparent adjudication procedures and pervasive use of closed door trials

In some countries, particularly those of civil law tradition, judicial decisions are traditionally not published, nor are verbatim court transcripts provided. Often open trials are also not held. Thus, when there are inconsistent applications of the law, or where there is an indefensible ruling, it is difficult for the public to ascertain and establish such facts. It is not uncommon for judges sitting on the same bench to apply the law differently, or, of even more concern, for an individual judge to apply the law differently to cases with similar circumstances. Without verbatim court transcripts or published decisions, such discrepancies are difficult to detect. Instituting public trials, hearings and proceedings can also improve the transparency of courts rulings.

Public perception of corruption is a disincentive to engage in judicial reform

In countries where corruption is endemic, and there is little respect for government office, citizens may view any unfavourable decision to be an indication of corruption. Public perception of corruption (whether true or not) prevents people from using the formal justice system as they feel that it is biased against them. Disadvantaged groups in particular may avoid the system if they feel they will not receive a fair judgement.

Inadequate data/statistics on the extent of judicial corruption

Such statistics are necessary to provide a basis to establish effective remedies. Further, accurate and up-to-date documentation of cases can facilitate civil society, National Human Rights Institutions and specialized NGOs in scrutinizing the decisions of judges.

Lack of effective mechanisms for employee selection, promotion and discipline

A lack of transparency in selection mechanisms, and appointments which are not based on merit, enable nepotism and political influence. In addition such unaccountable mechanisms also discriminate against disadvantaged groups who do not have the personal and political connections necessary to influence them.

Lack of external review mechanisms by state and non-state actors

Ombudsmen, National Human Rights Commissions, civil society, etc., can all play a critical role in monitoring the judiciary and ensuring the integrity of the justice system is maintained.

Capacity Development Strategies to Enhance Integrity and Accountability in the Court System

Support lobby groups to sensitize and encourage government ratification of the Convention Against Corruption²⁶

Gain political commitment at the highest level to fight corruption and put into place laws that address corrupt practices. Seek out and support reformers in the system so that laws against corrupt behaviour are enforced.

Undertake an independent assessment of the extent, cause, location, impact and cost of corruption

This is necessary for the formulation of effective remedies. Planning based on such assessments is only possible where the data has a high level of credibility. Follow-up assessments must be conducted regularly to allow independent impact monitoring of anti-corruption work. The findings of the assessment should be disseminated widely in local languages. Evidence of corruption, not just the perception, is required in order to effectively assess its incidence and develop a framework of anti-corruption policies. The entire process should be monitored by an independent and credible body with members selected on the basis of professional integrity and competence. The assessment and investigation of corruption could be done by an independent Ombudsman or Inspector General.

Improvement of the legal education system and training on rules of practice and ethics

In many countries significant improvement of legal and judicial education is needed, including mandating courses on professional ethics. An acute understanding of the law is an effective weapon against corruption and professional misconduct. Training on professional responsibility and codes of conduct provide judges and prosecutors with basic information on legal ethics. Mentoring schemes within the courts may also reduce corrupt practices and can act as another mechanism for internal monitoring of the judiciary.

Introduction of clear sentencing guidelines

This can limit discrepancies in sentencing and provide a tool for transparent adjudication of cases. It is important, however, that any system developed should not unduly impinge on judicial discretion to match the sentencing to the circumstances of each individual defendant.

²⁶ See the United Nations Convention Against Corruption, December 2003 [http://untreaty.un.org/English/notpubl/Corruption_E.pdf].

Support the formation and development of professional organizations for judges²⁷

Such organizations can also be useful in maintaining integrity and holding members accountable as well as playing a key role in training.

Disciplinary mechanisms must be in place to address corruption

The drafting and adoption of codes of conduct and the establishment of an independent, credible and responsive complaint mechanism within the judiciary is an essential step in the fight against judicial corruption. The responsible entity should be staffed with serving and retired judges and should include, to the extent possible, attorneys and lay people. It should also be given the mandate to receive, investigate and determine complaints of corruption involving judicial officers and court staff. Similar mechanisms should be established for all the legal professions. In the event of proof of the involvement of a legal practitioner in corruption, appropriate sanctions should be in place including disbarment of the persons concerned. Bar councils and associations can act as a regulatory body for all legal practitioners as they ensure appropriate qualifications and training before being 'admitted' to the practice. They can also act as a complaints bureau and tribunal on complaints of misconduct against lawyers. Investigation of criminal conduct should be undertaken by the police and the judiciary while investigation of administrative violations could be done by independent ombudsmen.

Streamline court administrative procedures

Procedures must be streamlined and easily understood by all so that arbitrary decision-making by court staff is reduced - uniformity and transparency in the administrative process significantly diminishes court personnel's capacity to obtain illicit payments.

Computerization of court files

This can reduce the workload of a single judge and speed up the administration of justice. It also helps prevent the loss of court files. For the system to be effective in countering corruption, a system of double checks should be put in place.²⁸

Case distribution should be random to limit the possibility and perception of corruption

Purposeful case assignment can be defended if it is based on the experience, expertise or workload of magistrates, but it is susceptible to abuse. Thus, the distribution of cases should be random and not influenced by any person concerned with the outcome of the case.

Mandatory rotation of judges to limit the ability of litigants to engage in 'judge shopping'

Assignment rotations could be introduced to move judges to different regions, taking into account gender, race, minority involvement, religious beliefs and ethnic origin.

Declaration of assets

Judges should be encouraged to declare their assets and those of their immediate family members prior to taking office, and then periodically throughout their tenure and upon departing from office. Declaration of assets could be one of the comprehensive ethical rules for all senior level government employees. Such declarations can be made public. They could be verified and monitored on a regular basis by an independent official or body and necessary disciplinary measures should be in place to deal with corruption if it is detected.

Ensure the security of judges handling sensitive cases

Support the development of mechanisms and allocation of resources to ensure security for judges handling sensitive cases. Measures should be taken to protect judges from intimidation and threats from those in power to avoid undue influence.

Improve access to information

The publication of judicial decisions is one of the most effective ways to eliminate corruption within the justice system. It not only reduces corruption but also the perception of corruption as judicial decisions are made accessible and judges can be held accountable for the decisions they make. Further, the public should have access to information about the status of proceedings and procedures to avoid delays. Holding hearings in public and allowing decisions to be made public offer one solution. The media should also have access to non-sensitive information regarding the case and a right to publicize the information.

Civil society and other external review mechanisms play an important role in reducing corruption

Civil society and other external review mechanisms can play an important role in reducing corruption within the justice system by enhancing public awareness of judicial procedures and citizens' rights, while creating public pressure for reform. They can also engage in court monitoring. Institutions providing external checks and balances and anti-corruption campaigns should be supported. It may also be useful to create a disciplinary body consisting of experienced and

²⁷ See the Basic Principles on the Independence of the Judiciary, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. [http://www.unhchr.ch/html/menu3/b/h_comp50.htm].

²⁸ IT improvements, however, may not always be appropriate or applicable. See section on Operational Efficiency.

impartial officials to receive, investigate and decide on complaints made against judges and prosecutors. While such initiatives must adhere to the principle of judicial independence, independence should not impinge on operational transparency.

Recognize, enhance and strengthen the role of the independent media as a vigilant and informed guardian against corruption in the judiciary

This should be supported by the judiciary itself – courts should be afforded the means to appoint, and should appoint, media liaison officers to explain to the public the importance of integrity in judicial institutions, the procedures available for complaint and investigation of corruption and the outcome of any such investigations. Journalists who routinely cover the courts must be educated in the law and court procedures, and their responsibility to be factually correct must be emphasized. An independent media should have free access to court records so that they can assess court performance directly and not have to depend on court personnel.

Restore Public Trust and the Credibility of the Judiciary

Eliminating judicial corruption is not enough if courts and judges are still perceived as corrupt by litigants and the general population. A monitoring system could be put in place to assist in restoring the credibility of the judiciary. For example, independent groups of counsels could evaluate court proceedings, provide feedback to the bench and their assessments could be made public. In addition, judicial conduct commissions could be established enabling breaches of ethics to be reported and dealt with accordingly.

D. INDEPENDENCE

Judicial independence means that both the institution of the judiciary and individual judges are free from interference from other institutions and individuals.²⁹ Judicial independence lies at the heart of a well functioning judiciary and is a fundamental principle in ensuring access to justice and upholding the rule of law. The law can only guarantee people's rights and freedoms when it is interpreted and applied by independent and impartial judges.³⁰ An independent judiciary functions as a mechanism of checks and balances on the legislative and executive branches of government, and a watchdog against corruption and abuse of power.

There are three general principles informing the independence of the judiciary:

- Courts and individual judges within judicial systems must be (and publicly perceived to be) impartial in rendering their decisions.
- Judicial decisions must be accepted by the contesting parties and the larger public.
- Judges must be free from undue interference from other branches of government as well as from private powers and higher court judges within a national judiciary.

Challenges to the Independence of Courts

Inadequacy of constitutional provisions for judicial power and independence

It is essential that constitutional and legislative provisions be adequate to secure judicial independence, otherwise there is a risk that independence will not be established at all, or that it may, once established be eroded and weakened. Political interference and executive domination are two of the most serious threats to judicial integrity and independence. Although provisions vesting judicial power exclusively with the judiciary and guaranteeing its independence are made in most constitutions, these constitutional safeguards can be diluted, manipulated or overturned through constitutional amendments and new legislation. In some countries, ruling parties have attempted to amend constitutions or pass laws in ways that undermine the jurisdiction of the courts or make the court vulnerable to partisan influence. If the jurisdiction of the courts is subject to political manipulation and incursion, judicial independence is called into question. For example, non-transparent criteria/qualifications for judicial appointments can be a way of undermining judicial independence.

Inadequate budgets for the judiciary and inadequate control over expenditures

Judiciaries with inadequate budgets cannot provide the salaries, benefits and pensions necessary to retain qualified candidates and discourage corruption. Budgetary distribution can sometimes be arbitrary and lacking in transparency and allocation of resources can be politically influenced. Poor financial planning exacerbates these problems. The failure of the judiciary to present its financial needs in a professional and comprehensive manner weakens its ability to acquire the necessary resources. Independent control of the budget is also necessary to ensure that the needs of the judiciary are met.

²⁹ Interference can come from various sources, the executive, legislature, local governments, individual government officials or legislators, political parties, political and economic elites, the military, paramilitary and intelligence forces, criminal networks and the judicial hierarchy itself. Independence issues can be particularly evident in countries where the Ministry of Justice has a controlling influence over the judiciary.

³⁰ A judicial officer and prosecutor must act independently, and without fear of retaliation when engaged in the authorized discharge of his or her duties.

Inadequate mechanisms for judicial appointment

In many countries the problems of judicial independence stem from the selection and appointment of judges. If, for example, appointments are made for political or personal motives, or through non-transparent procedures, judges become vulnerable to external influence.

Lack of security of tenure and unclear disciplinary mechanisms

When judges are arbitrarily or easily removed from their positions, they are much more vulnerable to internal or external pressures in their consideration of cases. In many countries, the authority, standards and procedures for disciplining and removing judges are unclear and non-transparent.

Deficient law school training, judicial training and continuing legal education

Deficient legal training is a significant obstacle to the development of an independent judiciary. In order for judges to apply the law impartially they must know and understand it well, otherwise they may be susceptible to outside pressures. For example, they may be influenced by bad legal arguments or if they have poor appreciation of the doctrine of judicial independence they may submit to executive direction when they should not. Judicial schools controlled by the executive are also a threat to judicial independence.

Judicial Councils

In many countries, judicial councils or commissions have been established to improve the process of judicial selection. In civil law countries, these bodies are generally called 'judicial councils' or 'high councils of the magistracy'. In common law countries, they are generally called 'judicial service commissions'. The role of judicial councils varies from one country to the next. Some judicial councils have oversight or even primary responsibility for the full range of issues related to the management of the judiciary, including administration of the court system. Others are focused primarily on appointment, evaluation, training, and/or discipline of judges, and do not take on administration. The membership of judicial councils often includes representatives of several different institutions, in order to provide an effective check on outside influence over the judiciary or to reduce Supreme Court control over the rest of the judiciary. The judiciary itself frequently has one or more representative. Often the executive has its own members. In some countries, the legislature, private bar and law schools may be included.

Adapted from USAID, "Guidance for Promoting Judicial Independence and Impartiality", Revised Edition, January 2002

Judicial reform aimed at strengthening judicial independence could meet with strong opposition

Efforts for reform may meet with resistance from the legislature, the executive, political parties, special interest groups, judicial hierarchy and other self-interested groups.

The tension between independence and accountability

Judicial independence and judicial accountability are often believed to stand in irreconcilable opposition. Independence frees the judiciary from external control over its decisions. On the other hand, accountability focuses on having mechanisms in place which require the judiciary to explain its decisions, often to external bodies or assessors. To ease the tension between accountability and independence, a mechanism should be developed that is not vulnerable to misuse by the executive or other influences.

Capacity Development Strategies to Enhance the Independence of the Courts

Reform of the judicial appointment, promotion and transfer process

The development and application of distinct selection criteria and procedures should be undertaken to assist in the selection and appointment of judges. Criteria for judicial appointments should be objective, clear, and made accessible to the public. A broadly representative selection body such as a judicial council can be an effective mechanism to screen candidates.³¹ However, it is necessary to minimize the potential for politicization of such a screening body and ensure that members have the requisite experience, abilities, and/or training to assess the qualifications of candidates. Any method of judicial selection and promotion should be based on merit. It is crucial to build in transparency at every stage of the process so that the public is informed and the risk of political manipulation is reduced.

Support the development of codes of ethics

These can be valuable to the extent that they stimulate debate and discussion and understanding among judges, as well as the general public about what constitutes acceptable and unacceptable conduct. Because debate and discussion of ethical issues are among the most important results of a code of ethics, the process of developing such a code of conduct can be as important as the final product. Enforcement mechanisms for a code of ethics also need to be addressed.

³¹ Other methods include selection by the executive or the legislature, election of the judiciary (with a system for retaining judges who have been once elected) or competitive examination.

Develop the leadership necessary for judicial independence

Training of entry level judges as well as more senior judges to strengthen their commitment to judicial independence and their abilities to resist public pressure can assist judges when they have to make unpopular decisions in controversial cases. Such programmes are also useful in developing good working relationships and helping to identify potential reformers within the system.

Strengthen security of tenure as a fundamental safeguard of judicial independence

Judges need to have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, which should not be subject to government interference. Judges should be removed only if an independent investigation with formal proceedings and procedural protections recommends removal on the grounds of professional misconduct (i.e., corruption or incompetence).

Provide non-monetary incentives

Judges and court staff should be provided with adequate monetary remuneration, however non-monetary incentives can also encourage improved performance, for example, providing opportunities for additional training.

Training programmes for judges and staff should be included in budgeting and planning

Success in gaining a budget allocation for training programmes is more likely if resource needs are well documented, all court levels participate in identifying needs, and a strategic approach is developed to defend those needs to the Ministry of Justice.

Effective judicial reform requires hard facts

Poor diagnosis of problems increases the likelihood of reform failure. Measuring and analyzing demand for an independent judiciary is an important area of inquiry, as is the development of statistical systems to measure the performance of the judicial system. Polls and sectoral surveys of judges and the public can be an effective tool for gathering information and can be used as part of a media strategy or for coalition building itself. The statistics generated by good case tracking and information systems not only allow courts to better manage their operations, but they also enable outside watchdogs to observe trends and identify aberrations.

External monitoring mechanisms can be a powerful tool for enhancing the independence of the judiciary

Public review, discussion and debate are all necessary checks on the judiciary to ensure impartiality, transparency and accountability. However, external monitoring can also have its deficiencies, for example, an irresponsible public statement by a member of civil society can have the effect of politicizing the judiciary.

Promoting societal respect for the role of an independent judiciary

If a society expects and demands an independent judiciary it will most likely get one. However, if expectations are low, the likelihood that the judiciary will operate fairly is equally low. Legal empowerment and legal literacy interventions can be successful in developing constituencies that place such demands on actors within the judicial and political institutions (see Chapter 5).

Clarifying links, separating powers and developing cooperation

The judiciary, the prosecution service, the police and other justice sector agencies can contribute to the strengthening of judicial independence by respecting the role and function of the judiciary and by working in cooperation with it.

The judiciary should be accountable to the public for its decisions and operations

Judicial independence does not render judges free from public accountability, however the media, and other institutions should be aware of the potential for conflict between judicial independence and the monitoring of judicial activities. Accountability requires that clear criteria be developed by which courts, individual judges, and others are held accountable. Developing judicial accountability and integrity without interference is critical to ensuring that the judiciary is able to fulfil its role and hold governments accountable.

E. ACCESSIBILITY

Accessibility refers to the right of every person to access an independent and impartial court and the opportunity to receive a fair and just trial with a view to providing an effective remedy to a grievance. Impediments to such access can be numerous, including high court costs, delays, inadequate normative framework and improperly narrow interpretation of laws by the judiciary, restrictive jurisdictional rules, overly complex regulations, language barriers, geographical proximity, ineffective enforcement mechanisms,

security of would-be litigants and corruption. It is also linked to judicial independence and legal literacy.³² Accessibility is a pre-requisite to justice for all.

Many of the world's poor have difficulty accessing their legal systems and face unfair decisions, intimidation, high costs, and the risk of productive time lost in proceedings they feel they cannot win. Those living in rural areas, as well as those with claims that are small for the court system but important to the claimant, and those who need speedy justice, can find the courts completely inaccessible.

While this chapter is looking at accessibility from the side of the provider, many issues relating to accessibility are also covered in the capacity to seek justice section of the Guide in Chapter 5. Also specific challenges of accessibility for disadvantaged groups are discussed in Chapter 6.

Challenges to Ensuring Accessibility of the Court System

Court costs are too high for people to seek a remedy

Many people cannot afford to go to court and are therefore deprived of a judicial remedy. Legal aid systems usually apply only to criminal matters. Family, property and civil matters are not covered and access to justice with respect to them is effectively denied because of the expense and complexity of such cases. For example, as family law issues are generally not covered by legal aid, women often suffer disproportionately from the high costs of litigation and legal services and have to represent themselves in complex legal matters.

The costs involved in obtaining a judgement are proportionally more expensive for small amount disputes, creating a further impediment. A system needs to be put in place a system where access to an effective legal remedy is also affordable for small claimants.

The lack of clarity in the normative framework on the justice dimensions of social, economic and cultural rights

This prevents people from seeking remedies through the courts for violation of rights, and leads to the failure of the State to fulfil their obligations in relation to such rights. (For further discussion on this see the section on Normative Protection in Chapter 3).

Restrictive rules of 'standing' act as a barrier to accessing justice

'Standing' is fundamental to access to justice. Standing is a party's right to make a legal claim. In essence, the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. Often the argument is improperly used that restrictive rules of standing guard against a flood of litigation or against damaging and meddling interference.

Complex regulations and procedures are alien and off-putting to the majority of the population

Poorly trained or unhelpful court staff can also inhibit people from referring their claim to a court. Court support staff are the first point of contact for most people entering the court system and they should assist people in their attempt to access the court system.

Geographical and physical barriers

Those living in rural and remote areas sometimes find the courts and legal services inaccessible due to remoteness and poor transportation. Courts are mostly located in towns and large cities and it may take days of travel for people living in rural and remote areas to access the justice system. Further, there are fewer lawyers in rural and remote areas as these areas are less able to attract well-trained legal professionals.

Cultural and linguistic barriers

For people from culturally and/or linguistically diverse backgrounds in multicultural and multilingual countries, the judicial system can be too alien or complex for them to understand. For example, there may be no provision of interpreter services and translated legal information materials. There may be a subtle or overt lack of cultural awareness, sensitivity and compassion to the needs of cultural, linguistic and ethnic minorities among judges and legal professionals. Lack of female court staff may be a barrier for women in seeking assistance from the courts in matters such as sexual assaults and domestic violence. Women may be reluctant to try to access the court system if female court staff are not available to hear their complaints.

³² *Though narrow interpretation of the law can be an obstacle, allowing wide discretion in interpretation of the law can also raise problems of accountability.*

Capacity Development Strategies to Enhancing the Accessibility of the Court System

Make courts more accessible

Provide support to make courts more accessible through implementing measures such as:

- **Reducing litigation costs** such as bail, transcript, filing and enforcement fees, waiver of court fees;
- **Providing defence attorneys** at a low cost or for free for those who are unable to pay, introduction of legal aid systems throughout universities and law schools, and encouragement of volunteerism by members of the bar;
- **Streamlining rules and procedures** for courts to make them more accessible to the public and improving case management to speed up trials;
- **Establishing small claims tribunals** or other alternative mechanisms where disputes can be resolved more quickly, cost-efficiently, and less formally, without a lawyer;
- **Raising awareness** of the different access problems faced by people that may prevent them from seeking out remedies for their grievances;
- **Mainstreaming gender** in the judicial process;
- **Using mobile courts** to ensure territorial coverage;
- **Providing information** about the courts to the public through publications, public notice boards, radio, TV, help lines, ICT etc.;
- **Promoting the use of plain language** in legislation and legal documentation; use of local languages to conduct trials and publish court records; and publishing of laws and decisions in all major languages;
- **Encouraging regular interaction** between judges and people of local communities to better understand each other;
- **Sensitizing judges** to the cultural, linguistic and religious needs of minorities;
- **Increasing opportunities for candidates from disadvantaged groups** to qualify as judges;
- **Better coordination** between courts and other dispute resolution mechanisms;
- **Providing secure court premises** which are necessary for victims and vulnerable persons (e.g., victims of sexual assault and domestic violence, children, etc.). Witness protection services should be provided to those who file a complaint to protect them from intimidation before their testimony or criminal retaliation after;
- **Ensuring that there is no discrimination in the selection of judges and lawyers.** Women and minorities should be encouraged to seek judicial office.

Rules on standing

In order for the right of access to justice to be truly effective, the rules on standing should be sufficient to allow any member of the public having an interest in a matter or being affected or potentially affected by a matter to have the right to make a legal claim. Therefore, support should be provided to the development of inclusive standing tests, rules and procedures.

An Example of a Public Litigation Success Story

Barse, a journalist, filed a petition in the Supreme Court against the State of Maharashtra in India. Barse argued that women prisoners were being subjected to violence while incarcerated in prisons within the City of Bombay. The Supreme Court ordered a third party to conduct an investigation and issue a report on the findings. As a result of the report, the Supreme Court ordered that women prisoners should only be held in prison cells guarded by female police officers and that a woman officer be present at all times during interrogations.

Public Interest Litigation:

“...public interest litigation is a collaborative effort on the part of the petitioner, the court and the Government or the public official to see that basic human rights become meaningful for large masses of people. It merely seeks to draw the attention of the authorities to their constitutional and legal obligations to enforce them so that the rule of law does not remain confined in its beneficent effects to a fortunate few, but extends to all, irrespective of their power, position or wealth”

Both the example and the quote are taken from “The Indian Judiciary: Public Interest Litigation and Alternative Dispute Mechanisms” Honourable Justice A.S. Anand, in Charles Myers

Duty bearers should be pro-active in the provision of justice and in ensuring human rights are not violated

Protection should be given even when those whose rights are being violated are not aware of the violation. Public interest litigation should be encouraged as it can help those who are disadvantaged, through third party action, to seek legal redress for human rights violations.

Sufficient pool of interpreters

There should be enough interpreters, trained to function in courts, who are competent, accredited and available to interpret in the languages needed. Courts should have staff to manage interpreter services. Interpreters should have a professional code of conduct, e.g., they should not interpret for both the witness and the defendant. Judges should ascertain the language competence of litigants to follow court proceedings and order interpreter services when needed.

Judicial Interpretation of the Law, an Indian Example

Failure to effectively enforce environmental laws and non-compliance with statutory norms by polluters resulted in an accelerated degradation of the environment and adverse effects on public health in India. This prompted environmentalists and residents of polluted areas, as well as NGOs to turn to the courts for a suitable remedy.

The judiciary referred to constitutional provisions to provide the Court with the necessary jurisdiction to address this issue. The Court observed that Article 21, "The right to live, includes,...the right of enjoyment of pollution-free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has the right to have recourse to Article 32 of the Constitution".

Adapted from Justice B.N. Kirpal, "Developments in India Relating to Environmental Justice"

Provide advocacy and support for judicial interpretation and application of laws using international and national human rights frameworks and instruments

Such support is necessary especially to promote and protect social, economic and cultural rights. However, unenforceable judgements should be avoided as they can undermine the credibility of the courts.

Build political will and encourage local ownership

For reform efforts to be successful and sustainable, they must build on solid political will and local ownership. If the judiciary is not brought into the process, or judges feel attacked by the reform process they can become effective opponents. However, once engaged, they can help design and refine programmes based on their pre-eminent understanding of what the challenges to independence are. Reform of the formal justice system is a long-term goal that will require sustained effort on the part of reformers and the UNDP.

4.2.2 PROSECUTORS

Prosecutors play a crucial role in the administration of justice, in particular criminal justice. They enjoy a range of statutory positions, which include private lawyers prosecuting public cases, civil servants working for the executive, and prosecutors enjoying the independence of a quasi-judicial status³³. Their main responsibilities are to file criminal cases and to prosecute defendants. With the power to request the conditional release of detainees, prosecutors act on behalf of states to protect the rights of all parties, which include the accused and the public, in criminal proceedings. The aim of prosecutors is to help the delivery of justice rather than to punish. They are responsible for investigating both incriminating and exonerating, circumstances. In addition, prosecutors supervise the police in investigating and gathering evidence. They may also be entrusted with supervising the enforcement of the judgments of the courts.

The role, duties, and responsibilities of prosecutors are affected by various factors, such as the Constitution, the political system, the legal system and framework in place, international organizations present in the country, ethnic, religious, cultural, and linguistic diversity etc. As their role and duties may differ slightly from one jurisdiction to the other, this section addresses the general principles, challenges, and strategies concerning prosecutors in access to justice programmes. However, as prosecutors are part of the court system, many of the issues addressed in the previous section also concerns prosecutors.³⁴

Prosecutors have a considerable impact on poor and disadvantaged persons' access to justice. In court proceedings, disadvantaged groups are often uninformed of the notion of their rights under the law, including fundamental human rights, and they seldom locate the appropriate channels to report injustices and gross violations of their fundamental freedoms. There is potential for

³³ The World Bank web site on legal and judicial reform includes a discussion on the Prosecution which also includes references to useful links and resources. [http://www4.worldbank.org/legal/legl/institutions_p.html]

³⁴ See also *Guidelines on the Role of Prosecutors*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990)

prosecutors to take advantage of this lack of legal knowledge and violate the rights of those involved in the judicial process, especially disadvantaged groups. For example, prosecutors may prevent access to legal advice and delay trials unjustifiably and to their own benefit. In some systems, the discretion of the prosecutor as to who to indict is a quasi-judicial power, and can also be abused. Hence, careful selection and rigorous training of prosecutors is crucial, and independent and stringent disciplinary measures should be put in place to discourage abuses.

In common law countries, using an adversarial system of trial, prosecutors represent the interests of the State in front of a neutral third party (the judge) in an adversarial trial in which the ultimate aim is to have one party's position win over the other. They have a minimal supervisory role over the police in investigations. Only in special cases involving corruption, bribery or corporate crimes do prosecutors perform an investigative function.

Prosecutors play more of a so called 'inquisitorial' role in the civil law system. They not only initiate prosecution but also supervise investigations from the outset.³⁵ They exercise a quasi-judicial power to see that the rights of suspects are protected.³⁶ They contribute to the judicial role of seeking 'the truth'.

The prosecution service is an essential part of the justice system. Generally, the public prosecution service is headed by a chief lawyer who represents the State, participates in executing the criminal policy of the State, and inspects the application of laws by courts.³⁷ The chief prosecutor is assisted by deputy attorneys and many other public prosecutors who take action in criminal cases or in civil cases involving the State.

The table below describes briefly the role of prosecutors in different legal systems in three Asian countries:

Table 6. The Role of Prosecutors³⁸

| COUNTRY | CHINA | THAILAND | SRI LANKA |
|-------------------------|--|--|--|
| LEGAL SYSTEM | Communist/Socialist | Civil Law | Common Law |
| ROLE OF THE PROSECUTORS | <p>The Supreme People's Procurator is in charge of prosecution and legal supervision.</p> <p>It approves arrest, conducts prosecutorial and investigative works, and initiates public prosecution.</p> <p>It is not involved in investigations, detentions, and preparatory examination of criminal cases.</p> | <p>Civil Law State attorneys institute prosecution of criminal cases and direct enforcement of criminal sentences.</p> <p>They have a large amount of discretion in controlling and directing criminal cases.</p> <p>They investigate certain categories of criminal cases (especially those involving money laundering or corporate crimes) on their own initiative, without assistance from the police and other law enforcement agencies.</p> | <p>The Attorney General acts as the chief law officer.³⁹</p> <p>The District Attorney conducts indictment and criminal prosecution in the name of the Attorney General after the police have investigated the case.</p> |

³⁵ Prosecutors in civil law jurisdictions often have little control over the police who rely on their own hierarchical structures. This can inhibit prosecutors' ability to conduct efficient investigations.

³⁶ The quasi-judicial power of prosecutors might include the abilities to 1) assess and make legal decisions based on guidelines, rules of professional conduct, and directives from senior management; 2) dismiss pending cases; 3) decide when to issue warrants; and 4) control certain aspects of judicial proceedings.

³⁷ In many jurisdictions, this individual is known as the attorney general; in other jurisdictions, the person is called the solicitor general or the prosecutor general. Some jurisdictions have even instituted both the attorney general and the solicitor general to prosecute government cases, with the solicitor general assisting the attorney general. The attorney general often plays a dual role of acting as the chief legal advisor to the State and as the chief prosecutor. This becomes problematic in situations where government officials are prosecuted and the attorney general

³⁸ Bureau of Justice Statistics. 2003. *The World Factbook of Criminal Justice Systems*. US Department of Justice. [<http://www.ojp.usdoj.gov/bjs/abstract/wtj.htm>].

³⁹ The chief law officer represents the Government in any criminal or civil proceedings and provides advice to the Government on legal matters and the constitutionality of national laws and policies. The individual can also institute, conduct, or discontinue proceedings for any offence without government control.

Challenges in Ensuring Access to Justice through Prosecutors

Operational efficiency

- **Lack of adequate resources**, especially in civil law jurisdictions where prosecutors are more actively involved in investigations, can prevent prosecutors from doing their jobs efficiently. In addition, inadequate government resources and funding to the Justice Department or Ministry could lead to inadequate mentoring programmes and insufficient training for prosecutors on human rights issues.
- **Limited communication between the Government and professional/bar associations of lawyers.** Without communication and cooperation between the State and legal members of bar associations are less likely to be educated on the importance of human rights in the justice system or aware of governmental goals with respect to human dignity or are less likely to function as an advocacy and oversight mechanism over government policies.⁴⁰

Integrity and accountability

- **Tolerance of corruption can encourage improper conduct by prosecutors.** For example, they may accept or pay bribes to expedite/dispose of cases or to overlook critical evidence during investigations. Prosecutors may also knowingly disregard the basic rights of disadvantaged individuals, assuming that their lack of legal knowledge and resources would make them incapable of seeking public remedies and speaking out against abuses.
- **Low salary levels of prosecutors in many countries.** Prosecutors who are inadequately rewarded for performing their duties might be tempted to accept bribes. Poor pay also tends to only attract junior and inexperienced lawyers to the ranks of prosecutors. This creates a high turnover of prosecutors leading to poor prosecution capability.
- **Lack of national qualifications for the selection, promotion, and transfer of prosecutors.** Without clear selection criteria for prosecutors, there is a risk that prosecutors will be appointed based on subjective conditions (e.g., prejudice, bribery or discrimination).⁴¹ The absence of criteria can also hinder states in promoting qualified prosecutors who are aware of the ideal and ethical duties of their office, uphold the constitutional and statutory protections of the

rights of the suspect, and defend the human rights and fundamental freedoms recognized by national and international law.

- **Lack of clearly detailed codes of conduct and ethics for prosecutors.** Without establishing clear codes of conduct and ethics for prosecutors, states cannot inform the general public as to the role of prosecutors and they may also fail to establish objective standards that determine whether prosecutors have violated a suspect's rights. A code of ethics is a pre-requisite for holding prosecutors to account for ethical breaches.
- **Imprecise criminal procedural codes.** Prosecutors should always follow the criminal procedural codes in filing charges and prosecuting individuals. Imprecise criminal procedural codes allows prosecutors to detain suspects for unreasonable amount of time, therefore depriving suspects of basic rights to legal counsel, timely trials, etc. Procedures should be put in place to deal with the re-filing of charges after dismissal or adjudication in order to address double jeopardy concerns.

Independence

- **Government setting of prosecutors' agenda.** While it is appropriate for the national Government to set priorities, there is a need to guard against political interference with investigations and prosecutions. For example, a change in government should not impact on the conduct and role of law enforcement agencies.
- **Tension between police and prosecutors.** As prosecutors and the police fall in most cases under the supervision of two different government divisions (the Ministries of Justice and the Interior respectively), strengthening the independence of prosecutors is likely to affect their collaborative relationship with police in investigative work.
- **Prosecutors overstepping their quasi-judicial power.** Prosecutors, particularly those working in rural or remote areas, are often asked by locals to mediate or arbitrate disputes. Such acts contradict the fundamental nature of prosecutorial work and overstep the function of judges, local magistrates, and ADR groups in resolving these matters.⁴² Prosecutors in civil law jurisdictions may also be seen to be working too closely with the judiciary and perceptions of judicial independence can be called into question.

⁴⁰ Cooperation between the Government and bar associations does not mean that the agendas of bar associations should be dictated by national policies. Bar associations should act mainly as instruments that flag government activities and programmes for the purpose of promoting public awareness. The cooperative relationship between the Government and bar associations needs to be monitored carefully and assessed continuously.

⁴¹ Prosecutors, for example, can be appointed by the executive with the advice and consent of the legislature. As a result, there is a dual screening, and the prosecutors are directly accountable to the executive and indirectly accountable to the electorate.

⁴² Prosecutors in Laos PDR have immense quasi-judicial power over judges. They can overrule judges' decisions *de facto* by bringing cases to the National Assembly for rehearing. Such unrestrained quasi-judicial power is problematic.

- **Lack of personal safety for prosecutors and their families.** When the safety of prosecutors or their families is threatened, prosecutors are much more vulnerable to external pressures when trying cases and are more likely to compromise their goal of delivering justice to victims.

Accessibility

- **Attitudes of prosecutors.** Sometimes, prosecutors can be indifferent or unhelpful, which discourages disadvantaged groups from seeking legal remedies.
- **Geographical and physical barriers.** Individuals living in rural areas might find the prosecutors' office inaccessible due to their remoteness or the area's poor transportation. This lessens their tendency to seek legal assistance from prosecutors.
- **Cultural and linguistic barriers.** People with culturally and/or linguistically diverse backgrounds might have difficulties accessing services and understanding complex legal proceedings that are based on different customs and languages.

Capacity Development Strategies to Enhance Access to Justice with Prosecutors

Operational efficiency

Maintain essential facilities and funding in justice institutions to reduce corruption among prosecutors. Adequate resources and funding provide prosecutors with the opportunities to learn from mentors and programmes about their role while ensuring individual freedoms and rights in court proceedings. States should produce annual reports detailing the funds allocated to justice institutions to improve accessible and support for disadvantaged groups. Funding and essential facilities like information and administrative management greatly improve prosecutors' efficiency in processing and prosecuting cases. Provision of new resources, however, must be carefully supervised to ensure that they are not diverted for inappropriate or unlawful purposes.

Human resources development of prosecutors

- **Increase support on human rights understanding by lawyers.** Organizations such as the National Human Rights Commission, the Association for the

Prevention of Torture, and the International Association of Prosecutors can help to equip lawyers with an adequate understanding of human rights principles and can encourage discussions on human rights violations. Such organizations could provide training to prosecutors on the content and application of international conventions relating to policing and prosecution. They should also actively promote programmes to inform the public about their rights and duties under the law and the role of prosecutors in protecting their fundamental freedoms. Increasing awareness and demand for basic rights from the public can in turn ensure prosecutors uphold human rights principles in the justice system.

- **Increase prosecutors' awareness of gross human rights violations.** Such awareness could be increased by giving prosecutors intensive trainings on the principles of human rights and the need to assist disadvantaged groups, particularly women, children, and other disadvantaged groups, to assert these rights. Although the administration of justice is essentially a domestic matter and the national constitution, legislation, and legal culture, is of paramount importance in domestic courts, they also need to pay attention to the human rights standards set by international human rights instruments. Trainings on prosecution of gross human rights violations are necessary to ensure that consistent standards and respect for international human rights norms are upheld. States can also foster sensitivity among prosecutors by creating incentives and conditionality that encourages them to uphold human rights principles among disadvantaged groups. In addition, sanctions need to be put in place for prosecutors who commit human rights violations (both by commission or omission).
- **Train prosecutors in case management, evidence gathering and investigation.** Although the role of prosecutors in investigating cases and gathering evidence varies from minimal to substantial involvement, prosecutors should have the skills to assist or supervise the police when necessary and determine whether or not evidence has been obtained lawfully. Further, specialized trainings on specific topics, e.g., case scheduling, budget planning, etc., are necessary for prosecutors to effectively streamline case management procedures for monitoring and accountability purposes.

Integrity and accountability

- **Help states to establish codes of conduct and ethics for lawyers.** This should be done in accordance with national law and recognized international standards.⁴³ Legal institutions and experts should advise and assist states on establishing codes of conduct and ethics for lawyers, which would function as standards for gauging the prosecutors' performance, particularly when prosecutors have grossly exceeded or taken advantage of their authority in judicial proceedings. For example, supporting legislative reforms to define the boundaries of prosecutorial discretion to institute and waive prosecution. The codes should give the public a general understanding of the role of prosecutors. The Guidelines on the Role of Prosecutors⁴⁴ provides a good starting point on principles.
- **Detailed criminal procedural codes should be created.** To ensure that prosecutors respect the rights of suspects, especially those from disadvantaged groups, states need to codify their criminal procedures and specify the conditions of detention (e.g., the severity of the crime, the maximum time period for detaining the accused before charges are brought, when warrants should be issued, etc.) and the suspects' rights to legal advice. Legal experts and institutions should coordinate with and assist the Justice Department or Ministry in creating these codes. The code provisions should give detainees the right to a prompt appearance before a judge to challenge unlawful, excessive detentions in accordance with international human rights standards.
- **Maintain sufficient funding.** Adequate funding and compensation/reward packages in justice institutions decrease the likelihood that prosecutors will disrupt the effective functioning of a fair justice system. Sufficient funding should also be put into place to attract experienced lawyers into the ranks of the prosecution and enable them to conduct full investigations.
- **Hold prosecutors accountable for their conduct in court.** Courts should impose high standards on prosecutors when investigating and prosecuting criminal cases, based on a code of conduct and ethics. Prosecutors who violate the rights of a suspect, e.g., unreasonably detaining the accused, failing to withdraw charges when evidence is insufficient, falsified, or improperly obtained, or carrying on prosecution without adequate

investigation, should be subjected to sanctions by the court. Another way of holding prosecutors accountable is by ensuring that the promotion of prosecutors is based on objective factors such as professional qualifications, ability, integrity and experience, as determined according to fair and impartial procedures.

- **Authorities should cooperate with professional associations, legal institutions, and human rights groups to monitor the activities of prosecutors.** Other groups such as these can be useful partners in generating public discussion on laws and observing the conduct of prosecutors. Most importantly, disadvantaged groups might have easier access to these groups and be more willing to report corruption and human rights violations by prosecutors.

Independence

- **Give prosecutors discretionary power to divert criminal cases from the formal justice system,** particularly cases that involve juvenile defendants⁴⁵. States should fully explore the possibility of adopting diversion mechanisms to avoid overburdening prosecutors with cases involving lesser crimes and to avoid the stigmatization of minor defendants as a result of pre-trial detention, indictment, conviction, and imprisonment⁴⁶. Prosecutors should consider available alternatives when deciding whether or not to prosecute individuals, particularly disadvantaged persons and juvenile defendants. Before filing charges, prosecutors should look into the nature and gravity of the offence, protection of society, and background of the suspects. Most importantly, although prosecutors should have the discretionary power to choose alternative mechanisms to dispose of cases, they should not be involved in mediation.
- **Prosecutors should enjoy the freedom to form and join professional associations** to represent their interests, to promote their professional training and to protect their status.

Accessibility

- **Encourage community outreach and education projects by prosecutors.** These efforts will not only increase the credibility and reputation of prosecutors' offices, but will also challenge misconceptions about their indifferent attitudes, allowing disadvantaged individuals to understand more about prosecutors.

⁴³ *Timor-Leste is a good example of incorporating codes of conduct for prosecutors and the judiciary (the Superior Council for the Public Prosecution and the Superior Council for the Judiciary) in its constitution, in accordance with international standards.* [<http://etan.org/etanpdf/pdf2/constfnen.pdf>].

⁴⁴ UN (United Nations). 1990. "Guidelines on the Role of Prosecutors." Adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders. 27 August to 7 September 1990, Havana, Cuba. [http://www.unhcr.ch/html/menu3/b/h_comp45.htm].

⁴⁵ *Giving prosecutors discretionary power would require a substantial adjustment in the functioning of the judicial system. It should be noted that the prerequisite for this capacity development strategy is legal reform—the Government must be willing to grant more power to prosecutors.*

⁴⁶ *This discretionary power, nevertheless, needs to be well-defined and carefully monitored so that prosecutors do not overstep their prescribed power.*

■ **Recruit prosecutors from disadvantaged or minority backgrounds.** For example, women, cultural and linguistic minorities, those from rural or remote areas, etc. Prosecutors with similar backgrounds as the individuals they serve may understand better the difficulties of the poor and disadvantaged in seeking legal remedies and could address their needs and grievances more effectively. The relationship between prosecutor and

defendant is generally one of power, thus encouraging prosecutors from disadvantaged groups may help in mitigating cases of abuse and discrimination. See Chapter 6 for more on Disadvantaged Groups.

■ **Ensure the views and concerns of victims are considered** and that they are informed of their rights.⁴⁷

4.3 Informal Justice Systems

4.3 INFORMAL JUSTICE SYSTEMS

Informal justice systems refer to processes of resolving disputes outside of formal court systems.⁴⁸ This includes state sanctioned Alternative Dispute Resolution (ADR) processes as well as non-state justice systems i.e. traditional and informal justice systems.

ADR mechanisms can be set up by the State to address perceived short comings of the formal courts or by non-state actors such as NGOs or religious groups to provide easier access to those in need of such services. Informal justice systems can help in reducing court backlog, expediting dispute resolution, and are a cost-efficient alternative to formal court litigation.

In contrast to this, Traditional and Indigenous Justice Systems (TIJS) are pre-existing methods of resolving disputes within communities. The State in these cases needs to engage with TIJS to promote the positive aspects of TIJS and ensure that they function in accordance to national laws and international human rights standards.

While the goal of ADR and TIJS are often the same – to provide alternatives to the formal system different strategies need to be adopted in each situation. This section is broken down into two parts. The first section addresses ADR and the second examines TIJS.

Interface between the Formal and Informal Systems

In order to assist the Government of Cambodia in its *Strategy for Legal and Judicial Reform*, UNDP Cambodia undertook a study to assess the access to justice situation in Cambodia. The study used a national survey, detailed case studies, in-depth interviews and participatory workshops to examine people's use of formal and informal system to resolve conflicts. It looked at people's demand for justice and ability of institutions to respond to these demands. The courts, ADR (Cadastral Commission) and community and indigenous justice systems were evaluated during the workshops to determine the ability of people to access them and their degree of effectiveness. Recommendations emerging from this survey will feed into UNDP projects in the sector as well as influence the Strategy for Legal and Judicial Reform.

UNDP Cambodia

4.3.1 ALTERNATIVE DISPUTE RESOLUTION (ADR)

Alternative Dispute Resolution (ADR) refers to processes that are available for the resolution of disputes outside the formal courts of justice. This includes not only state-sanctioned ADR such as court-annexed ADR, but also community-level

ADR mechanisms and ADR services provided by other non-state actors (e.g., civil society). ADR typically includes:

- **Arbitration** - A simplified version of a trial involving less strict rules of evidence. Decisions made in arbitration hearings are usually binding, even if the disputing parties don't agree with them. Arbitration is often used to resolve commercial and business disputes.
- **Neutral evaluation** – A non-binding process where a third party with expertise in the subject matter hears the arguments of the disputing parties and suggests a likely outcome of a court hearing. This process may encourage disputing parties to come to a settlement.
- **Mediation/conciliation** – The terms 'mediation' and 'conciliation' are often used interchangeably. Mediation involves a third-party intervention (the mediator or a panel of mediators) in which the disputing parties meet and negotiate face-to-face and where the mediator may advise on, or determine the process of, mediation.

Mediation at the community-level is a form of ADR frequently used by disadvantaged groups; therefore, UNDP programmes should consider this option to improve access to justice for disadvantaged groups. For example, community mediation boards can be established through legislative acts and commissions can be set up to monitor their activities. They are often free of charge to users and mediation boards generally meet once a week to discuss cases in public. Community mediators are typically local volunteers who are trained to resolve conflicts and are not required to have academic or professional credentials but generally represent the diversity of the community served. They are often individuals of some standing and moral authority within that community who are well respected and are likely to be accepted by those coming before them with disputes. Most community mediators are retired teachers and civil servants living within the community, religious leaders, or volunteers.

Community Mediation – Sri Lanka

In Sri Lanka, community mediation boards have been established by the Ministry of Justice to reduce court backlog and facilitate access to justice for disadvantaged groups. The Mediation Boards Act was passed in 1998 to provide the legal framework for community mediation boards. Mediators were trained (along with trainers so that capacity building of mediators could continue) and mediation boards were established at the local level to increase access to alternative means of dispute resolution.

⁴⁸ There is much debate about the term 'informal justice system' as in some cases these systems may be set up by the State (e.g., state sanctioned ADR) and therefore can be considered formal. In this case, informal justice system refers to traditional justice systems as well as different forms of ADR.

Informal ADR also has the potential for strengthening local-level (community) governance since it can play a role in empowering communities to be self-supporting. Given that many local disputes or conflicts arise from disempowerment and diminishing social cohesion at the community level, this is an important subsidiary aim of ADR mechanisms.

Role of ADR in Strengthening Access to Justice

Though ADR cannot be a substitute for the formal court system, it can serve as an alternative that complements formal systems. Access to justice, especially for the poor and disadvantaged, is facilitated through ADR mechanisms as it addresses key obstacles facing these groups and is more accessible than formal courts. Some characteristics of ADR that promote access to justice include:

- Faster than court settlements
- Lower costs in comparison to litigation in court (no lawyer and court fees, etc.)
- Not as formal as court systems and people may feel less intimidated to approach them
- Local communities often already have their own ADR, reducing linguistic and cultural barriers
- As many mediators are from the community and are well known, disputing parties may more willingly trust them and their suggestions than judges in the formal system
- Helps in reducing court backlog

ADR (formal and informal) plays an important role in prevention as well as control. It can be used at an early stage, reducing the chances of escalation. The formal system, however, usually functions retrospectively, i.e., after a conflict or crime has taken place.

ADR is also about finding win-win solutions to problems, thereby eliminating the adversarial nature of court decisions, which are often win-lose decisions. When community members have to live closely together after the conclusion of a dispute, this type of win-win situation can play a big role in ensuring harmony at the local-level.

Challenges in Ensuring Access to Justice through ADR

Ineffective enforcement of ADR decisions

There is some debate on whether referrals to mediation should be mandatory (ordered by the court) or voluntary. Some judicial systems require litigants to mediate prior to court action while others

make mediation voluntary. In either case, mediation awards have no enforceability under law. Since no rules of evidence or laws are followed in a mediation hearing, and there are no legal representation of the parties, enforcement of mediation awards is not compatible with the law. Because there is no punitive action for violating the award, there are instances where the agreement reached during mediation is broken, and parties go back to the beginning of the problem, which, along with extensive delays, may also cause the community to lose confidence in mediated settlements.

Unpredictability of ADR decisions

The essence of mediation is that parties in dispute agree on a solution that is acceptable to both in that specific instance without the decision necessarily being legally correct. Since ADR often lacks formal procedures in decision-making and there is a lack of substantive laws to follow, outcomes of decisions primarily depend on negotiations between the parties as well as the mediation skills of the mediator/panel.

- Mediators can come from diverse backgrounds and may have different levels of qualifications that can affect the outcome. They are often inadequately trained, partly due to insufficient funds, but also because the training itself may not be comprehensive.
- Not all countries have laws and regulations on mediation, or binding codes or minimum standards for mediators to follow.

Lack of impartiality

The impartiality of mediators from the community may be questionable. Issues of corruption and nepotism are likely to arise, especially at the local-level where structural inequalities may be perpetuated by decisions made by the mediator.

Unclear standards and guidelines

Mediators may not be aware of, or may be unwilling to apply, national or international human rights standards. As a result, outcomes of mediation settlements may not be compatible with international standards. Some local customary practices, especially those applying to women, may directly contradict protections provided by international law. There is often no clear distinction in terms of the jurisdiction of community mediation and formal courts. Some disputes are simply not eligible for mediation. Serious crimes (such as murder, rape, grievous bodily harm, torture, armed robbery etc.) fall in to this category. In promoting mediation, it must be clearly articulated that such offences need to be addressed through the formal justice system courts (which have clear enforcement mechanisms), and no attempts must be made at mediation.

Lack of political will and funding

It is often a challenge to obtain state and donor funding for ADR mechanisms. Though ADR itself is not costly, funds are needed to train mediators and ensure proper monitoring of ADR processes. It is also necessary to have political commitment on the behalf of the State to establish and support ADR processes, especially when they face resistance from other judicial and law enforcement branches who may see them as 'competition' or may be dismissive of their abilities. In these cases, the judiciary and the police may not be supportive of referring cases to ADR mechanisms.

Capacity Development Strategies to Enhance Access to Justice with ADR

Increasing public awareness and confidence in community mediation

In any mediation programme, as a first step, the public must be made aware of the availability, modalities, and benefits of mediation. The public includes all duty bearers in the system including lawyers, police, politicians, community and religious leaders, as well as claim holders within communities. Awareness raising must take into account background conditions including political support, the institutional and cultural situation, human and financial resources, and power plays within communities. Some strategies could include:

- **A series of targeted focal group meetings** to increase awareness among duty bearers.
- **A wide media campaign** accompanied by focal group meetings for claim holders.
- **Awareness programming in schools** to 'educate' young persons on how to resolve their disputes through mediation.

Any meetings and campaigns must be conducted by experts, experienced in the process of mediation and knowledgeable of local conditions.

Obtaining political and financial support from government

Financial support is key to the success of mediation programmes. While programmes can commence with donor funds, sensitizing governments and increasing political will to allocate sufficient funding is crucial for the sustainability of mediation programmes when donor funding comes to an end. The Ministry of Justice can be an effective entry point for supporting community mediation boards and other ADR process. It can be seen as a champion of community mediation and ADR. However, it is also necessary to get the courts and the formal legal system to support these alternative processes as well.

Improving referral mechanisms to mediation boards and increasing caseloads at mediation boards

Sometimes, a mediation programme may have sufficient awareness and funding, but not enough referrals. In these instances, a clear interface between courts and community mediation systems should be set up so that they are both clear about the roles they play, when to refer cases to each other and what their monitoring duties are. For example, preparing guidelines on when to refer cases for mediation would help in reducing the caseload for lower courts. Also, sensitization of the police, promoting conflict management and mediation skills within the police and developing criteria for referrals by the police are some other strategies.

Formal Mediation

In an effort to promote mediation as a way to reduce the backlog of cases in courts, UNDP Nepal has helped district courts to organize "Settlement Fairs" – events in which dozens of pending court cases are settled simultaneously through trained mediators. After the success of these events, permanent mediation centres are now being established. The District Court rules were also amended, allowing the Court to refer cases for mediated settlement to appropriate institutions or individuals.

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Training in community mediation

As mediation becomes more and more widespread there is considerable expertise within the field and this expertise must be used for foundation level training, advanced training and training of trainer courses, and continuous training for mediators. A code of ethics, human rights and minimum standards for mediators, and a handbook on how to apply the code of ethics should also be developed and be used as part of the training curriculum.

Avoiding conflicting roles

There are a growing number of NGOs and civil society groups providing mediation and conflict resolution training at the community level. While these groups are generally seen to be providing a valuable service, there are also potential problems. For example, there may be confusion over who has the authority to resolve disputes at local levels which can undermine the authority of formally trained magistrates as well as traditional leaders. In Papua New Guinea, this issue has resulted in a concentrated effort to ensure that mediation/ADR training is accompanied by awareness raising on how informal mediators trained by NGOs should

be used in relation to both formal magistrates and police, as well as what their role is in relation to traditional leaders. Therefore, there must be a clear mapping of the roles of the various justice players at the local level (formal and informal) and this should be widely disseminated through awareness programmes in order to avoid confusion and “forum shopping”.

Community involvement

Local communities, especially disadvantaged groups, should actively participate in, and monitor, ADR processes to ensure that they do not have a bias. Women and minorities should be trained as mediators, and encouraged to take part in ADR hearings. Claim holders can also help in monitoring ADR mechanisms by:

- **Developing a local report card system** to evaluate the success and sustainability of settlements.
- **Formulating civil society watchdog groups** within the community to monitor the implementation of settlements.
- **Overseeing progressive realization** of settlements.
- **Including members of disadvantaged groups** in mediation panels.

These elements are essential ingredients for encouraging community involvement and making mediation more meaningful and relevant.

Using ADR to complement the formal justice system

ADR is an important area for UNDP’s work as it can facilitate access to justice for disadvantaged groups. ADR programmes developed by UNDP should complement UNDP’s access to justice programmes designed for formal courts. As courts become more congested, the need for community mediation can only grow. One of the challenges for the community mediation sector is to ensure that societal demand for mediation is met by professional and effective services in this area, and ‘justice’ is received by all claimholders, especially those representing disadvantaged groups.

4.3.2 TRADITIONAL AND INDIGENOUS JUSTICE SYSTEMS

Traditional and indigenous systems of justice refer to the types of justice systems that exist at the local or community level which have not been set up by the State.⁴⁹ It can also be seen as a system of justice that usually follows customary law or an uncodified body of rules of behaviour, enforced by sanctions, varying over time.

Traditional and indigenous systems of justice exist throughout the Asia-Pacific region and serve as an alternative for many people who are unable to, or choose not to, access the formal justice system (courts as well as formal ADR).⁵⁰ Though law making and enforcing is one of the core functions of the State, traditional and indigenous justice systems often fill in the gap when the State is not able to fulfil its duties or when people simply opt to use traditional systems. In particular, groups that are marginalized by the State often feel it more worthwhile to seek systems of justice that better suit their needs and represent their values. As a result, traditional and indigenous justice systems (TIJS) handle the bulk of the cases in the Asia-Pacific region and when working on improving people’s access to justice, programmes need to recognize their existence and seek entry points in improving the role and function of TIJS.

It is difficult to generalize about traditional justice systems, as there are a wide range of TIJS with varying degrees of structure. They range from systems dealing with small-scale civil disputes to those dealing with capital crimes, from systems that promote harmony and restorative justice to those that seriously violate human rights. They include arbitration and mediation systems, and disputes are resolved by single persons or by collegial bodies. The common denominator of TIJS is merely that they exist and function largely outside the purview of state governance. This, and their lack of homogeneity, presents a major challenge when developing solutions and strategies to improve the functioning of TIJS.

The Salish System– Bangladesh

Salish mediation councils are a type of traditional alternative dispute resolution system that is often used at the local level. An estimated 60-70% of local disputes are solved through the Salish. They are often used for the resolution of small disputes or as an alternative to expensive and time consuming court processes and are accessible to disadvantaged groups. Marriage, family, dowry and land issues are also often dealt with through the Salish councils. Encouraging and supporting the Salish with procedures for recording, conducting and making decisions helps increase the ability of people to access justice at the local level.

It is important to recognize that TIJS has its limitations, and may not always be able to deliver appropriate and equitable forms of justice. While many of the failings attributed to TIJS (e.g., nepotism, corruption, human rights abuses, gender bias, etc.) are similarly applicable to formal justice agencies/systems in many countries, these limitations need to be recognized in order to

⁴⁹ Penal Reform International, for example, defines ‘traditional justice systems as non-state justice systems which have existed since pre-colonial times.’

⁵⁰ Dinnen, for example, states that in Papua New Guinea, traditional systems of justice are used 98% of the time. See Annotated bibliography for publication details.

address them. TIJS may be susceptible to elite capture and may serve to reinforce existing power hierarchies and social structures at the expense of disadvantaged groups. Popular and community justice traditions may be exploitative and violate the basic human rights of individuals (e.g., vigilante justice where the community takes its own form of vengeance, often violent, against perpetrators). Programmes that seek to work with traditional and indigenous forms of justice should attempt to promote the positive aspects of TIJS – simplified process, easier access in terms of understanding the language and rules, lower cost, geographical proximity, and restorative focus – and reform the negative aspects that compromise human rights standards.

Role of Traditional Systems in Strengthening Access to Justice

TIJS can compensate for the State's unwillingness (lack of political will) or inability (lack of capacity) to provide justice for all. Below are some reasons why people may avoid formal justice systems and instead use TIJS:

- In remote areas and societies, and also in areas not under state control, the courts are often physically too far away and the only accessible form of resolution for disputes may be TIJS.
- The costs associated with the formal justice system (court and counsel fees, travel costs, delays) are often too high, especially for the poor and disadvantaged.
- TIJS can play a role where the State is overwhelmed with a backlog of cases because of a lack of financial or staff capacity.
- Intimidation can be an important factor preventing people from seeking justice under formal systems. Unfamiliarity of formal procedures and the formal court atmosphere can be an obstacle. As traditional forms of justice are often conducted in the local language and follow local customs, people are less likely to be intimidated by the proceedings.
- Traditional judges are usually aware of the local context. For example, the case may be about livestock theft, but during the hearing, other issues such as land disputes may emerge and the traditional system has the flexibility to address those problems as well.
- People also may prefer to use traditional justice systems because the process of dispute resolution is usually much faster than formal systems. Long court delays thus can be avoided.

Along with facilitating access to dispute resolution mechanisms, traditional and indigenous processes often take a restorative approach to implementing justice. The goal often is not just to punish the perpetrator, but also to compensate the victim for their loss, prevent the accused from committing the crime again, and to reintegrate both the victim and the offender back into the society. As a result, traditional processes tend to seek restitution, reconciliation and rehabilitation, and emphasize compromise rather than applying strict legal sanctions. However, because of a lack of formal enforcement mechanisms, traditional systems rely largely on social pressure and the consent of both parties to the ruling, which may not always follow human rights standards.

In addition, the existence of traditional or indigenous systems enables legal pluralism. In many countries in the region, the formal justice system is based on the legal system of their former colonial rulers, and as a result is not necessarily well understood or respected by many ordinary citizens. Building bridges between the formal sector and TIJS is not only a way of trying to regulate TIJS and ensure their compliance/consistency with state law; it is also a way of building understanding of, and respect for, what are often exceedingly fragile formal justice systems. It is important to focus on strengthening the intersections between the two in a manner that promotes the rule of law and respect for human rights.

Preference for TIJS

The Phong community in Cambodia have their own system of justice which involves using village elders to conciliate and settle their dispute. Part of the settlement includes a payment of 'Leas Leang' where the village elder determines the payment that must be made by the wrongdoing party. During the Access to Justice Workshop held in Monduliri, Cambodia in November 2004, the participants expressed the following reasons for their preference for using indigenous systems of justice to resolve their problems:

- Lower cost/free of charge
- Less time consuming than the formal system
- Easy to get to
- Can use their own language and speak out freely
- Community leaders understand the context of the conflict
- Amicable settlement
- Simpler procedure
- Less nepotism/corruption than in the formal system

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Challenges to Ensuring Access to Justice through Traditional and Indigenous Justice Systems

Even though traditional courts can play a role in facilitating access to justice, there are limitations as to how effective, efficient and impartial they can be. Customary traditional laws often reflect social hierarchies and can be discriminatory in their rulings. Often, the rulings depend on the knowledge and skills of the individual mediator/arbitrator. Further, there are no minimum standards that have to be followed and the rights of victims and suspects are protected only by customary norms. Therefore, it is important to regulate these systems so that abuses do not occur. The following section details some weaknesses of TIJS that may be an obstacle in terms of access to justice.

Gap between traditional laws and human rights standards

TIJS needs to respect human rights, at its most basic level the right to equality and non-discrimination. As traditional judges and community members are often not aware of human rights and related duties they are usually not upheld. Another problem arises when human rights standards directly contradict local customs and beliefs. For example, public humiliation and physical violence may be considered an appropriate punishment for someone who has committed a crime in the community. However, this would be in direct opposition to human rights laws that protect individuals from torture and cruel forms of punishments.

Inappropriate use of traditional and indigenous justice systems

The differences between human rights systems and traditional and indigenous justice systems can become especially problematic in the case of capital crimes, such as rape and murder. The informality of procedure, which may be a strength in dealing with small scale civil and criminal cases makes these systems inappropriate for cases in which formality is needed to protect the rights of both the victim and the offender. This includes the right to due process and to legal assistance, rules of evidence and presumption of innocence. In contrast to this, traditional and indigenous systems may put the burden of proof on the accused, use torture to effect a confession, or allow serious offenders to escape legal responsibility for their actions.

Exclusion of disadvantaged groups

TIJS throughout the world are often dominated by men of high status and tend to exclude women, minorities, younger people and most disadvantaged

groups. The traditional justice system in India, for example, is usually run by those from higher castes. As a result, social hierarchies and biases are reinforced in the dispute resolution system and there is little opportunity for people from disadvantaged groups to appeal against decisions made by those in power. Traditional laws can also be biased and can discriminate against women and other disadvantaged groups. For example, in Melanesia, women accused of adultery are imprisoned whereas their male counterparts are not punished. Also, decisions are often made not on merit alone, but as a result of outside pressures such as powerful connections or threats of violence or sanctions. This seriously compromises the integrity of TIJS.

The Barangay Justice System (BJS) – Philippines

Traditionally, Barangay leaders were respected members of Filipino communities and were often responsible for resolving disputes. In 1978, the BJS was restructured into a formal system and eventually incorporated into the Local Government Code of 1991. Though the BJS was not used very much initially, a concentrated effort was made to increase people's awareness of their rights and the functions of the BJS which includes mediated settlements. For example, even if crimes such as domestic violence are beyond the jurisdiction of the BJS, they can help families come to an agreement, especially when the goal is to induce a change in behaviour rather than sending people to prison.

“Forum shopping”

When jurisdictions are not clearly defined or overlap, it poses a problem for an effective justice system. For example, if one party in a dispute is not satisfied with the outcome of the decision, they have the option of appealing against the decision in other forums. This undermines the ability of TIJS to rule effectively and their positive role in reducing the backlog in formal systems.

Lack of enforcement mechanisms

TIJS are often centred around the concept of restorative justice where emphasis is placed on reconciling the victim and the offender and reaching a consensus about settlement. However, because traditional systems do not have specific enforcement measures to back their decisions, often they are non-binding and rely primarily on social pressure. Though this may be sufficient for minor cases, for serious offences however, accountable enforcement mechanisms need to be in place that are both humane (i.e., avoid cruel and degrading treatment) and effective.

Enforcement mechanisms that violate human rights

Sometimes, corporal, cruel and inhuman punishment for committing even minor crimes is used by some TIJS, attempting to enforce customary law. These violations of rights need to be addressed when developing strategies to improve TIJS.

Corruption

Some structural deficiencies make TIJS susceptible to corruption. Traditional leaders with the authority to resolve disputes may abuse their power to benefit those who they know or who are able to pay bribes. Traditional judges are often not paid or are insufficiently paid and may rely on gifts and bribes for an income, influencing the outcome of the hearing. Nepotism is also a problem in traditional systems. Traditional judges may be chosen on the basis of who they know or are related to, not on their ability to make appropriate and fair decisions. Finally, traditional justice systems may also lack independence and decisions may be influenced by outside (political) concerns and pressures.

Capacity Development Strategies to Enhance Access to Justice with Traditional Indigenous Justice Systems

TIJS does not make up for the shortcomings of the formal justice system

There is a danger in relying too much on traditional systems to solve all disputes. However, in many parts of Asia, TIJS remains the cornerstone of access to justice for the majority. Hence, the strategy should be one of engagement with TIJS to ensure that people who are not able or not willing to go through formal processes have access to some form of justice.

Combining rather than choosing between formal justice and TIJS

A more innovative approach entails designing hybrid justice institutions that combine the elements of both the formal justice system and TIJS. A good example of this is Papua New Guinea's Village Court. This court was created by statute with a defined jurisdiction which is subject to review by district courts. Village court magistrates are local villagers appointed by their peers and charged with settling local disputes in accordance with local custom. Their weakness in practice is that the Government often fails to provide the prescribed allowances, training, manuals, etc., and the district court magistrates are less than dutiful in fulfilling their supervisory obligations. This is essentially a failure of the formal system (e.g., the State fails to pay, train and supervise) although

in practice it is often portrayed (especially by lawyers) as an indication of the inherent failings of the informal justice system.

Start with thorough research and knowledge development

The large variety of traditional systems requires thorough research and knowledge development activities to enable programmes to effectively respond to the particular strengths and weaknesses of the TIJS. Research on customary law and indigenous institutions also implies the different laws and methods will be recorded. This can be helpful so that people can easily access previous cases when necessary. Though some argue that it may go against oral traditions, recording and researching laws and traditions can be useful as long as these laws are not codified and allow for flexibility. Research and publication of customary law may also help judges and other staff of the formal justice system to better understand and take into consideration indigenous methods of justice when they have to deal with cases relating to indigenous peoples.

Codification of traditional law

The issue of codification of customary law is a frequently debated subject. Customary law is often defined by its fluidity: each case is judged on its own facts without referring to a written set of laws. This allows customary law to change with the community and be as flexible as the situation demands. This becomes problematic only when attempts are made to codify traditional judicial customs and laws, as norms can change from village to village. The codification process will freeze the laws in place, and will not allow them to develop and change with the time. In special cases codifying customary law may lead to legal insecurity. Hence, it is best to devise programmes based on research and documentation of practices in consultation with indigenous communities, but codifying customary procedures themselves may be counterproductive.

Build linkages between formal and traditional justice systems

Building linkages between the formal and traditional justice systems is a key strategy in developing both the State justice system and TIJS. Linkages between Indigenous Peoples Organisations (IPOs), the State and indigenous justice systems can be a way to start discussions about indigenous issues and devise ways in which to work together in complimentary manner while respecting each other's jurisdictions. By creating clear guidelines for the role of the State vis-à-vis indigenous peoples and their territory while at the same time engaging in dialogue with them

can be a constructive means of working with the State. Also, encouraging other alternatives such as the State setting up hybrid justice institutions that combine elements of both the formal justice system and indigenous justice systems can be a means of interface between the formal and indigenous justice systems. For example, the formal justice system could adopt a more restorative and rehabilitative approach in the court room and in sentencing rather than an adversarial one.

Establish regulatory mechanisms

Regulatory mechanisms help to clarify the mandate (serious criminal offences should be referred to the formal courts) of TIJS, establish monitoring and accountability mechanisms (including against corruption and nepotism), and to ensure that decisions made and enforcement measures pursued adhere to certain minimum standards in line with national laws and human rights. However, it is best if these mechanisms and lobbying for setting up these mechanisms come from within indigenous communities. Often indigenous peoples have their own methods of holding their chiefs and elders accountable for their decisions.

Establish clear accountability lines

Accountability must be to the State justice system so that the State can ensure the protection of the rights of minority and disadvantaged groups and make sure that:

- The lower-level courts (e.g., district court) oversee traditional systems.
- An ombudsman-like institution is established to oversee the functioning of TIJS.
- Training is provided for basic documentation and record keeping in traditional justice institutions so that monitoring can be more easily carried out.
- A system of checks by civil society and local political representatives is promoted so that abuses of power are reduced.
- The legal empowerment and literacy of the community is enhanced so that they can also play a monitoring role.

In turn, traditional justice systems should also be able to demand accountability of the State mechanisms and ensure that their rights, and the rights of their community and their jurisdiction, are respected by the State.

Include popular TIJS methods into the State system

State justice systems could adopt a more restorative and rehabilitative approach in dealing with cases, they could allow community representatives to express their views during formal hearings, and could encourage a less adversarial approach in courts. These types of reforms can help state systems become more user-friendly and can increase the willingness of people to seek out formal systems.

Conduct training on human rights and national and international standards

Traditional leaders and judges should be made aware of their mandate and their duties, including the standards they need to follow. Legal awareness programmes can help communities ensure that their rights are not violated by traditional judges and that these judges fulfil their responsibilities to the community. If awareness programmes are promoted by the formal local courts, it may encourage linkages with the community and TIJS. Awareness programmes can also provide information on alternatives to traditional systems as well as where and how to appeal decisions made by traditional judges.

Working with Traditional Systems

To get an understanding of indigenous systems UNDP Nepal commissioned several studies in remote areas in Nepal and found that these century-old community mediation systems are functioning very effectively, including the implementation of and adherence to rulings in criminal cases. Based on the studies, a mediation manual was prepared that was used to train traditional mediators in order to raise awareness about the formal law. It was essential to convince traditional mediators of the added value of adhering to formal law as well as providing them with the best international practices on mediation.

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Include disadvantaged groups

Along with setting up laws that prohibit traditional systems from engaging in discriminatory behaviour, it is necessary to also address underlying beliefs and practices. Changing attitudes and behaviour can take time and the State and civil society need to be involved through active advocacy and behavioural change programmes to encourage traditional systems to be more inclusive. This can include promoting members of disadvantaged groups to actively participate and be part of the traditional tribunals, encouraging programmes that raise awareness about the rights of disadvantaged groups, and encouraging disadvantaged groups to mobilize themselves to make demands from traditional systems.

Build bridges between TIJS and the formal justice system

TIJS need to be considered as more than alternative systems that can fill in the gaps when the State is unable to provide adequate services. Further, it is necessary to move away from viewing the relationship between the formal system and TIJS in dichotomous terms (either/or alternatives). Building bridges between them is a way of achieving the ultimate objective which is to build a unitary (national) system capable of accommodating different justice traditions. Citizens, for example, can take their disputes to the local traditional judges (except for serious criminal cases which must be investigated by the State) which are monitored by the formal system and, if need be, have the choice to appeal the decisions in the formal courts. Ultimately, TIJS should be viewed as an integral part of the national justice system, not as an alternative to it.

4.4 Oversight

- 4.4.1 National Human Rights Institutions
- 4.4.2 Civil Society Oversight
- 4.4.3 Parliamentary Oversight

4.4 OVERSIGHT

Accountability is one of the key principles of the rights-based approach, and to ensure that the justice system is accountable it is necessary to set up oversight mechanisms. This section discusses three key actors that can play a role in external oversight of the justice system to ensure that it respects and promotes the rights of all people but especially those who are disadvantaged.

National Human Rights Institutions, including National Human Rights Commissions, Ombudsman offices, and thematic commissions investigate human rights abuses and make recommendations with regard to improving legislation and implementation of legislation that protect people from human rights violations. Civil society, including the media, can investigate abuses, publicize irregularities and advocate for changes within the justice system. Parliamentary oversight of the justice system is also necessary to ensure that the system functions properly and to address discrepancies in the system.

By establishing national human rights institutions, encouraging civil society to monitor the justice system and advocating for Parliament to engage with the justice system, additional checks are put in place so that the formal and informal justice systems work towards promoting access to justice for all.

4.4.1 NATIONAL HUMAN RIGHTS INSTITUTIONS

National Human Rights Institutions (NHRIs) are established by the State, according to specific legislation (e.g., constitutional amendment), in order to promote and protect human rights at the national level. The application of human rights and establishing NHRIs can be part of a remedial process for grievances. They are quasi-judicial or statutory bodies whose mandate generally includes (i) investigation of complaints in cases of human rights violations, (ii) promotion of human rights education, and (iii) review of potential legislation.⁵¹

In 1993, the UN General Assembly adopted what is generally known as the Paris Principles: a set of standards for national human rights institutions that stress the importance of certain institutional requirements – such as a broad mandate, a sound legal foundation, an independent appointment procedure, autonomy from the State and adequate funding – for institutional effectiveness in ensuring access to justice.⁵²

The responsibilities of NHRIs may include:

- **Reviewing draft legislation and administrative actions** and suggesting measures to improve the human rights situation such as amendments or additions to the existing legislation, or policy changes.⁵³
- **Investigating individual human rights violations** by seeking to settle a dispute, for example through consultation or mediation, between individual and the government body.
- **Acting as independent monitors of the executive's action**, including the activities of enforcement agencies and other actors within and outside the justice system. This is important in order to strengthen overall accountability in the system.
- **Promoting and ensuring the harmonization of national legislation and governmental practices with the international human rights instruments** to which the State is party to, as well as encouraging ratification of, or accession to, these instruments.
- **Promoting human rights education and awareness** through various means, including research and analysis on human rights, collaboration with academia, civil society and the media.
- **Litigating directly on behalf of disadvantaged and marginalized groups**, or indirectly as *amicus curiae* (friends of the court).

The International Coordinating Committee of National Institutions for the Protection and Promotion of Human Rights evaluates NHRIs from around the world and determines their accreditation status by the extent to which they adhere to the Paris Principles.⁵⁴ Political commitment of the Government and the establishing frameworks (along with human and financial resources) is also crucial in allowing NHRIs the independence to fulfil their duties.

Though NHRIs do not have judicial or lawmaking capacities (and as such do not have the mandate to issue binding judgments), they can still work through other means, including external ones such as the media and civil society organizations, to put pressure on government to respect human rights.

With regard to disadvantaged people, NHRIs can help them reach remedies that would otherwise remain inaccessible and can help strengthen their capacity to seek a remedy.

⁵¹ According to the International Council on Human Rights Policy's study on National Human Rights institutions. The term national human rights institution is "a hybrid category and includes many different varieties within it. As far as this study is concerned, the defining point is simply that it is a quasi-governmental or statutory institution with human rights in its mandate. That would exclude a government department on the one hand (say a human rights office in the Foreign Ministry) and an NGO on the other. But it would include human rights commissions, ombudsmen, Defensores del Pueblo, procurators for human rights and an infinite variety of other institutions. [<http://www.international-council.org/ac/excerpts/4.pdf>].

⁵² UNHCHR (United Nations High Commission for Human Rights). April 1993. "National Institutions for the Promotion and Protection of Human Rights, including the Paris Principles: Fact Sheet No.19". United Nations, Geneva. [<http://www.unhcr.ch/html/menu6/2/fs19.htm>].

⁵³ It is important to keep in mind that the role of NHRIs is to review rather than draft legislation.

⁵⁴ The National Human Rights Institutions Forum has a list of NHRIs from around the world and their accreditation status: <http://www.nhri.net/>

TABLE 7: THE ROLE OF NATIONAL OVERSIGHT BODIES

| INSTITUTION | DESCRIPTION | ROLE |
|--|--|--|
| <p>NATIONAL HUMAN RIGHTS COMMISSIONS</p> | <ul style="list-style-type: none"> ■ Established by the State, but independent and based on a pluralist representation ■ A form of civilian oversight over the implementation of rights and standards by private and public institutions ■ A means to protect, promote and monitor human rights at the national level ■ Promotes access to information, ensures institutional cooperation and seeks to encourage linkages to prosecutions from NHRI reports ■ Plays a role in implementation of international human rights norms by intervening at policy level as well as intervening on a case-by-case basis ■ A quasi-judicial body that lacks law-making or judicial capacities, but can seek to reach amicable settlements of disputes through conciliation or through binding decisions ■ Mandate derived from the Constitution and/or through legislation ■ Similar function to the more specific thematic commissions but has a broader human rights mandate | <ul style="list-style-type: none"> ■ Monitor both public and private sector, especially the State's implementation of human rights ■ Investigate human rights complaints of individuals and groups ■ Advise government on human rights related issues ■ Provide comments, opinions and recommendations and publish reports on the national human rights situation ■ Review draft legislation, and propose new legislation and amendments to existing laws to promote human rights ■ Work with the media and other civil society organizations to publicize human rights violations and to inform people of their rights ■ Follow up on situations of grave human rights concerns and issue advisory opinions to the State to end such situations ■ Establish working groups as necessary and set up local or regional chapters ■ Promote alliances and coalitions between different groups – civil society, media, and government in order to address human rights issues |
| <p>OMBUDSMAN</p> | <ul style="list-style-type: none"> ■ An individual or group of persons usually appointed by the Parliament to provide an additional means of remedy to victims of abuse of authority and/or institutional policies ■ Established by the State as an oversight body to monitor misadministration and ensure good governance ■ In most cases, monitoring duties limited to public administration but some may have a wider mandate to examine complaints of human rights violations | <ul style="list-style-type: none"> ■ Ensure fairness and legality in public administration ■ Investigate complaints by individuals or groups about violations of the rights of individuals or discrimination on the part of public administration ■ Can make recommendations based on the investigation of abuse when necessary ■ May mediate among the grieved parties and find amicable ways out of a situation or conflict ■ Monitor and report on problems in the public sector identified by the investigations |

| INSTITUTION | DESCRIPTION | ROLE |
|--|---|--|
| THEMATIC COMMISSIONS (WOMEN'S COMMISSIONS, EQUAL OPPORTUNITY COMMISSIONS, COMMISSION FOR PEOPLE WITH HIV/AIDS, ETC.) | <ul style="list-style-type: none"> ■ These commissions are set up by the Government but are independent and can monitor the activities of the State with regard to a particular theme ■ Can be set up by Presidential Decree (e.g., National Commission on the Role of Filipino Women) or by a legislative act (e.g., the Women's Commission in Nepal) ■ Though the National Human Rights Commission works on all human rights and discrimination issues, these specific commissions work on monitoring and advocacy of specific issues ■ Monitoring, promotion and follow up on implementation of certain thematic rights also to show state's commitments in bring equal participation of all ■ These commissions are often made up of senior members of state, CSOs and judiciary | <ul style="list-style-type: none"> ■ To ensure that the Government pays attention to the concerns of specific disadvantaged groups (e.g., the Women's Commission works to ensure gender issues are mainstreamed into government policies and programmes) ■ Promote affirmative action/ positive discrimination of disadvantaged groups ■ Report regularly on government activities, including monitoring and reporting on specific international treaties ratified by the Government (e.g., Women's Commission can ensure that the Government follows CEDAW standards) ■ Provide policy guidance in terms of both national policy and programme implementation (e.g., conduct studies and research on specific topics and submit recommendations to Parliament) ■ Advocacy work in conjunction with other civil society actors to promote awareness about the rights (as well as the violation of rights) of specific disadvantaged groups ■ To coordinate, advise and encourage the enforcement of laws (e.g., the Commission for People with HIV/AIDS can recommend that legislation be drafted that is sensitive to the concerns of people living with HIV/AIDS) ■ Investigate complaints and represent cases (e.g., cases of ethnic or racial discrimination at the work place) |

Role of NHRIs in Strengthening Access to Justice

National Human Rights Institutions take many forms, but primarily manifest themselves through National Human Rights Commissions, various thematic commissions (e.g., women's commissions, indigenous people's commissions) and through national Ombudsmen. The function of the Ombudsman is to ensure fairness and legality in public administration⁵⁵, while other NHRIs are more specifically concerned with protection and promotion of human rights.⁵⁶

These institutions facilitate access to justice by monitoring human rights situations and providing the means through which members of society can seek redress for violations of their human rights. First, as state institutions, they are by their

existence a statement of the Government's commitment to human rights, especially when enabling legislation provides them with an expansive mandate. Second, these institutions are under national ownership, which alleviates people's fear of external intervention. Third, a national human rights institution develops the country's capacity to respond to human rights issues internally, at a much faster rate than even the best-intentioned external actors and even more than the domestic courts.

NHRIs can help poor and disadvantaged people obtain remedies that would otherwise remain inaccessible to them. The presence of NHRIs may also be useful in preventing future grievances. These institutions often create a necessary space for human rights dialogue between state institutions and non-governmental entities. NHRIs

⁵⁵ In some cases, Ombudsmen may have a wider human rights mandate (e.g., in the CIS Georgia, Azerbaijan and Kyrgyz Republic).

⁵⁶ In situations of conflict, NHRIs also play a role in monitoring the implementation of international humanitarian standards.

can also act as independent monitors of the executive's actions, including the activities of enforcement agencies and other actors within and outside the justice system. This can be critical to strengthening of overall accountability within the system. Finally, NHRIs are also involved in legislative review and advocacy, which can improve normative protections for disadvantaged groups. NHRIs can further strengthen people's capacities to seek justice remedies through their role in human rights education.

Challenges in Ensuring Access to Justice through NHRIs

Deficient legal frameworks ensuring minimum standards for the institution

In many countries NHRIs are relatively new and their establishment may be seen as merely a token gesture by the Government and not really incorporating the true essence of international human rights standards. In fact, NHRIs may be provided with a narrow mandate, independence or authority, which would limit their ability to complete their duties in accordance with the Paris Principles. Also, there may not be a clear definition of the role of NHRIs which can lead to confusion over what is included within their mandate and responsibility. However, unless NHRIs meet the minimum standards of independence and are provided with the appropriate mandate to protect and promote human rights, the International Coordinating Committee of National Institutions for the Protection and Promotion of Human Rights (ICC) will not accredit these institutions, compromising their legitimacy.

Unsatisfactory performance

Performance refers to the extent to which a NHRI addresses human rights grievances, particularly those of the poor and disadvantaged. NHRIs' performance is critical to determine whether its existence contributes to greater access to justice, or perpetuates impunity by shielding governments from criticisms. There is also a risk that NHRIs focus too much on processing individual cases and do not focus sufficiently on broader human rights policy and implementation issues. The performance of NHRIs is also dictated by their mandate. If the legislation that establishes NHRIs is limiting, then their performance is confined within those parameters. Performance can also be compromised by appointing a commissioner who may not have the necessary expertise. It is important to ensure that commissioners are not just political appointees but have the necessary competence and a background in human rights.⁵⁷

Perception of insufficient legitimacy

The legitimacy of NHRIs depends on the extent to which they are accepted (by both the Government

and society) as independent human rights monitoring bodies. If the recommendations and opinions of NHRIs are not honoured and there is no respect for minimum standards, their legitimacy will be eroded over time. If the institutions are not perceived to be completely independent and objective, or are not able to perform their necessary duties (i.e., highlight human rights violations as well as discriminatory conduct and omissions on the part of the Government), then their legitimacy is compromised. Also, if there is no mechanism of follow up defined in NHRI legislation NHRI's will not be perceived as a credible and effectively functioning institutions. An indicator for the lack of legitimacy is the trust people have in civil society organizations rather than NHRIs and their reluctance in seeking assistance from NHRIs.

Establishing a National Human Rights Commission – Bangladesh

As courts are very expensive, time consuming and largely inaccessible especially for the very poor, UNDP Bangladesh is focusing on developing preventive strategies with regard to human rights, including the creation of a strong, independent NHRI to provide accessible remedies. However, despite having conducted a PRA study on institutional development of human rights in Bangladesh that pointed out the need for a central organization to deal with cases of human rights violations, a national human rights commission still has not been established. Though the PRA was helpful in developing baselines, the initiative lacked overall detailed guidance in setting up the NHRC. Also, while participation of all stakeholders should be encouraged, a prolonged political process may be disastrous, especially in a context where governments are unstable and policies change frequently. As a result, a national human rights commission has yet to be established in Bangladesh.

Limited political commitment

Government commitment is necessary in order to establish NHRIs. Legal arrangements (within the legislation) should be included in the legal framework as a proof of political will. After establishing a NHRI, it is then crucial to provide it with adequate financial and staff support as well as the necessary mandate and freedom to access information and fulfil their role. Provision of adequate resources can be a basic indicator of political will. Without adequate political commitment, the Government can undermine the goals and work of NHRIs. For example, if governments fall short of fulfilling their obligations to provide NHRIs with the necessary resources, both human and financial, or if NHRI members and staff face threats, intimidation or harassment by state agents, this can obstruct their ability to do their jobs.

⁵⁷ Though commissioners may not be overt in their support for the ruling party, they may display subtle executive-mindedness and may be partisan in their decision-making or the cases they choose to pursue.

Inadequate budgets

A national human rights institution depends to a large degree on public expenditure to determine the scope of its work. Government control over the budget allocations for a NHRI may limit its independence, neutrality and effectiveness. As the Paris Principles note, in order to secure the smooth conduct of activities of the national institution, it is necessary to have adequate funding. This funding should be used to enable NHRIs to have their own staff and premises so as to maintain control of their operation. In addition, their budget should be granted directly from the State budget and not through a particular Ministry.

Lack of efficient, qualified and experienced staff

The work of NHRIs requires committed and experienced staff – both to work in the capacity of policy, strategy and decision-making and to ensure implementation of programmes. However, low budgets restrict NHRIs ability to recruit the necessary level of qualified and experienced staff. This also affects the motivation of staff to carry out their duties. Sometimes, governments underpay ombudsmen or do not fund fulltime commissioners for the NHRI, making it difficult for the NHRI to be effective. As per the Paris Principle, a more pluralist representation should also be required.⁵⁸

Capacity Development Strategies to Enhance Access to Justice with NHRIs

Ensure legitimacy

- **Establish sound founding legislation.** NHRIs should ideally be established by law or, preferably, by constitutional amendment, as presidential or other kinds of decrees make them vulnerable to having their powers limited or abolished. In order to establish NHRIs within the appropriate legal framework, there needs to be sufficient political commitment that can be generated by the Government itself or encouraged through advocacy by citizens' groups, NGOs and other civil society organizations.
- **Strengthen NHRIs' accountability.** Ensuring that NHRIs report publicly on their activities is a way to strengthen their accountability. Reporting may be done formally to a parliamentary body and/or to a committee representing different sectors of society, or informally through periodic meetings with civil society organizations, government officials, etc. Generally, an annual report on the activities of the NHRI should be submitted to Parliament and shared with the media.
- **Allow for investigative powers and develop capacities to address systemic violations.** NHRI's founding legislation should allow for

investigative capacity with respect to all human rights violations (civil and political as well as economic, social and cultural). They should have the authority to investigate all actors, including government officials, insurgent groups, armed forces, the police, etc. They need to have freedom to access, for example, all places of detention, and their security along with those whom they speak to must be guaranteed. Their ability to access information, documents, materials and evidence from different actors is also critical in ensuring public legitimacy. NHRIs may also be granted the power to initiate legal proceedings on their own, to conduct public enquiries on issues where systematic patterns of abuse may be found, and provide the necessary recommendations for addressing and improving the human rights situation in their country. NHRI's capacity for policy analysis and identification of systemic problems can maximize the impact of its investigative work. Also, it is necessary to establish a way of linking (in given cases) NHRIs with the Chief Prosecutor for timely prosecution of human rights violations.

The Islamic Human Rights Commission – Iran

The experiences of the Islamic Human Rights Commission (IHRC) in Iran demonstrate that a human rights watchdog organization can operate successfully, despite the lack of a strong legal mandate, if it is anchored well in the national governance structure. Though the IHRC has a limited mandate (and has a status similar to that of an NGO), it is treated by the Government as a national institution and functions in a similar capacity. It works on human rights complaints, human rights education, and human rights reporting as well as building partnerships and networks. By supporting such institutions, UNDP can be involved even in sensitive and controversial issues.

- **Ensure financial sustainability.** NHRIs should be able to present and defend their case for funding to Parliament without depending on the executive to do so. Sensitizing of parliamentarians through committee structures is important to increase Parliament's awareness of the work carried out by NHRIs and encourage allocation of sufficient resources. Also, alternative routes of funding (e.g., through international cooperation) can be explored without compromising financial sustainability.

Secure autonomy and independence

Autonomy and independence are crucial to NHRIs. Without autonomy and independence to monitor and report on human rights issues, they will be

⁵⁸ In countries where there are multiple NHRIs there may be a limited number of efficient, qualified and experienced staff to meet the needs of all the institutions.

unable to fulfil their duties. To guarantee this independence, it is necessary to ensure that:

- **Appointments are made through a transparent process** that selects the best-qualified members and at the same time ensures a pluralist representation of society.
- **Membership and staffing of NHRIs is diverse** (including from disadvantaged groups) and qualified in working on human rights.
- **Clear terms of appointment are defined** so that commissioners cannot be removed simply because they criticize the Government.
- **The authority to hire and fire staff** lies within the jurisdiction of the NHRI.
- **Commissioner/ombudsman/staff should not hold or perform incompatible functions elsewhere** - in either government or civil society.
- **Immunity should be provided for staff from prosecution** for words spoken or acts performed under the mandate of the NHRC.

Increase accessibility

Accessibility of NHRIs can be improved in order to facilitate reporting of human rights violations. By ensuring that complaints-making mechanisms are accessible is one way to accommodate civilian complaints. Some strategies to increase access, especially for disadvantaged people, to NHRIs include:

- **Expanding geographical outreach** through developed structures (regional and local).
- **Non-threatening/neutral location of premises** (including premises that are sensitive to the needs of disadvantaged groups – e.g., accessible for people with physical disabilities).
- **Ensuring representation of disadvantaged groups** in the institution's membership.
- **Establishing linkages with NGOs** working on particular issues and with disadvantaged groups.
- **Initiating investigations focused on issues facing disadvantaged groups.**
- **Promoting public enquiries.**
- **Advocacy work on the rights of the disadvantaged**, for example, through outreach to the media.

Build linkages

Improve coordination with the judiciary, prosecution, police and prisons. NHRIs should complement the work of the formal justice system. NHRIs should have the mandate to ensure that cases are dealt with, e.g., by filing cases in court or by having them automatically filed by the prosecution where they lack prosecutorial capacities. Though NHRIs usually have no powers to enforce their decisions, they can help facilitate the judicial process when they work with the formal system. In such circumstances, the judiciary is critical to ensuring appropriate redress and prevent impunity. Linkages with police and prison institutions can expand NHRIs' access to persons in detention. Ways to build linkages include:

- **Strengthening cooperation between different types of NHRIs.** Where there are multiple national institutions for the protection of human rights, maximum coordination needs to be ensured through joint planning and regional and international cooperation among national human rights institutions. This can serve to mutually develop the capacities of the various institutions working on specific human rights issues, as well as reducing role confusion among NHRIs. Cooperation can also strengthen the internal security of the institution itself, if its activities make it vulnerable to threats by those complicit with human rights violations. Cooperation and planning strategically can help in making the optimal use of limited resources.
- **Constituency building to ensure maximum legitimacy.** Legitimacy is indispensable for NHRIs to be effective. Initial legitimacy can be strengthened through ensuring maximum participation of different sectors of society, particularly those involved in human rights within and outside government (including human rights activists and civil society organizations) during the process of establishing NHRIs. Much of the public legitimacy of NHRIs lies in the extent to which they succeed in developing links with the Government, the media, professional groups (lawyers, forensics, etc.) and other civil society institutions, and address urgent social issues, which are often controversial. In addition, a well-maintained case handling process can increase its reputation in society in general. Cooperation with UN and regional human rights bodies and special procedures on the follow up to government commitment can also assist NHRIs in their work and in building networks regionally and internationally.

4.4.2 CIVIL SOCIETY OVERSIGHT

Civil society actors, in particular civil society organizations (CSOs) and the media can act as watchdogs over the justice sector and function as a force for accountability. Civil society is a crucial agent for limiting authoritarian practices, strengthening the empowerment of the people and improving the quality and inclusiveness of the justice sector.⁵⁹

Role of Civil Society in Strengthening Access to Justice

Civil society actors have a five-fold function in improving access to justice:

- As campaigners and advocates pressing for reform.
- As monitors, fostering accountability within the justice sector.
- As disseminators and communicators of information.
- As educators through legal empowerment and legal literacy initiatives.
- As direct agents helping people access justice through legal aid and representation services.

This section focuses on the first three functions of communicator, campaigner and monitor; the others are covered in Chapter 5.

Experience shows that without considerable public pressure, governments and other state institutions are unlikely to foster the transparency and accountability needed to curb malfeasance by officials. Therefore, it is important that civil society actors engage in dialogue to pressure and negotiate with justice institutions and political authorities to change practices in the justice system and to ensure that new regional and international systems of protection are given effect in national justice systems and institutions.

Civil society actors can improve access to justice through systematic independent observation, monitoring and evaluation of the justice system and sustained reporting back to actors within and

outside of the justice system about procedures, behaviours, and practices. Scrutiny applied by the media and civil society can aid the successful and just resolution of disputes and strengthen overall accountability within the justice system.

While there are no explicit international standards which guarantee civil society's role in access to justice, several instruments state the importance of civil society involvement in ensuring transparent and accountable governance processes in all sectors of society.⁶⁰ In addition, two international legal instruments guarantee freedom of association and thus, define the parameters within which a government may restrict or regulate CSOs – the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights.⁶¹

Challenges in Ensuring Access to Justice through Civil Society Oversight

Civil and political rights may not be legally protected

Despite being enshrined in international conventions and resolutions, if civil and legal rights are not protected under national legislation, civil society actors wishing to use these rights to challenge the State or other more powerful actors may be threatened or intimidated.

No accountability or enforcement mechanisms

In many countries there are no mechanisms to enable the public to claim their right to information, and no public and media access to court proceedings.

No effective media

In its absence, CSOs or coalitions advocating reform, work largely in isolation and are deprived of the opportunity to influence and mobilize public pressure.

Journalists may lack professional skills

In many countries where civil society has been repressed or is weak, the media often lacks the professional skills, understanding and resource base needed to undertake investigative reporting.

⁵⁹ There is no one standardized definition of civil society, however there is agreement more or less on two main principles about what civil society is not. First, civil society is not part of the Government or state apparatus. Second, civil society is not the market; it is non-commercial and therefore excludes profit-seeking firms. The media are considered part of civil society because of the role they play in the formation of public opinion even though they are technically considered firms. CSOs in this section include NGOs, CBOs, PVOs and the media.

⁶⁰ One example is the Copenhagen Declaration on Social Development and the Report of the 1997 Special Session of the UN General Assembly. Further, the GA Resolution 48/134 on national institutions for the promotion and protection of human rights and the Commission on Human Rights resolution 2003/76 on National Institutions state that the composition of national institutions ensures the pluralist representation of the social forces (or civil society), highlighting the importance of partnerships and increased cooperation with representatives of NGOs, universities and qualified experts.

⁶¹ Some states are not signatories to the International Covenant on Civil and Political Rights, 1966 and the Universal Declaration of Human Rights by its nature was never opened for signing. Despite this, the Universal Declaration has been accepted as having the force of international customary law since 1968 and as such lists rights which are universal in nature. These rights apply to all people of the world, and the Covenant falls under the same category by virtue of its adoption and application. As such, the basic rules are binding.

Few civil society actors prepared to advocate for justice and legal reform

Often CSOs in lesser developed countries are dominated by middle-class professionals and based in urban centres. Consequently, they generally represent relatively small constituencies, which exclude the poor, vulnerable and disadvantaged. Therefore, even if they are vocal and active, individual CSOs often exercise very little leverage on behalf of a reform agenda.

CSOs may be unable to form coalitions to champion reform agendas

Constraints to collective action vary, but are largely as a result of policy issues and leadership styles. Many CSOs are personal expressions of dynamic leaders who, having founded an organization, are reluctant to share power with or subordinate their identity to a coalition involving other CSOs.

Misuse of the principle of 'judicial independence'

While some judiciaries welcome civil society involvement, the principle of 'judicial independence' is often misused as an argument to reject any form of public control or accountability. The notion that the justice system should be considered a public service is not widely understood.

Non-lawyers may be ill-informed

Legal professionals often argue that non-lawyers do not understand the law and what they do and are therefore incapable of contributing usefully to their work.

Civil society may lack the expertise and willingness to monitor effectively

In many countries civil society is reluctant to engage in activities which involve monitoring, analyzing and criticizing justice institutions as it is considered as dangerous. Being too vigorous in criticism could lead to trouble, either officially or unofficially. There is also often widespread pessimism about what, if anything, civil society actors can achieve in such matters.

Other capacity constraints faced by CSOs

- CSOs often lack the internal capacity to fulfil their role, including limited resources, knowledge and technical skills, and as a result they often lack the necessary legitimacy and credibility required to meet their objectives.
- Competition for resources among CSOs may be fierce.

- CSOs often lack sustainable funding and are seen as lacking in transparency and accountability due to limited capacity for proper financial and administrative management.

- CSOs are sometimes more accountable to donors than their constituents and are criticized for being donor-driven.

- The way in which governments and civil society react to each other can be an obstacle. Non-democratic states, which often have corrupt and inefficient bureaucracies and are dominated by patronage networks, generally do not respond positively to reform initiatives. CSOs can also view the Government as the main obstacle to achieving their objectives and can become unnecessarily critical and antagonist rather than engaging constructively with the Government.

Capacity Development Strategies to Enhance Access to Justice with CSOs

Monitoring

- **Organized and routine court monitoring normalizes the observation and information-gathering process.**

The objective of civil society court monitoring groups (ideally comprising of media and CSOs) is to report on what takes place in courts and to make recommendations for improvement. This type of monitoring provides a comprehensive way to examine a local justice system and is particularly useful for reformers within the system. It protects them from external threats and frees them from internal pressures to deliver a verdict in favour of one party regardless of the evidence. In the Philippines, observers attend courts to monitor and study court performance and report to the Supreme Court any violations of judicial ethics and procedures they observe. The information gathered from these observations is published in the hope that it will stimulate reform and improvement. Reports indicate that judges are altering their conduct because of the project and are ordering their staff to be on their best behaviour. In this particular project, the monitors are not known to the judges, and there is no way of knowing when the monitors might be present in the court.

- **Effective monitoring mechanisms are complex, and more effort needs to be dedicated to their design and refinement.**

This should involve developing the technical capacity of civil society to effectively monitor and evaluate the functioning of justice sector

institutions. Developing this technical capacity should include the preparation of reliable empirical studies of justice system functioning and the impact of reforms.

- **Provide support to judicial councils or other institutions playing a role in judicial selection processes.** Only with judicial leadership fully committed to justice reform, will it be possible to move forward on commitments related to access to justice and succeed in efforts to eradicate corruption and overcome impunity. The strategic and organized public participation in judicial appointment processes can have a significant impact on the outcome of these processes by ensuring that persons who are qualified to dispense justice, in terms of competence, integrity and dedication, are recruited to key positions.
- **Providing hard facts is important.** Faced with accurate and reliable data, it is much harder for officials to contend that allegations are baseless. This can also help in constituency building, as one crucial foundation for informed public debate is sound data and analysis on the system's internal workings. This typically involves research to generate information, and can also involve innovative and participatory methods, which in themselves act as awareness raising and mobilization mechanisms. A lack of reliable data will also impact on the ability to conduct investigative journalism into, and legal analysis of, the judicial system.
- **Public opinion surveys provide empirical evidence on public opinions towards the justice system.** While such surveys often reveal little that is not already known or suspected, they can present opinions about public issues in a way that is difficult for leaders to deny or ignore. Such data alone cannot force reform, but it contributes to a climate in which political will for reform is easier to encourage.
- **Civil society involvement will have more impact if it is ongoing and constructive.** This means sustained engagement with the issues and institutions of the justice sector and constantly taking the initiative to present proposals for the development of transparency mechanisms or other mechanisms to improve the justice system. CSOs should remain active and vigilant even after completing a successful campaign as ingrained non-transparent practices can easily reassert themselves.

Networks and coalitions

- **Linking civil society with wider networks,** nationally and internationally can have a larger impact on the reform process and make individuals less vulnerable to threats, intimidation and other risks inherent in community mobilization. Linking CSOs with National Human Rights Institutions designed to oversee the actions of state institutions and protect human rights, can establish a nation wide presence through regional offices and local networks. International organizations can function as a remote accountability mechanism at the local level. Human rights CSOs have been particularly adept at using international counterparts and institutions to draw attention to governmental policies and behaviour not in accordance with international conventions ratified by the Government. International CSOs such as Amnesty International, Human Rights Watch and the International Federation of Journalists have successfully drawn the attention of donor governments and key actors in the international community to harmful state practices, after having been alerted of cases and problems by local CSOs.
- **Support coalition building to strengthen support networks.** Given the limited size, resources and impact of most CSOs, partnerships between CSOs, the media, civil society, and reformers within the justice system can build a strong support network able to hold the legal system more accountable, and create a widespread demand for change. Coalitions that include diverse groups, which have established reputations and credibility are likely to have greater impact. Successful coalitions have a broad membership, ideally one which cuts across classes or other social divisions, demonstrating the legitimacy and relevance of the concern, and limiting any suggestions it might be a narrow interest group.
- **Support e-governance and the use of networking technologies to strengthen CSOs.** Foster interaction and partnerships between CSO networks through international, national and local e-governance initiatives. CSOs can enhance their own internal capacities and networks, and take a stand vis-à-vis issues relevant for the local context by harnessing both expertise and knowledge through new and existing CSO networks.

Media

The media can be an effective advocacy tool to promote behavioural change, disseminate information, raise awareness and monitor the obligations by duty bearers.

■ Use the media to catalyze the justice sector.

This has been done either through exposing bad practice or corrupt behaviour by officials, or alternatively by praising good practice or good behaviour and reinforcing positive service delivery innovations. Individual cases can also be used as opportunities for broader advocacy by highlighting success stories, which can have a wider effect and help create an enabling environment for future cases.

■ Media capacity development interventions.

Strategies could include the education of journalists about legal processes, about their responsibilities and their rights, and how to effectively and responsibly report on the judicial system in order to support legal reform initiatives. It is important that there are specialist journalists writing in this field, as non-specialists may use terminology inaccurately or inappropriately, sensationalize or personalize issues, or fail to put the issues into a broader context.

■ Investigative journalism and professional legal reporting can make the justice system more transparent.

By making the system more transparent, it becomes more difficult to conceal corruption and malfeasance. In Sri Lanka, the Asia Foundation has supported the development of a university degree programme in investigative journalism. In the Philippines, the Centre for Investigative Journalism has provided training to journalists and sponsored investigative press reports, which have exposed judicial malfeasance.

4.4.3 PARLIAMENTARY OVERSIGHT

The justice system includes formal and informal institutions, mechanisms, and processes that are meant to provide remedies for disadvantaged individuals' grievances within national and international human rights frameworks. By using its monitoring and legislative powers, Parliament can oversee the various aspects of the justice system to ensure that the institutions function properly.

Parliament should reflect public and social concerns in order to retain public legitimacy and promote the participation of constituents, particularly members of disadvantaged groups. When disadvantaged groups are given a voice,

Parliament's oversight function can play a significant role in ensuring the delivery of constitutionally guaranteed socio-economic rights and the further strengthening of a rights-based culture. Responsible parliamentary oversight of the justice system is therefore, an essential component of good governance and democracy.

Role of Parliament in Strengthening Access to Justice

Parliament can exercise its oversight functions through a wide range of means. One of the most obvious controls that Parliament exercises over the judiciary is the ability to confirm, review and impeach executive judicial appointments. Through this power, Parliament is able to monitor the composition of the courts.

Parliament also exercises a significant influence over the justice sector through its power of budgetary allocation. Parliament is responsible both for allocating funds and overseeing their usage.

Another one of the most direct forms of parliamentary oversight of both the judiciary and the police is through committees. Committees provide parliamentarians with the opportunity to organize their work and to focus expertise. In addition to specific judiciary and police oversight committees, a number of other parliamentary committees perform relevant oversight functions. For example, counter-corruption committees investigate claims of corruption among judges or police. Some ad hoc or select committees influence justice and security sector policy and undertake other types of oversight of specific justice system actors. Committees also allow for direct communication between Members of Parliament (MPs) belonging to different political parties. Access to committees by all constituents, for instance through public hearings, petitions and the media ensures that their effectiveness is maximized.

Parliament can also perform oversight functions through a range of actors. Parliament has the power to create or enhance National Human Rights Commissions (NHRCs) so that they can monitor the actions of the justice system as a whole and to initiate litigation or provide *amicus curiae* submissions when necessary. As mentioned earlier in this chapter, Ombudsmen can also be important tools for oversight. Parliament has the power to create an ombudsman office charged with the task of overseeing specific sectors of the justice system. In addition, MPs can work with NGOs and think-tanks that can act independently to monitor the justice system in order to have access to more information. Parliament can also create specialized think-tanks to provide it with additional expertise when needed. Finally, Parliament often exercises

“ultimate oversight”, even over watchdog institutions such as human rights commissions to ensure that they in turn are effectively carrying out their mandates.

Other means of strengthening parliamentary oversight include:

- **Inviting experts from civil society** to participate in parliamentary hearings.
- **Engaging research institutes and universities** to carry out research and audits.
- **Ensuring that NGOs can have access** to all relevant public policy documents.
- **Stimulating the existence and functioning of NGOs** by lowering the bureaucratic barriers for legal recognition of NGOs or giving financial support.
- **Allowing the media to cover abuses** and encouraging training in media awareness on issues relevant to the justice sector.
- **Requesting that independent institutions conduct research** on the executive’s budget and activities.⁶²

Through its role in overseeing the executive, Parliament can also exercise oversight of ministries that control various aspects of the justice system. Parliament must hold the executive branch accountable for their policies and activities. In this context, the most relevant bodies within the executive are the Ministry of Justice, which oversees prison systems and sometimes, the Attorney General’s Department; the Ministry of the Interior, which oversees the police; and the Ministry of Defence when the military is performing policing functions. This can be accomplished through enacting laws and providing the executive with legal guidelines. Through this legislative power, Parliament is able to control the finances of agents of law enforcement. Parliament can have significant legislative, financial and oversight power available to it. Some tools at its disposal include:

- **Questioning officials** on their activities and intentions.
- **Conducting public hearings** on new legislation proposed by the executive.

- **Responding to complaints** of constituents regarding the justice system.
- **Setting up special parliamentary inquiries.**
- **Deciding on defence and security budgets.**
- **Holding a vote of confidence** on the executive or impeaching a specific minister.
- **Releasing information to the public.**

Challenges in Ensuring Access to Justice through Parliamentary Oversight

The greatest challenge to parliamentary oversight is striking a balance between intervention and respect for the independence of the judiciary. Judges must be able to make decisions in an atmosphere free from intimidation from the legislative branch. However, at the same time, the judiciary has to respect Parliament’s duty to keep it to account.

A clear line must also be drawn between parliamentary oversight and executive control. Parliament should not micro-manage the justice system. However, Parliament’s constitutional duty to oversee the executive must be respected. The executive must operate transparently and share all relevant information with Parliament.

Ombudsmen and NHRCs can also face limitations. Since their mandates originate in Parliament they may not be entirely independent, which can hinder the effectiveness of their work.

Political sensitivity can also pose a major challenge. For example, it is relatively rare for parliamentarians to challenge executive nominations to the judiciary since such nominations are generally considered a privilege of the executive.

An additional challenge is posed by the difficulty of ensuring that disadvantaged groups are enfranchised. Parliament does not always listen to the concerns of their least influential constituents. Yet, these are the groups that most desperately need their assistance. Programmes that promote participation should be particularly focused on these groups.

Another challenge is that development organizations, including UNDP, tend to work with Parliament and the justice sector separately. Working together with both of them could enhance their relationship.

⁶² Born, Hans. 2000. “Representative Democracy and the Role of Parliaments: An Inventory of Democracy Assistance Programmes.” 4th International Security Conference, Geneva, November 15-17, 2000. International Security Forum, Geneva. [http://www.isn.ethz.ch/5isf/5/Papers/Born_paper_IV-2.pdf].

Capacity Development Strategies to Enhance Access to Justice with Parliamentary Oversight

By supporting parliamentary oversight of the judiciary, UNDP can ensure that a system of checks is put into place and that judiciary is held accountable. Providing support to parliamentary committees dedicated to overseeing the judiciary, including providing information (e.g., by encouraging experts to participate in parliamentary hearings, engaging research institutes to carry out research and audits, etc.) and assisting in building commitment and political will, can be a strategic entry point for UNDP.

Some specific strategies:

- **Promote awareness** among MPs about criteria for objectively assessing potential justices.
- **Provide policy advice** to the executive or the legislature in any of the areas falling within parliamentary oversight of the justice sector.
- **Provide comparative and other research** to enhance the institutionalization of parliamentary oversight.
- **Advocate for budgetary reform** that addresses impediments facing the disadvantaged, especially in accessing justice.
- **Promote the enhancement of oversight components** in the mandates of various parliamentary committees.
- **Assist in ensuring that committees are empowered with sufficient research and other resources** to fulfil their oversight role.
- **Encourage constituent participation** in the work of committees.
- **Emphasize the role of socio-economic factors** in determining the conduct of members of the justice and security sectors.
- **Assist in the creation of advocacy-based organizations and institutions** and facilitate transparent links to Parliament.
- **Facilitate dialogue** among the executive, legislature, and civil society regarding improvements to the justice system.
- **Work with Parliament and the justice system in tandem** through joint programming, budgets, steering committees etc.
- **Provide support to parliamentary committees.** Through committees, parliamentarians have the opportunity to organize their work and to focus expertise. A well-developed committee structure is needed if Parliament is to be effective in its oversight of the justice system. Committees are vital as they allow for direct communication between parliamentarians belonging to different political parties.

4.5 Enforcement

4.5.1 Police

4.5.2 Prisons

The first part of the document discusses the importance of maintaining accurate records of all transactions. It emphasizes that every receipt, invoice, and bill should be properly filed and indexed for easy retrieval. This not only helps in tracking expenses but also ensures compliance with tax regulations.

In the second section, the author provides a detailed breakdown of the company's financial performance over the past quarter. Key metrics such as revenue growth, profit margins, and operational costs are analyzed. The data shows a steady increase in sales, which is attributed to the company's expansion into new markets and the introduction of innovative products.

The third section focuses on the company's strategic initiatives for the upcoming year. It outlines the goals for increasing market share, improving customer satisfaction, and optimizing the supply chain. The author also discusses the challenges that may arise and the strategies to overcome them, such as investing in research and development and strengthening partnerships with key suppliers.

Finally, the document concludes with a summary of the overall financial health and a call to action for the management team. It encourages continued focus on innovation and operational excellence to ensure long-term success and growth.

4.5 ENFORCEMENT

The two institutions charged largely with the responsibility of enforcing the law are the police and the prisons system. Without enforcement, legislation promoting access to justice and defending the rights of the disadvantaged will be ineffective. Programmes seeking to work in the area of access to justice of the disadvantaged need to engage with the police and prison system as they are often the most common point of contact disadvantaged groups have with the formal system

At the first stage of enforcement, the role of the police is crucial. From an access to justice point of view, the role and mandate of the police goes beyond the fighting of crime or serving as a security agency. They are also public service providers who have an important responsibility to uphold and defend human rights. Unfortunately, in some countries the police have not been so effective in preventing human rights violations, or have even been accused of abusing their discretionary powers, and infringing on the rights of the people they are supposed to protect.

Prisons are the second key element in enforcement. They are a place in which people are confined and deprived of a range of liberties. The prescribed function of a prison is to enforce judgments under criminal law. Conventionally, prisons are institutions authorized by government, which form part of a country's criminal justice system. The responsibility for the prison service normally falls under the Ministry of Home Affairs, although in some countries this responsibility lies within the Ministry of Justice.

4.5.1 THE POLICE

Role of the Police in Strengthening Access to Justice

The role of the police in access to justice is two-fold:

- Maintenance of law and order
- Enforcement of judicial decisions

These roles grant the police broad discretionary powers, including the use of force, which, if misused, can result in grave human rights violations. The police, in this context, must be defined within a human rights and justice framework, which considers the primary mandate of the police one which respects and protects human dignity and maintains and upholds the human rights of all people.

The right to use force,⁶³ which is central to the role of the police, can lead to human rights violations if there is unnecessary and excessive use of force. Police can also misuse their authority if they

engage in arrest and detention without clear charges, thereby seriously undermining the right of individuals to freedom and liberty.

To guarantee that the discretionary powers of the police do not lead to human rights violations, there is a need to set up elaborate legal structures and accountability measures, which can monitor performance and successfully restrict the abuse of police powers.

A number of human rights instruments define the boundaries within which this power can be used. The instruments relating most directly to police performance are described below:

- **Code of Conduct for Law Enforcement Officials** defines, among other things, the circumstances under which force can be used; the accepted types of force; the principles of confidentiality with respect to sharing information, as well as issues of how to secure the medical health of persons in police custody.
- **Basic Principles on the Use of Force and Firearms by Law Enforcement Officials** defines the circumstances under which force and firearms should be resorted to; the rules guiding the use of force and firearms in terms of exercising restraint, minimizing damage and ensuring medical aid; the role of the Government when abuse of force takes place, as well as reporting and reviewing of procedures relating to cases of injury or death.
- **Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment** defines the circumstances under which detention should be carried out; how persons under detention should be treated and the rights and entitlements of people in detention.

Challenges in Ensuring Access to Justice through the Police

Inappropriate legal frameworks

Most police agencies in the Asia-Pacific region are still guided by past colonial laws and regulations that do not support the principles of human rights, such as accountability, transparency in actions and participation of the people. Some of the laws are in direct conflict with international human rights standards and constitutional guarantees of liberties. Inappropriate and outdated regulations can compromise the effectiveness of the police in serving the needs of the disadvantaged.

Discriminatory practices

Institutional and systemic discrimination by the police prevents many disadvantaged people, especially women, from seeking redress for a

⁶³ To apprehend a felon, for example, or to negotiate a family dispute or engage with someone who is mentally ill.

grievance. Behaviour can range from ridicule, ignorance, and hostility, to sexist and derogatory remarks. The police are often seen as favouring elite members of the community (either because these individuals can exert power over the police or because they can afford to bribe them). As a result, powerful people are often immune from the consequences of crimes they commit, blatantly violating human rights standards.

In insensitive behaviour towards victims of crime

Victims of crime are in a vulnerable situation, and often have to deal with poor service, lack of awareness and insensitivity on the part of police officers. For example, victims of rape need special kinds of services. Police should also be sensitive to the psychological and medical difficulties victims of sexual crimes face and should provide them with the care and support they require. In some cases, enforcement officials do not take rape cases seriously and claim that reports of sexual assault are exaggerated and deserve no special attention. Similar lack of sensitivity may also be displayed when dealing with people with physical or mental disabilities.

Lack of public confidence/faith in the police

Interaction between the police and the community in many Asian countries has traditionally been negative, with antagonism, mistrust and prejudice common to both sides. Many citizens do not feel welcome at police stations and feel discouraged from filing reports. The poor public image of the police is also caused by many instances of privileging the rich and powerful in society, common practices of corruption and bribery and non-registration of cases. Moreover, the police often do not include community perspectives in the planning and execution of their work which leads to further alienation and distrust on the part of the community.

Lack of transparency/access to information

Mechanisms to make policing more transparent and accountable are lacking in all countries in the region. People may generally have difficulties in accessing information about departmental rules, copies of complaints they have filed and data or information on crime, policies and procedures adopted while making arrests and detentions etc.⁶⁴

In sufficient oversight and accountability mechanism

There is often an absence of suitable internal and external oversight mechanisms to monitor the quality of policing. For example, the "tough on crime" strategies adopted by many governments in the region often overlook abuses committed by the police. Also, mechanisms to ensure police accountability may be neglected or even weakened in the name of fighting crime or terrorism.

Influence of external actors is too great

The police force is often closely connected to the executive and consequently subject to various political influences and pressures, which may be detrimental to its proper functioning and performance. This lack of independence from external influences can encourage a culture of impunity within the police force. Unless the police are only accountable to the rule of law and guided by the framework of respect for human rights, their ability to fulfil their duties as defenders of human rights will be seriously compromised.

Excessive arrests

Disadvantaged and powerless sections of society often experience a higher number of haphazard and unlawful arrests by the police resulting in casual detention and victimization. Police in the Asia-Pacific tend to 'over-arrest' which not only leads to over-crowded prisons and pre-trial detainees, but as discussed in the next section on prisons, it is also a violation of human rights.

Poor protection of detainees

The conditions under which detainees are kept in police custody often violate their human rights. Detainees may be chained within offices, kept in police cells for long periods of time or not given adequate medical attendance. Clear regulations protecting detainees and training on respecting the rights of detainees is often lacking.

Poor working ethics and low police morale

Low pay rates and adverse working conditions serve as obstacles to good policing, creating low morale and poor ethics within the police force. This problem is also related to limited career prospects and lack of incentives, as few forces have a sustained and reliable motivation scheme for their members. Police staff often languish in their positions for long periods of time without due credit for good performance. This furthermore deprives the police service of the visionary and talented police officials who are needed to strengthen the quality of service provided.

Poor administration and insufficient training

Shortfalls in supervisory and managerial competence and insufficient human resource management lead to lack of discipline, ineffective management and poor administration. Further, the police are generally under-trained and many critical functions are consequently performed by incompetent personnel.

Lack of resources and mismanagement of funds

Police services are generally severely under-resourced and suffer from lack of basic amenities and tools. Also, poor resource management

capacity within the police force makes it difficult to sustain various reform measures. Moreover, the police have a tendency to focus on protocol, ceremonial and static security tasks at the expense of providing other much needed public services.

Rampant corruption and malpractice

Corruption and malpractice in a variety of shapes and forms exists in most policing agencies. Rampant corruption is linked to the abuse of the wide discretionary power enjoyed by the police, as well as other factors mentioned above.

Inefficient crime prevention and weak investigation

The level of efficiency in crime prevention is low, and there is a critical need for improvements in crime investigation. Further, the police often lack appropriate strategies for engaging communities in crime prevention.

Poor coordination

Lack of coordination among police, prosecution, courts and other relevant agencies is another obstacle for ensuring access to justice. For example, police should be able to refer to the appropriate branch of the judiciary or even refer cases to ADR systems as opposed to the formal courts.

Police Reform and Strengthening the Police Force – Bangladesh

A key lesson learned from the police project in Bangladesh is the need for political will, determination for reform, high-level project management skills and conditional and sustained support from development partners to improve governance, the rule of law and equitable access to justice. It is crucial to detect change agents within the police force and build an internal constituency for reform through formal and informal discussions. Effective and independent monitoring and evaluation of reform progress is also essential. Police procedures should be monitored to ensure that they are poverty-sensitive and pressure from outside (e.g., CSOs) can ensure that procedures are implemented properly and in a sustainable manner. Addressing professional concerns and problems, for example, recruitment, posting, promotion, career management, strategic decision-making, intelligence-based investigation, oversight, future directions and planning, and managing politic interferences, etc., can also help build confidence within the police force and encourage the adoption of human rights in their work.

UNDP Bangladesh

Capacity Development Strategies to Enhance Access to Justice within the Police

Often access to justice problems stem from the fact that police have a responsibility to enforce judicial decisions and maintain security, law and order at the same time as ensuring that human rights are upheld and respected. In order to improve access to justice, strategies for police reform should subsume traditional “public administration reform” activities under more human rights focused activities, specifically with regards to enhancing accountability, inclusion and adherence to human rights standards.

Law reforms

■ **Revise laws, regulations and procedures that do not correspond to principles of good policing, or are directly in conflict with international human rights standards.**

To this end, collaboration with the Ministries of Law or Justice and/or Law Commissions should be encouraged. Depending on the political will for reform in the country, strategies could support coalition building to bring about public pressure for reform, while direct support from the legislative branch and civil society can bring about legal reform that ensures police conduct adheres to international human rights standards. For more specific suggestions, refer to the earlier section in this chapter on Ministry of Justice and National Human Rights Institutions.

Accountability and transparency/access to information

■ **Strengthen processes and procedures.**

Organizational elements for strengthening accountability could include specific departmental policies and procedures, precise job descriptions as well as inspection systems and performance evaluations to ensure that rules are observed and undue and excessive use of power is curtailed including unnecessary ‘locking up’.⁶⁵ Standard operating procedures are important to improve accountability, efficiency, uniformity and transparency. It is also important to adopt processes and procedures on substantive issues such as establishing an anti-corruption strategy and a robust code of conduct.

■ **Internal body for oversight.** Support the establishment of institutions that deal with complaints about police conduct, for example, a professional standards unit. A professional standards unit is an investigative and administrative institution within the Police Department primarily responsible for ensuring

⁶⁵ Penal Reform International and Regional Partners. 2002. “Access to Justice and Penal Reforms. Special focus: Under-Trials, Women and Juveniles.” Second South Asia Regional Conference, Bangladesh 2002, Section 5, Point 10. [http://www.penalreform.org/download/SARO/dhaka_Conference.pdf].

the integrity of the Department by focusing on matters of alleged violations or misconduct by police authorities as well as issues of corruption. Their mandate is to take disciplinary action and identify organizational conditions that may contribute to misconduct or poor efficiency. In addition, a periodic performance evaluation could help in monitoring individual officers, and it could also encourage improvement in services as they would be rated on the types of services they provided.

- **Involvement of Police Commissions and quasi-judicial institutions.** Support could be given to the setting up, or strengthening of, a Police Commission. A Police Commission is an independent agency with the mandate to investigate citizens' complaints about misconduct of municipal police officers. A Commission provides administrative and investigative support services and is empowered to hear and determine appeals against disciplinary penalties or dismissals and to conduct hearings into public complaints. Involvement of quasi-judicial bodies such as women's commissions and human rights commissions could also help in monitoring police conduct with regard to disadvantaged groups. See National Human Right Institutions

Civilian Police Commissions

In Sri Lanka, a National Police Commission has been established where only civilians can be part of the Commission. The Commission, with the Inspector General of Police, has disciplinary control over police officers and controls the appointment, promotion, transfer, and dismissal process. It has the power to investigate public complaints of the police as well as individual cases brought against particular police officers or the police service and provide redress in accordance to the law. The Commission also sets the codes of conduct and standards as well as establishes schemes for recruitment, training, improving efficiency and independence of the police service. The Commission is ultimately accountable to the Parliament to which it has to report on its activities annually.

in this chapter for more information.

- **External oversight mechanisms.** As discussed in the previous section, civil society oversight as well as parliamentary oversight is critical to ensuring the accountability of the police. Initiatives to strengthen interaction between police officers and the community can help to identify officers who are misbehaving, and reward those who are performing well.⁶⁶ In addition, the media can also play a role in

enhancing accountability, and access to non-confidential police information should be increased through the development of a police-media relations strategy.

- **Visiting systems.** Support could be given to independent custody visiting systems that allow volunteers from the community (NGOs, CBOs, etc.) to visit police stations to check on the treatment of detainees and to observe the conditions under which they are held. Similarly, support could be given to NGOs to help with the protection of witnesses in collaboration with the police system. However, these visits should only be conducted by appropriately qualified persons and with due discretion and confidentiality. Additional protection measures need to be put in place for witnesses under witness protection.
- **Access to information.** Maintaining proper records of cases brought before each police station can ensure suspects have access to information about their case, enabling records to be readily available for examination on request. To ensure that confidentiality is respected, ethical principles and control mechanisms should be developed.
- **Investigation of police misconduct.** Efforts to strengthen accountability should also include oversight mechanisms to ensure that any deaths, disappearances, or serious injuries of persons while in police custody (or shortly after the termination of police custody) are thoroughly investigated.⁶⁷ In addition, a system should be developed for the reporting and reviewing of all incidents involving the use of force by police.⁶⁸

Improved human rights/gender sensitive approach

- **Training and sensitization programmes.** To counter discrimination in the police force, the development and implementation of training and sensitization programmes on human rights, especially with regard to the specific needs of disadvantaged groups should be supported (e.g., gender sensitization, awareness of needs of people with disabilities, concerns of people with HIV/AIDS, constraints facing Internally Displaced Persons, etc.). Initiatives in this direction could also include support for curricula/training material development for national police academies and training institutions. UNDP Bangladesh, for example, has developed a detailed human rights training manual for the police.
- **Strengthening the role and numbers of women and minority groups in the police force.** This could be done both by targeted

⁶⁶ Numerous examples exist from around the world of civilian oversight bodies vested with the responsibility to deal with citizens complaints of alleged police misconduct. These include the Civilian Complaint Review Boards of the USA, Independent Complaints Directorate (ICD) of South Africa, the Independent Police Complaints Commission of the UK, and the Peoples' Law Enforcement Board of the Philippines.

⁶⁷ Principle 34, Body of Principles for the Protection of All persons under Any Form of Detention or Imprisonment. (General Assembly Resolution 43/173, 9 December 1988).

⁶⁸ Principles 22-26, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. (Adopted by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990).

recruitment procedures as well as by giving special training to police officers from disadvantaged groups, and by supporting networks of these officers across police stations. To make the police more sensitive towards minority groups, strategies could include advocating for a more diverse police service and supporting the development of strategies to this effect.

- **Enhancing society-police linkages through community policing.** Community policing is a philosophy and an organizational strategy that promotes a partnership between police and the wider community. It is based on the premise that both the police and the community should work together as equal partners to identify and solve problems of crime. Supporting community policing can be an effective strategy to make police services more responsive to community needs and more service oriented. In community policing, it is important to ensure the involvement of women and a diverse representation from the community. It is also important to ensure that checks are in place to prevent abuses of power. Further, there is a need to ensure that community groups do not inappropriately become substitutes for official law enforcement, and that members are properly trained and monitored in their new roles.

Community Policing in India

Community policing is characterized by greater interaction between communities, the police and local governments in formulating and evaluating strategies for crime prevention and reaction. In India, several innovative community-policing efforts have been supported by UNDP. For example, members of some residential colonies conduct joint patrols with the police, facilitating communication and interaction between the two groups. This type of police-community interaction helps not only in combating crime, but also improves relations between the two groups and helps to increase the level of trust in the police.

- **Dialogue and baseline surveys.** Based on the above points, UNDP entry points to improve human rights within the police force could include strategies to encourage dialogue with government and police authorities. Other initiatives could include the development of baseline surveys of citizens' perceptions about policing and the police service. Greater involvement of local governments in formulating crime prevention policies (along with oversight functions) can also improve police services and encourage them to be responsive to the needs of the local community.

- **Model police stations.** Strategies to develop "model police stations" that can function as lead agencies in demonstrating how pro-people policing can benefit the community can be undertaken. In India, such initiatives have included the development of training-of-trainers programmes on good policing directed at potential "change agents", who are then given the responsibility of moving the change agenda forward in their respective police stations.

Enhanced professionalism and service orientation

- **Public administration reform interventions.** Increasing professionalism can result in a stronger adherence to human rights standards. Professionalism within the ranks of the police can be increased through training as well as public administration reform. Regular public administration reform interventions contribute to the performance of the police by strengthening management, IT-systems, financial capacity and strategic planning.
- **Human resources.** To strengthen the management of human resources in the police force, strategies could include support for revision of recruitment processes, modernization of training curricula, development of professional trainers and police instructors, and development of quality training modules and training materials. To improve leadership in the police, extensive leadership training programmes could also be supported. Any strategy directed at improving the performance of the police should ideally be backed by the institutionalization of effective complaint mechanisms to monitor activities and performance of police services.

- **Improving work conditions.** Initiatives directed at improving incentive structures and working conditions for police could also be supported. Pay, work conditions and allowances for police officers need to better reflect the complexities and challenges of their work. Promotion and career prospects for capable officers should also be increased and organization and rank structures should be flattened to more accurately reflect contemporary policing practice. Establishing a separate pay commission for law-enforcing agencies could be an inception strategy in this area. In order to reduce human rights violations and inappropriate working conditions for police staff, it is crucial that police practices are demilitarized – both in terms of organizational structure, function, and the type of training and weapons they are provide with.

■ Strengthening of investigation processes.

To address inadequacies in criminal investigations, there is a need to strengthen investigation processes. Improving criminal investigation can help in fighting impunity in all fields, such as human rights violations, police abuses, corruption and also common crimes. Impunity leads to a lack of confidence in both the police and the judicial system. Strategies could include:

■ **Support for an adequate legal and policy framework**, including respect for human rights in the course of criminal investigations, greatly increased technical and managerial competency and improved equipment and physical facilities.⁶⁹

■ **Examining of intelligence-gathering methods**, which are critical to crime investigations and ensuring that they follow human rights standards.

■ **Coordination between intelligence agencies and the police** and clear demarcation of jurisdiction and authority of the different agencies.

■ **Ensuring access to the police at regional and local levels.** Police services should not just be available in important urban centres but should be made available in remote areas and at the village level as well. Better police force deployment is an important means of ensuring improved access to law enforcement.

Foster political will and commitment for reform

There is no scarcity of information about the problems and the need for police reform, but there is little evidence of substantial action to resolve the issues. A key lesson learned from this is the need for political will, better coordination among different actors of criminal justice system, commitment for reform, sustained support from internal change agents, and high-level project management skills to ensure equitable access to justice and enhanced compliance with human rights instruments. Effective and independent monitoring and evaluation of reform progress is also essential. For example, a programme for police reform can focus on capacity development to enable police to effectively perform their duties. A well-designed and implemented programme based on a larger access to justice and human rights framework can make a meaningful contribution to improving the image, efficiency and effectiveness of the police as a service provider and protector of human rights. It can also act as a means through which states can implement international human rights obligations they have ratified.

4.5.2 PRISONS

The nature of prisons and of prison systems varies from country to country. The UN Standard Minimum Rules for the Treatment of Prisoners (Rule 8) requires segregation of prisoners by sex, age, criminal record, the legal reason for their detention and necessities of their treatment. More specifically, men should be separated from women, untried prisoners should be separated from convicted prisoners, persons imprisoned for debt and other civil prisoners should be separated from persons imprisoned by reason of a criminal offence and young prisoners should have their own facilities.

In the domain of criminal justice, prisons are used to incarcerate convicted criminals, but also to house those charged with, or likely to be charged with an offence. Custodial sentences are sanctions, which are authorized by law for a range of offences. A court may order the incarceration of an individual found guilty of such offences. Individuals may also be committed to prison by a court before being tried in court, generally because the court determines that there is a risk to society or a risk of absconding prior to a trial taking place.

Incarceration is designed to mitigate the likelihood of individuals committing offences: thus prisons are in part about the punishment of individuals who transgress statutory boundaries. Prisons also serve to protect by removing individuals from society, who are likely to pose a threat to others. Prisons can also have a rehabilitative role in seeking to change the nature of individuals in order to reduce the likelihood that they will re-offend upon release.

Prisons and Access to Justice

The concept of imprisonment from a human rights perspective is complex, since by definition, keeping people in prison infringes on one of the most fundamental human rights – the right to liberty.⁷⁰ From a human rights perspective, imprisonment must be guided by the following three principles:

- Any infringement of a person's liberty should only be a last resort and options for non-custodial alternatives should always be exhausted;
- Imprisonment should only be utilized in criminal matters and in strict accordance with international law related to securing prisoners' rights and consistent with the presumption of innocence;
- Defendants should be granted release pending trial and excessive use of pre-trial detention should be avoided.⁷¹

⁶⁹ Principles 22-26, *Basic principles on the Use of Force and Firearms by Law Enforcement Officials*.

(Adopted by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

⁷⁰ UNDP, "Supporting Citizens' Access to Justice", UNDP Mozambique.

⁷¹ UN, *International Covenant on Civil and Political Rights (ICCPR)*, Article 9 (1).

The relationship between the court and the prison system is particularly important, since a strong cooperation between the two institutions is necessary to ensure a well functioning justice system and to guarantee access to justice for prisoners. The fact that the court is responsible for depriving people of their fundamental right to liberty means that it also has an obligation to ensure that the human rights of the imprisoned person are protected during the period of incarceration. The court is also empowered to review the continuance of a prisoner's detention and it can have an important role with respect to the re-entry of prisoners into society. In some countries, the legal framework enables prisoners to petition the Supreme Court when they have a grievance with respect to their imprisonment, giving prisoners an important forum for the enforcement of their rights.

Francies Corale Mullin vs. the Administrator

In India, the right of prisoners' to file a petition with the Supreme Court has led to some landmark judgments. One such judgment is the case of "Francies Corale Mullin vs. the Administrator, Union Territory of Delhi & Others" in which the Supreme Court explained the elements of personal liberty under the Indian Constitution (Act 21). The case arose because the detainee's access to his family was restricted to one visit a month and he was only allowed to meet his lawyer in the presence of an officer of the Customs Department. The Supreme Court ruled that the right to life and liberty included his right to live with human dignity and therefore the detainee was entitled to have interviews with family members, friends and lawyers without such severe restrictions.

Once imprisoned, all persons deprived of their liberty should be treated with humanity and with respect for the inherent dignity of the human person.⁷² The rights of prisoners are protected through various international law instruments. The International Covenant of Civil and Political Rights (ICCPR) prohibits torture and cruel, inhuman, or degrading treatment or punishment, without exception or derogation. ICCPR mandates that, "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." It also requires that, "the reform and social re-adaptation of prisoners" be an "essential aim" of imprisonment. Several international legal instruments specify the rights of prisoners and the duties of the prison administration of which the most important ones are:

- Standard Minimum Rules for Treatment of Prisoners
- Basic Principles for the Treatment of Prisoners
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
- United Nations Standard Minimum Rules for Non-Custodial Measures [The Tokyo Rules]

Despite these legal instruments, violations of prisoners' human rights remain of great concern in all regions and most countries in the world. From an access to justice point of view, this is particularly concerning, since the large majority of prisoners come from disadvantaged groups who, due to imprisonment, are further marginalized and made vulnerable.

Prisons have an important role to play as an institution of the integrated justice system. They act as a mechanism to hold lawbreakers responsible for their actions, thereby protecting citizens against violations of their rights. The actions and duties of prison staff are directly linked to the rights of prisoners, therefore, any prison reform intervention should look at both securing the rights of prisoners and the capacity of prison staff to fulfil their duties.

Challenges in Ensuring Access to Justice within the Prisons System

Outdated prison and penal legislation

Outdated prison and penal legislation govern the administration of prisons in many countries. In Bangladesh, for example, the Penal Code dates back to 1860. Such legislation tends to favour confinement and safe custody through punitive measures, with few alternative mechanisms to imprisonment, such as rehabilitation and social reintegration or parole/probation and community service.

Excessive use of pre-trial detention

Even though the international legal framework prescribes strict criteria for the use of pre-trial detention, the laws of many countries lack the necessary mechanisms for granting pre-trial release. Excessive use of pre-trial detention often leads to detainees being imprisoned for years before having their case processed.⁷³ In some countries, un-sentenced prisoners make up the majority of the prison population.

⁷² This is articulated in Article 9(3) of the ICCPR. Interpreting this provision, the UN Human Rights Committee has ruled that detention before trial should be used only to the extent it is lawful, reasonable and necessary. Necessity is defined narrowly: "to prevent flight, interference with evidence of the recurrence of crime" or "where the person concerned constitutes a clear and serious threat to society which cannot be contained in any other manner."

⁷³ See Human Rights Watch [<http://www.hrw.org/prisons/pretrial.html>] for a discussion on excessive pretrial detention.

Disqualification from provisional liberty

In some countries, large categories of prisoners – such as persons charged with drug crimes or crimes of violence, or repeat offenders – may be disqualified from obtaining relief under the terms of provisional liberty.

Excessive imprisonment for petty crimes

Imprisonment is often used for offenders such as civil debtors, fine defaulters and those who commit petty crimes, who should ideally be dealt with through non-custodial options. As a result, the number of people imprisoned has dramatically increased in recent times.⁷⁴

Violent and discriminatory practices

Violent and/or discriminatory practices in prisons towards certain groups of disadvantaged people such as women, people living with HIV/AIDS (PLWHA), children and juveniles, minority groups, people with disabilities, people with mental illnesses, drug addicts, etc., are a general concern in the region.

The Process of Imprisonment – The Short Story

When an individual has been arrested by police, he or she must be brought promptly before a judicial authority, such as a judge, whose function is to assess whether a legal reason exists for that person's arrest. The period of time between the arrest and the presentation before a magistrate depends on the national legal framework. During this period the defendant may be held in police custody. Once presented before a judge, the judge then determines the necessity of pre-trial detention for the person and the preliminary charge and detention order is issued or the person is released. Depending on the law pertaining to the offence, the defendant may file an application for bail, but if it is not granted, the defendant becomes a remand prisoner and the custody is usually transferred from the police to the prison authorities. According to international standards, remand prisoners are to be kept separate from convicted prisoners. All individuals who are charged with a criminal offence are entitled to be tried within a reasonable time. If the person is found guilty and sentenced to incarceration, he or she then becomes a convicted prisoner and will be transferred to a regular prison. The type of prison usually depends on the type of conviction.

Poor prison administration and lack of professionalism

Poor administration of prison services leads to poor provision of services and entitlements and exacerbates the poor physical and psychological

conditions in many prisons. A contributing factor in this is the inadequate training given to many prison staff. Further, prisons are often ill-equipped, under-resourced and lack the necessary institutional support. Lack of professionalism also stems from low pay, poor entitlements, limited career and capacity development opportunities. These factors lead to demoralization, lack of incentive and low levels of professional pride. In addition, high staff turnover in prisons prevents systems and procedures from functioning smoothly and efficiently.

Lack of accountability and oversight mechanisms

A lack of mechanisms to monitor prison conditions effectively and ensure accountability in respect to human rights is a general phenomenon. Prison administrations are generally reluctant to open up prisons and the situation of prisoners to public scrutiny.

Inadequate access to information

The lack of transparency and accountability is exacerbated by the fact that it is difficult to get access to reliable information on the situation of prisoners, data on the number of pre-trial detainees, the health of prisoners and accurate prison records, etc. Maintaining complete, accurate and regularly updated records is crucial for ensuring respect for human rights of prisoners.⁷⁵

Poor prison conditions

Lack of access to adequate food and drinking water can constitute a human rights violation. Severe overcrowding can lead to low physical standards in terms of floor space, ceiling height, lighting and ventilation. Access to private and hygienic sanitation in the cell and opportunities to use external sanitation is not always available when necessary. Basic health care facilities are generally not available for people with mental illness, people living with HIV/AIDS and pregnant women, leading to deterioration of a prisoner's general health as well as contributing to the spread of tuberculosis, hepatitis and HIV/AIDS. In addition, poor conditions can also lead to criminal offences within prisons and additional violation of human rights. For example, lack of separate facilities for women and juvenile inmates may expose them to sexual abuse and violence.

Insufficient coordination and knowledge sharing

Insufficient coordination and knowledge sharing between justice actors such as the police, courts and prisons can lead to ineffective processing of criminal cases. In some countries, the escort of prisoners to court is the responsibility of the police and when there is a lack of cooperation between the police and the courts and/or the prisons, this

⁷⁴ Penal Reform International and International Centre for Prison Studies. *A New Agenda for Penal Reform - International Penal Reform Conference*. Royal Holloway College, University of London, Surrey, United Kingdom. 12-17 April 1999. [www.penalreform.org/english/models_egham.htm].

⁷⁵ See Principle 12 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (General Assembly Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva 1955, and approved by the Economic and Social Council in resolution 663 (XXIV), 31 July 1957 and 2076 (LXII) of 13 May 1977).

can lead to delays and bottlenecks within the system. Lack of coordination can also increase the risk of unlawful deprivation of liberty, as information about legal status with respect to documents regulating the enforcement of judgments may be inaccessible. In addition, lack of infrastructure, adequate transport and adequate means of communication between the different agencies can also pose as barriers.

Insufficient focus on rehabilitation and social reintegration

It is difficult for inmates to be successfully integrated back into society and get decent work once they have been released. Therefore, there is a need for better preparation for release and training of prisoners to assist them to live as normal a life as possible within their society following their release.

Widespread corruption in the penal system

This can lead to discrimination, impunity, inefficiency and increased human rights violations. For example, living conditions of prisoners are likely to vary according to their ability to bribe prison officials and reform initiatives are less likely to succeed due to resistance from people who are privileged through corrupt practices.

Special consideration for disadvantaged groups

Many of the problems outlined above are exacerbated for disadvantaged groups. Therefore, the protection of these groups needs particular attention in prison reform interventions. See Chapter 6 for further strategies.

Capacity Development Strategies to Enhance Access to Justice within the Prisons

Normative legal framework-penal legislation (also see Chapter 3)

- **Advocate for a revision of provisional liberty laws** since they often do not contain provisions to ensure that persons charged with drug crimes or crimes of violence are eligible for provisional release. Further, they often do not allow judges to grant pre-trial release for non-bailable offences.⁷⁶ Since poor people are generally at a disadvantage even when liberal bail acts are in place, advocacy efforts could also be directed at strengthening or introducing the practice of granting bail on personal recognizance. Reviews of the power and practice of arrest and detention by the police could also be undertaken to address the habit of exaggerated arrests.

- **Review of penal legislation.** The reform of the formal legal framework should also address the revision of penal legislation to ensure enhanced emphasis on rehabilitation and social reintegration.

- **Limit pre-trial detention.** Support should also be provided for legislative reforms to discourage and limit pre-trial detention.

- **Establish clear disciplinary rules and procedures.** Clear disciplinary rules and procedures that apply to convicted persons within the prisons should be established. The lack of clear disciplinary rules (or inappropriate disciplinary rules) could be a source of abuse and human rights violations.

Building coalitions for reforms

- **Reform in the prison system should be seen as part of a larger justice reform agenda** where the cooperation and involvement of other judicial actors such as the police, the court system, paralegal institutions, etc., is extremely important. Moreover, civil society involvement should be addressed. See other sections on Police, Courts, NHRIs, Civil Society Oversight, etc. in this chapter.

- **Engage the media, civil society, government and parliamentarians in building partnerships** to strengthen the reform agenda and support pressure from below. This could include initiating dialogue on how to hold perpetrators of human rights violations in the prison system accountable for their actions (see the section on Civil Society for more information).

Strengthen accountability of the prison system

- **Address corruption in the prison system** by enhancing transparency and accountability, externally as well as internally. Support could be given to the development of an internal complaints mechanism which would give prisoners an opportunity to register their grievances and report on any human rights violations taking place. These mechanisms are mandatory under international human rights instruments.⁷⁷ It is necessary to ensure that these mechanisms ensure anonymity to avoid prisoners being penalized for lodging complaints. External accountability measures could include the introduction of processes by which prisoners can appeal directly to the court. Further, support should be given to the establishment/strengthening of mechanisms

⁷⁶ See Human Rights Watch [<http://www.hrw.org/prisons/pretrial.html>] for a discussion on excessive pretrial detention.

⁷⁷ See Principle 33 of the Body of Principles for the Protection of All persons under Any Form of Detention or Imprisonment and Rule 36 of the Minimum Rules for the Treatment of Prisoners. (General Assembly Resolution 43/173, 9 December 1988)

to ensure that any deaths, disappearances, and serious injuries of persons while in custody (or shortly after the termination of detention or imprisonment) are thoroughly investigated.⁷⁸ Also see the sub-section on Accountability and Integrity in the section on The Court System in this chapter.

- **Ongoing monitoring** by civil society, i.e., community groups, NGOs, para-legal institutions, National Human Rights Institutions and media, is essential for the protection of prisoners from ill-treatment and for the promotion of decent detention conditions. Support should be given to these actors in the development and strengthening of monitoring programmes in prisons. Such monitoring programmes have been developed in India and Cambodia, where NGOs have established visiting schemes for regular consultations with the inmates.⁷⁹

Civilian participation in prison commissions

- **Administrative capacity and the performance of prison officials.**
- **Support for material improvements in prison facilities and conditions.**
- **Support the development of prison regulations according to international standards** as well as the development of job descriptions and a code of conduct for prison staff with clear guidelines for disciplinary proceedings for misconduct etc. Initiatives in this area could also include management training for prison staff.
- **Support the development and implementation of training and sensitization the programmes** in the areas of human rights and gender to counter the widespread discrimination against disadvantage groups in prison. Gender sensitivity and respect for human rights needs to be infused into all aspects of training from training on administrative tasks to the use of force by correctional officers.
- **Support the creation of effective, merit-based and transparent recruitment mechanisms,** and the establishment of career development plans as a means of developing pride in, and loyalty to, the prison service and responsibility for the duties within the system. Also, recruitment of female correctional

officers and those from minority and other disadvantaged groups is also recommended.

- **Support the development of communication and information-sharing mechanisms** between all criminal justice system agencies and stakeholders such as police, prison officials, judiciary, bar association, probation and welfare service, health service, local leaders, defence counsel and directorate of public prosecutions.
- **Strengthen the IT-capacity of prisons** by supporting the development of prison databases in which important court dates and details of sentences can be registered. In relation to this, it is also important to restrict access to the information by developing clear guidelines on who can retrieve confidential information. In cases where IT resources are absent or limited, support should be given to the development of manual record-keeping procedures to ensure that accurate, complete and regularly updated data regarding prisoners is maintained.

Rehabilitation of prisoners and restorative justice

- **Develop prisoners' rehabilitation agencies and livelihood programmes.**⁸⁰ This could be done by supporting coordination activities between health and psycho-social welfare, vocational training and educational departments. The purpose and justification of imprisonment is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure that upon their return to society, the offender is able to lead a law-abiding and self-supporting life.
- **Restorative justice is a systematic response to wrongdoing that emphasizes healing the wounds of victims, offenders and communities** caused or revealed by criminal behaviour. Support could be given to practices and programmes responding to crime through interventions directed at victim-offender reconciliation/mediation, victim assistance, ex-offender assistance, restitution⁸¹, and community service.⁸² Strategies in this area could also support the integration of the principles of "restorative justice" into the curriculum of law schools/academies and other educational institutions. As imprisonment generally has damaging rather than constructive consequences, restorative justice

⁷⁸ See principle 34 of the Body Principles for the Protection of All Persons under Any Form of detention or Imprisonment. (General Assembly Resolution 43/173, 9 December 1988)

⁷⁹ For more see Common Wealth Human Rights Initiative in India [<http://www.humanrightsinitiative.org/programs/qj/prisons/prisons.htm>], and the Cambodian League for the Promotion and Defence of Human Rights [<http://www.licadho.org/programs/monitoringoffice.php>].

⁸⁰ There are good examples of initiatives involving civil society in prisoner rehabilitation initiatives such as the UNDP programme on judicial reforms in the Philippines, which facilitates the reintegration of offenders into the community after their release by allowing people who can relate their own life experience with the inmates to visit the prison. [<http://www.undp.org/dpa/choices/2004/march/philippines.html>].

⁸¹ In its traditional sense, restitution has been defined as a monetary payment by the offender to the victim for harm reasonably resulting from the offence. However, restitution can embody both monetary payments and in-kind services to the victim.

⁸² For more information on restorative justice, see [<http://www.restorativejustice.org>].

mechanisms should be explored and adopted in appropriate instances as a preferred form of criminal justice bearing in mind the right of both victims and community. See also the section on Informal Justice Systems in this chapter.

Advocate for support to non-custodial alternatives

- **Alternative dispute resolution** provides options that may take disputes out of the penal justice arena and thereby can help to limit punitive measures and reduce the number of arrests. Therefore, potential ADR options should be explored and supported. See also the section on Informal Justice Systems in this chapter.

Preventative programmes for HIV/AIDS

Below are some types of interventions that can be applied within the prison context to address issues relating to HIV/AIDS. For more areas of intervention see Chapter 6.

- **Support programmes which sensitize prisoners and prison officials** (both headquarters and prisons) on STD related issues.
- **Initiate HIV/AIDS preventive programmes** with prison headquarters managing and controlling the intervention to ensure efficient monitoring and implementation, high level ownership and long-term sustainability.
- **Advocate with government and prison authorities for better health care facilities**, including proper treatment opportunities.
- **Support civil society organizations working in the area of HIV/AIDS especially networks of PLWHA.**

Legal aid and legal awareness

- **Initiate activities to provide legal aid to prisoners**, as prisoners on remand may be innocent or they may have been held in prison longer than the possible penalty for the offence they are charged with. Legal aid can be

supported through links with bar associations, lawyers associations and legal aid clinics etc. These groups can provide support in submitting bail applications and expediting trial. The Government also needs to fulfil its responsibility and ensure that prisoners who do not have counsel of their own choice (particularly when they cannot afford it) are assigned a counsel to assist them.⁸³

- **Ensure that prisoners are aware of their rights and entitlements.** It is equally important the prisoners themselves are aware of their rights and entitlements vis-à-vis the criminal justice processes and judicial agencies. All prisoners have a fundamental right to be informed.⁸⁴ The development of legal literacy programmes for prisoners should, therefore, be supported. Besides training, this could include the preparation of manuals to be used as guidelines as well as literacy work on the ground by NGOs or paralegal institutions. See the Civil Society Oversight section earlier in this chapter.

Focus programme interventions on disadvantaged groups

It is necessary to recognize that it is often the poor and the most disadvantaged that are found in prisons. Often the more advantaged parts of society will find a way to avoid imprisonment and it is usually people who may not have been able to afford lawyers or those who may not be aware of their rights that are imprisoned. It is not uncommon to find people who may be innocent or those who have not been sentenced to languish in prisons for long periods of time. As a disproportionate number of prisoners are from disadvantaged groups, UNDP needs to engage in reforming the prison system to ensure that it follows international standards that discourage discrimination as well as protects and guarantees the rights of prisoners.

⁸³ See Principle 17 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (General Assembly Resolution 43/173, 9 December 1988) and Rule 43 of the Standard Minimum Rules for the Treatment of Prisoners (Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva 1955, and approved by the Economic and Social Council in resolution 663 (XXIV), 31 July 1957 and 2076 (LXII) of 13 May 1977).

⁸⁴ See Principle 13 of the Body of Principles for the Protection of All Persons under Any Form of Detention (General Assembly Resolution 43/173, 9 December 1988) or Imprisonment and Rule 35 of the Standard Minimum Rules for the Treatment of Prisoners (Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva 1955, and approved by the Economic and Social Council in resolution 663 (XXIV), 31 July 1957 and 2076 (LXII) of 13 May 1977).

CAPACITY TO DEMAND JUSTICE REMEDIES

CHAPTER



- Overview of the Chapter
- 5.1 Legal Empowerment
- 5.2 Legal Awareness
- 5.3 Legal Aid and Counsel

OVERVIEW OF THE CHAPTER

This chapter deals with activities aimed at strengthening people's capacities to seek out and demand justice remedies. Such activities are referred to as "legal empowerment" strategies.¹

Legal empowerment of disadvantaged people is necessary to complement activities under the other two areas of the access to justice service line - normative protection and capacity to provide justice remedies (see Chapter 3 and 4). However, legal empowerment can also have a beneficial impact beyond access to justice. For example, when people have adequate capacities to seek justice, they are better able to hold government officials accountable for the implementation of the law, and to participate in governance processes.

Justice remedies are not always available, yet even when they are available, either formally or informally, people may not always make use of them. This section examines the critical capacities needed to seek a remedy through the justice system, focusing particularly on poor and disadvantaged people. Capacities needed include:

- Legal awareness, including effective access to legal information, and particularly government obligations to provide legal awareness.
- Legal aid and specific strategies to strengthen access to it, including improving legal education while expanding services for the poor, strengthening public defence systems, promoting pro bono lawyering, expanding paralegal activities, supporting alternative lawyering and developmental legal aid and expanding the concept of legal aid to include other necessary forms of financial and psycho-social support.
- Other necessary capacities to seek justice include the ability to overcome external obstacles at institutional and structural levels, as well as factors specific to poor and disadvantaged groups themselves.

¹ For an extensive overview of legal empowerment in development efforts see Golub, S. 2003. "Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative." Carnegie Endowment for International Peace Rule of Law Series 41: October. Legal empowerment is defined as the use of legal services and other related activities to increase disadvantaged populations' control over their lives.

5.1 LEGAL EMPOWERMENT

Legal empowerment² is central to people's ability to seek and demand remedies from the justice system. Different strategies can be adopted to ensure that people, especially those from disadvantaged groups, have the means to demand justice.

Empowering people by strengthening their capacity to demand justice remedies can have a substantial impact on poverty reduction and on overall institutional accountability.

Legal empowerment has the potential to not only reduce poverty and improve the material circumstances of poor and disadvantaged groups, but studies show that legal empowerment also impacts other important development issues. For example, legal empowerment can contribute to the reduction of domestic violence, the successful implementation of land reform programmes, and so on.

Legal empowerment helps to mobilize disadvantaged people's participation in development and decision-making processes. This in turn helps to improve responsiveness and accountability in the system. It is important, however, that access to justice strategies include legal empowerment-related components systematically, particularly when trying to strengthen accountability of institutions.

Key Actors

- Non-governmental organizations, including not only legal NGOs, but also other NGOs involved in development activities
- Community-based organizations
- Law universities
- The media
- Ministries of Justice, especially Departments of Public Defence
- Professional Bar Associations

Challenges to Enhancing Legal Empowerment

Improving people's capacity to seek a remedy

Education and training alone is not sufficient to develop effective capacities to demand justice remedies. Education must go hand-in-hand with other strategies, such as community development, advocacy, mediation and litigation. Education is an important component in legal empowerment and can increase awareness, but it needs to be part of a broader legal empowerment strategy.

Basic Assessment Checklist

- Legal protection of freedom of expression and right to information
- Mechanisms (procedures, policies and institutional capacities) for government dissemination of legal information
- Components present in legal infrastructure that provide for disadvantaged groups
- Quality and reach of professional legal education
- Ongoing development initiatives that could use legal empowerment to strengthen accountability/impact
- Profile of common victims of human rights violations
- Profile of prison population

Integrating legal empowerment strategies

Poor and disadvantaged people's capacity to seek remedies is affected by a number of factors that need to be addressed through an integrated approach. A legal awareness campaign that does not take into account the constraints of the formal legal system, or the difficulty of obtaining an institutional response, or the insecurity in which disadvantaged people live, is likely to have a very limited effect at best. Integration can be strengthened in two ways:

- Linking actors at different levels, from government institutions, non-governmental organizations, universities and communities;
- Building on existing development activities, such as micro-credit schemes, family planning or land reform.

Strengthening community-level capacity

Obstacles at the community level are the most immediate factors preventing people from seeking justice. They are also often the most critical obstacles and the ones most easily addressed by affected groups. For UNDP, decentralization provides an opportunity to engage local government in legal empowerment initiatives. Similarly, coordinating various actors' efforts at national and local levels can result in the greatest impact for community-led initiatives.

Sustaining legal empowerment initiatives

Legal empowerment initiatives are not easily sustainable (especially from an organizational point of view), but they can achieve sustainable impact. Legal empowerment strategies usually require a long-term perspective, but legal services

² The lessons and recommendations in this section are gathered from experiences of UNDP, the Asian Development Bank, the Ford Foundation, the International Council on Human Rights Policy, the Carnegie Endowment for International Peace, and other development agencies.

need continuous support and are difficult to sustain in the absence of funding. However, sustainability is not necessarily critical in all circumstances. Legal empowerment activities can take place in response to specific problems or in the context of ongoing development activities. They can also be oriented toward ensuring accountability in programme implementation, by enhancing people’s capacity to understand and act on their responsibilities under the programme and under relevant regulations and laws. Therefore, sustainability of impact may be achieved even in the absence of organizational sustainability.

The role of non-government actors is critical

Expanding legal infrastructure for disadvantaged people is an urgent need. Governments play a fundamental role in this regard (e.g., through public defence systems). However, non-government organizations, community-based groups and academic institutions also can be highly effective. NGO partnerships and NGO-Government cooperation can also produce significant impact.

Cross-cutting measures are necessary

The complexity of obstacles constraining the capacity of disadvantaged people to seek remedies requires different responses in different areas. Cross-practice development is necessary to ensure a meaningful and comprehensive legal empowerment effort. Further, legal empowerment strategies may impact on a wide range of non-legal development activities, and for this reason should be mainstreamed into ongoing development efforts.

Table 8 summarizes some of the obstacles affecting people’s capacity to seek remedies beyond legal aid and awareness:

Obstacles Affecting Poor and Disadvantaged People’s Capacities to Seek Remedies

Table 8: Obstacles Affecting Poor and Disadvantaged People’s Capacities to Seek Remedies Beyond Legal Aid and Awareness

| EXTERNAL OBSTACLES | | INTERNAL OBSTACLES |
|---|---|--|
| Institutional | Structural | |
| <ul style="list-style-type: none"> ■ Normative/institutional bias and discrimination | <ul style="list-style-type: none"> ■ Growing inequalities, invisibility and disempowerment | <ul style="list-style-type: none"> ■ Isolation |
| <ul style="list-style-type: none"> ■ Inadequacy of formal structures | <ul style="list-style-type: none"> ■ Social discrimination | <ul style="list-style-type: none"> ■ Illegality |
| <ul style="list-style-type: none"> ■ Weak accountability systems | <ul style="list-style-type: none"> ■ Growing insecurity | <ul style="list-style-type: none"> ■ Insecurity |
| <ul style="list-style-type: none"> ■ Technical and financial constraints | <ul style="list-style-type: none"> ■ Culture of impunity | <ul style="list-style-type: none"> ■ Weak organizational capacities |
| | <ul style="list-style-type: none"> ■ Corruption, patronage, nepotism | |

External Obstacles

External obstacles can be found at the institutional level or within the economic, social and political structures in which people and institutions operate. Distinguishing institutional obstacles from structural obstacles is often difficult, as they are closely related. Underlying both may be a lack of political will to address such problems.

Institutional Obstacles

- **Normative/institutional bias and discrimination.** Institutions and legal and policy frameworks may reflect the perspectives of powerful groups and may be inadequate for the specific needs and circumstances of disadvantaged people.
- **Inadequacy of formal structures.** Even when disadvantaged groups may be aware of their rights, they may be unwilling to claim them using formal structures. These structures may often seem alien and intimidating to them, as well as distant, corrupt and costly.
- **Weak accountability systems.** Accountability mechanisms within the justice system are sometimes weak or even on occasions, nonexistent. This lack of accountability may be aggravated by poor coordination among agencies and a culture of corruption, patronage or nepotism.

Structural Obstacles

- **Growing inequalities, invisibility and disempowerment.** Social, political and economic structures at national and international levels may favour the ‘better-off’ and neglect the disadvantaged, resulting in further disempowerment. Inequality reinforces disadvantaged people’s exclusion

from, or invisibility in, government programmes and activities and from the development process. They are often excluded from decision-making processes that impact on their lives, seen as “others,” or only paid lip service in participatory forums.³

- **Social discrimination.** Many people find themselves excluded from access to justice without necessarily being poor. They may be discriminated against for reasons that have more to do with the attitudes and beliefs of those around them – e.g., discrimination against people living with HIV/AIDS, or religious groups. Often, an effect of discrimination is to increase vulnerability to poverty.
- **Growing insecurity.** Since the 1990s, the world has experienced a concerning rise in threats to individual security and safety, such as the spread of HIV/AIDS, environmental hazards, terrorism, violent conflict and other threats to security. These prevent disadvantaged people from taking risks in seeking justice, while further eroding the already insecure contexts in which they live.
- **Culture of impunity.** A prevailing culture of impunity discourages poor and disadvantaged people from seeking justice. Sometimes a single conviction may be more effective than a large-scale training in obtaining attitudinal change within the system.
- **Corruption, patronage, nepotism.** Corruption may occur at any level of governance, justice or legal enforcement. Corruption within the justice system is a powerful impediment to people seeking remedies for grievances and further alienates those who do not have the resources or networks to engage in corruption and benefit from it. Patronage systems are another strong disincentive, as services that should be available to all as a matter of right are converted into “favours” based on kinship, personal networks, indebtedness or political affiliation.

Internal Obstacles

Sometimes the nature of their situation can prevent poor and disadvantaged groups from actively seeking justice, even when they may be aware of their right to do so. Internal obstacles reflect psycho-social factors and may include:

- **Internalization of public prejudice.** This internalization of discrimination towards one’s own community, with the resultant loss of confidence and self-esteem can prevent people from pursuing formal mechanisms.

- **Historical traditions of oppression and exclusion.** This alienates disadvantaged groups from the formal institutions of the State. Such groups may be reluctant to engage with the formal institutions of justice as a consequence of deep, long-established distrust.

- **Physical distance.** The majority of the poor live in rural areas at great distance and remoteness from justice remedies.

Other internal obstacles

- **Illegality.** Sometimes a contradiction exists between the ideal of the rule of law and the reality of poverty. As a result, poor and disadvantaged groups often find themselves in situations of “illegality,” for example, informal labour, immigration, indigenous practices, that alienate them further from the justice system. Illegality also makes them vulnerable to abuses in the context of campaigns to counter criminality and strengthen national security. This can, in turn, aggravate existing social conflicts, as poor and disadvantaged groups in developing countries may have a weak notion of the State and of the nation.

- **Insecurity.** Disadvantaged people often live in situations of high insecurity (physical, psychological, social and economic), in which they cannot afford to take risks or require immediate benefits when they do so. Insecurity also makes them vulnerable to risks resulting from asserting their rights, such as threats, job dismissal, lawsuits or deportation. Similarly, those living within politically oppressive systems or in situations of violent conflict may decide not to claim their rights, simply as a survival strategy.

- **Weak organizational capacities.** Because of historical oppression, disadvantaged groups may lack a culture of self-organization for collective claims. They may also mistrust outsiders and have low expectations of the benefits of participation. Although informal structures of self-organization may exist, these too may also be hampered by discrimination, patronage and nepotism. Lack of networking with other organizations at the local, national and meso-levels can limit organizational effectiveness as well.

- **Technical and financial constraints.** Technical and financial limitations are powerful impediments to seeking access to justice, and often result in denials of justice for those who do not understand or cannot afford long, costly, complex and cumbersome processes of justice.

³ International Council on Human Rights Policy (ICHRP). 2004. “Enhancing Access to Human Rights” Geneva, Switzerland.

Capacity Development Strategies to Facilitate Legal Empowerment

Ensure short-term benefits within long-term strategies

Risks are involved in seeking justice. Due to the insecurity in which disadvantaged people live, their ability to take risks is limited, and they require immediate benefits when they do so. Therefore, strategies aimed at strengthening their capacity to seek remedies also should deliver immediate and useful benefits for the communities concerned. Strategies that depend on taking cases to court, or engaging in processes of legal or institutional reform, are unlikely to attract the attention or the support of very poor communities, unless they are accompanied by actions that bring immediate, tangible results that increase the security of their lives.⁴

Build on collective organization and action

Poor and disadvantaged people may know their rights but remain powerless unless they work together to assert common interests or to protect members of their group. Organization is power, and acting as a group may be critical if they wish to assert their rights effectively and obtain a response from government. Building on community organization and partnership is an effective entry point for legal empowerment, once the group has achieved a certain degree of acceptance and cohesion in the community. Similarly, strengthening national and regional mobilization of government and non-government actors can help in the push for fundamental reforms.

Focus on justice systems preferred by poor and disadvantaged people

The capacity to seek justice remedies can be strengthened by allowing disadvantaged people to use their own preferred system of justice, if feasible. These systems may include those based on traditional or informal mechanisms. Litigation may be considered as a last resort for people distrustful of the justice system. Strategies, therefore, should include a combination of judicial and non-judicial forums (see Informal Justice Systems in Chapter 4).

Expand the role of non-lawyers

Lawyers' and their technical skills are important components of access to justice; however, non-professionals can also play a significant role. For example, the use of paralegals rather than lawyers can often improve cost effectiveness, quality of communication, and accessibility for disadvantaged people.

Allow programme innovation and experimentation

Assessments show there is no standard "best practice" for legal empowerment and that the most effective strategy depends on the specific needs of the group targeted. Therefore, the involvement of target groups in programme design and decision-making is critical for impact and success (see Chapters 1 and 2). Legal empowerment strategies are quite new for many development institutions and should ensure that they allow for experimentation and learning.

Analyze risks and costs involved in claiming rights

Social justice movements can be effective in seeking access to rights and remedies by disadvantaged people. At the same time, such movements can also provoke social turmoil which can result in retaliation by repressive regimes. Similarly, in contexts of patronage, people may not initially understand their needs in terms of rights. If they eventually do so, this can give rise to a reaction by their former "benefactors". Therefore, there is a need to examine the risks and costs of strengthening people's capacity to claim rights. A practical assessment of risks should be undertaken by poor and disadvantaged people themselves.

5.2 LEGAL AWARENESS

Legal awareness is critical to seeking justice. Poor and disadvantaged people often do not make use of laws, rights and government services because they simply do not know about them. This following section deals with strategies to expand legal awareness, and the responsibilities of government in expanding awareness.

Legal awareness is only one element of legal empowerment, but it is an important one. The degree of a person's legal awareness can affect their perception of the law and its relevance to them, as well as influencing their decisions on whether and how to claim their rights. Access to legal counsel and other forms of legal aid can increase an individual's legal awareness and assist them to make informed decisions and choices (see section on Legal Aid later in this chapter).

Lack of legal awareness is a powerful impediment to those seeking access to justice. Those who are subject to grievances cannot seek a remedy unless they are aware that such a remedy exists. For awareness to be present, sufficient information has to reach people in ways they can understand. Governments have an essential role to play in making this information available.

⁴ Garling, M. 2003. "Enhancing Access to Human Rights: Draft Report". International Council on Human Rights Policy.

Strategies to promote legal awareness may be undertaken by both government and non-government actors. In the case of government, ensuring timely access to legal information when it is sought is a fundamental duty of all agencies and departments at all levels (local, regional and national) and in all branches of government (legislative, executive and judicial). However, such a fundamental duty is often not defended at constitutional or legislative levels. In contrast, some institutions have specific mandates to promote awareness on laws and rights, for example, National Human Rights Institutions and electoral commissions, but sometimes these agencies have inadequate capacities to carry out their functions in this regard.

Non-government actors undertake legal awareness activities in different ways. They may establish legal clinics or legal aid centres, or they may conduct awareness raising campaigns at the community level, or through the use of mass media. Although they may be able to provide information targeted explicitly at disadvantaged groups, non-government actors face substantial obstacles such as uncoordinated efforts, dispersion, weak sustainability of initiatives, and limitations on large-scale impacts.

Challenges to Enhancing Legal Awareness

Lack of communications policies and procedures

A lack of sound communication policies and procedures within government agencies can be an obstacle that prevents citizens from understanding their entitlements regarding government services. It also reduces their awareness of new laws and legislation which may be relevant to them, and constrains their ability to monitor the Government's performance. There may also be an absence of normative provisions regarding access to information.

Reluctance to provide information

Governments may be reluctant to assist access to information on issues that they do not consider in the public interest or regard as sensitive information, for example, data on the jail population, HIV/AIDS and so forth.

Lack of outreach of legal awareness campaigns

If legal awareness campaigns stop at the middle level and do not reach down to the grassroots and community levels, they will be unable to reach the entire community especially the most disadvantaged. Awareness programmes should, therefore, be applied consistently, and with sufficient resources so as to reach all levels within the community.

Inadequacy of available information

Even when legal information is available, it may be inaccessible in physical or economic terms. It also may be incomprehensible to poor and disadvantaged people. Geographic distance, poverty and illiteracy pose serious obstacles for disadvantaged groups (see Chapter 6).

Capacity Development Strategies to Facilitate Legal Awareness

Enhance government communication policies, regulations and mechanisms

Developing guidelines for the implementation of legislative or constitutional provisions on access to information offers a valuable opportunity for change. Communication strategies should be responsive to the needs and aspirations of disadvantaged groups. Strategies may include employment of paralegals, production of information in user-friendly formats, proactive dissemination of information to those who face substantial physical or economic barriers to access, and establishment of information desks or kiosks.

Training of government officials

Even when laws and regulations on access to information exist, government officials may not be aware of them or may be reluctant to fully implement them. Training and sensitizing government officials will help to overcome resistance, and can also reveal obstacles officials may have in disseminating information to the public. Effective dissemination of information may require building government capacity to respond to new demands generated for legal awareness.

Adopt a demand-driven orientation

Assessing the specific information needs of people allows for better targeting and greater participation in legal awareness activities. In many cases, people need information on specific laws and regulations affecting them rather than general knowledge of international or constitutional human rights. Mapping legal awareness needs is critical for meaningful impact.

Produce and disseminate information that is accessible for disadvantaged groups

Language, culture and literacy factors require legal information to be tailored to the specific needs of disadvantaged groups. This may involve the use of popular education methodologies and other strategies, such as fliers and posters containing information about rights; school programmes for rights education; radio or television information shows; street theatre and role playing; self-help packages or kits for legal action without a lawyer; legal information kiosks; and website resource centres.

Involve non-lawyers in design and delivery of community education programmes

Good communications skills are often more important than specific legal expertise. The role of a non-lawyer in selecting, interpreting and packaging legal information for disadvantaged people can enhance the communication process if the individual has specialized understanding or experience of the needs of the affected group. Experience indicates that social scientists, community organizers, teachers and others with non-legal specialized skills can substantially contribute to legal dissemination efforts.

Use information and communications technology (ICT)

Strategies using ICT can be useful in assisting individuals with limited literacy, e.g., through the use of graphical and audio interfaces. For an effective strategy, combine ICT with more traditional means of accessing information. Community radio, for example, is particularly useful for reaching rural women, illiterate people, or physically impaired members of the community.

Encouraging community-level information

Explaining to people the importance of accessing information that directly affects their well-being (e.g., how to apply for a license or how to obtain a subsidy) is relatively easy. Communicating the importance of community-level information (e.g., information on the construction of sewers and public toilets, or the installation of water pumps) is much more difficult. It may take several months or perhaps longer, for community members to realize ownership of their communal services and press for their right to information about them. However, taking ownership of these public services is an important step in achieving political self-awareness and demanding accountability from the Government.

Use existing social networks to mobilize community members

Disseminating legal information among poor and disadvantaged groups is a significant challenge, as many are illiterate or politically marginalized. Using existing social networks such as saving groups or other community-based formal and informal networks is an effective entry point for larger community awareness and mobilization, as these groups already enjoy trust and familiarity among the community. Further, many of these groups are often comprised largely of women, which can facilitate women's active participation in legal awareness campaigns.

Lessons Learned from Access to Information Initiatives in India

UNDP's experience in India shows that preparing guidelines on how to implement provisions on access to information offers a valuable opportunity to mobilize change. Training government officials on access to information is also important for increasing understanding, overcoming resistance to new duties, and addressing resource deficiencies. Similarly, public hearings can be an effective means of demanding accountability, although these require a high level of technical preparation, and careful monitoring and conflict management at the actual hearing. UNDP's experience also shows that future access initiatives should adopt a more demand-driven orientation and focus on the information needs of people in order to achieve meaningful impact. Specific needs and obstacles of marginalized groups need to be considered explicitly. Quantitative and qualitative data that enables the targeting and monitoring of access to information initiatives are a critical component for success.

5.3 LEGAL AID AND COUNSEL

Legal awareness can help people understand they have a right to claim remedies against infringements of their rights – such as protection from forced evictions, not to be forced to work without pay, or not to be tortured. Yet, as discussed earlier in this chapter, people do not always know how to reach these remedies, or may require professional help to do so. When seeking remedies through the justice system, legal counsel may assist them in making informed decisions and choices. However, inability to pay for litigation costs, or to communicate effectively, or the risk of traumatic consequences are all critical concerns when navigating the legal process. Legal aid relates to all necessary capacities in this regard, including not only legal counsel, but also financial options and various forms of psycho-social support.

Challenges to Accessing Legal Aid and Counsel

Access is physically difficult

Legal aid services are usually concentrated in downtown/urban areas and are not easily accessible to those in suburban/rural areas (also see section on the Rural and Urban Poor in Chapter 6).

Lack of case-specific support

Pre-trial counselling and appropriate advice to avoid unnecessary processes are often lacking. Legal counsel also may be denied in the process of detention, often with impunity (see Chapter 4).

Strict eligibility criteria

Those who need legal aid services can find themselves denied support if they do not meet the court's criteria. Therefore, it is important that criteria are carefully established. Scarcity of resources requires applying certain restrictions for access.⁶ The specific combination and nature of the criteria used for eligibility can have a major impact on the communities and groups affected.

Unaffordable legal counsel

Alternatives to free, state-provided legal counsel are usually beyond reach of poor and disadvantaged people. The quality of legal assistance has traditionally been related to the payment of lawyers' fees, and legal fees increase with delays in justice.

Insufficient funding for legal aid services

Long-term, sustained, and permanent state funding for essential legal services for disadvantaged groups is necessary. While civil society organizations can provide additional legal aid services and can target specific disadvantaged groups, the State should be responsible for providing basic legal aid services to those who need it but cannot afford it.

Provision of legal aid services is obligatory only for criminal cases

Legal aid services take a specific rather than general approach, aiming to protect certain rights only. Under international law, free legal counsel is required only for criminal cases. The reality for poor and disadvantaged groups however, is that to access their rights, they require legal counsel to be expanded to other areas as well, from civil and commercial matters to administrative and labour relations. Many countries have expanded the scope of free legal counsel by constitutional law (see Chapter 3).

Complexity of the legal system and legal counsel is intimidating

The type of legal information and advice sought by most people is usually not complicated. Sometimes, however, legal practitioners overuse technical phrases and jargon making the justice system appear unnecessarily complex. This can be problematic for groups who do not understand the official language of the justice system. Clients may be reluctant to seek legal counsel for fear that lawyers will not understand them, or will not provide explanations in ways they can understand, or will even blame them for their situation.

Limited legal aid services

Legal aid should provide not only financial support but also other forms of support to navigate the legal process. Other support may include gaining exemptions for clients from legal and court fees, subsidies for bail, or provision of refuge and psycho-social support, such as in domestic violence cases. Such components of legal aid systems are often weaker than legal counsel services, placing an unnecessary burden on individual legal support providers.

Capacity Development Strategies to Enhance Legal Aid and Counsel

Capacity development strategies to address the obstacles described above can be classified into six groups:

- Improving professional education while expanding services for the poor
- Strengthening public defence systems
- Promoting pro bono lawyering
- Expanding paralegal activities
- Supporting alternative lawyering and developmental legal aid
- Enhancing professional bar associations
- Other legal aid components: financial and psycho-social support

For additional capacity development strategies within the formal and informal justice institutions see Chapter 4. For specific strategies relating to particular disadvantaged groups see Chapter 6.

Improving professional education while expanding services for the poor

Professional legal education may affect access to justice by poor and disadvantaged groups in a number of ways:

- **Quality of lawyers.** In many countries, formal legal education does not sufficiently address the type of legal knowledge and skills that disadvantaged clients require from lawyers, such as knowing how to deal with discrimination, human rights and poverty-related cases. Lawyers also may not have adequate practical skills to gain trust and understanding from clients.

⁶ There are generally three types of criteria that can be applied to provide free legal counsel: (i) the means test – free services are provided to individuals whose income falls below a certain level; ii) substantive restrictions – free legal assistance is available only for certain types of criminal and civil cases, and iii) budgetary restrictions – when demand goes beyond what the public budget can support, the Government establishes restrictive eligibility criteria, such as not granting legal aid to women in divorce cases when there are no children involved. Legal aid schemes may have a combination of all three types of criteria.

⁷ McCutcheon, A. 2000. "University Legal Aid Clinics: A Growing International Presence With Manifold Benefits." *Many Roads to Justice: The Law-Related Work of Ford Foundation Grantees around the World*. The Ford Foundation.

■ **Access to the legal profession.** Scarcity of education and law scholarships for disadvantaged people limit their access to the legal profession. Compulsory periods of apprenticeships for law graduates can improve the quality of lawyers; however, hiring for apprenticeships in some countries is subject to patronage, social privilege, and other forms of discrimination,⁷ blocking access by poor and disadvantaged groups to professional opportunities.

Improved legal education can have an impact on access to justice if it is translated into more and better services to those who cannot otherwise reach them. Strategies to simultaneously achieve both qualitative improvements in the legal profession and expanded services to the poor may include:

■ **Street and university law clinics.** Law clinics are university-based or affiliated centres, where law graduates receive a combination of classroom and lecture components with practical exercises and actual client service. Not all clinics seek to serve poor and disadvantaged groups; however, some target such groups explicitly. Clinics of this type have compelling potential to impact on access to justice, as not only do they provide free legal services to those who most need them, but they also encourage future work in pro bono and public interest lawyering. Further, they often generate broader social impact through policy advocacy and cooperation with NGOs.⁸

■ **Community services for law graduates and retired professionals.** Community service may be a means to obtain the necessary experience to enter the legal profession, to develop specific skills, or to continue working for access to justice after official retirement. For example, community service can be performed in local government, public defence systems, NGOs, neighbourhood committees, trade unions, human rights institutions and so forth. Support for community service may not only improve the legal profession and facilitate access to it, but also provide poor and disadvantaged groups with the experienced advice of senior and committed professionals. Incentives to community service, such as sufficient budget to conduct activities, fee deductions, training opportunities, learning credits and other merits, are necessary components of strategies in this field. Partnerships with universities and professional associations may help governments to expand legal services for poor and disadvantaged people.

■ **Legal research.** Research can foster access to justice by identifying issues in need of reform, uncovering injustices and providing concrete proposals for improvement. It also can contribute to drafting of legislation or reform of judicial proceedings. Legal research can provide a factual basis for litigation in specific cases. However, research does not always yield immediate results; its impact is often long-term and indirect, and it may depend on factors such as the existence of ‘champions’ at the highest levels, or mechanisms for continuous advocacy and technical support.⁹

Lessons and recommendations for improving professional education while expanding services for the poor

■ **Integrate legal aid programmes into law schools.** This can help to develop future legal professionals with a strong sensitivity to public interest and social justice and increase the availability of services for the poor.

■ **Education should be sensitive to social issues and students should be exposed to community realities.** Clinical legal education that includes topics related to discrimination, diversity and human rights can be better guided toward social justice goals. A community presence should be pursued to assist client access, while exposing students to a better understanding of the context of the problems.

■ **Maximize outreach and impact of law clinics by cooperating with community-based organizations and NGOs.** Some university clinics have increased their impact by concentrating on specific legal issues or population groups. Other clinics seek broad impact through class-action suits. Both non-governmental organizations and community based organizations can provide legal clinics with adequate knowledge on the challenges faced by poor and disadvantaged clients, as well as encourage the use of clinics among community members.

■ **Develop strategies for sustainability.** Law clinics can improve sustainability by tapping the resources and talents of the university, placing clinic instructors at the level of the law faculty, and developing a second tier of leadership for the clinic at early stages.

■ **Combine legal research with other strategies.** Legal research may have a minimal impact as a stand-alone strategy, but it can be a powerful tool for social change when combined with advocacy, litigation and other strategies.

⁸ For a detailed overview of university law clinics’ potential and strategic recommendations, see McCutcheon.

⁹ The potential of legal research is illustrated by a UNDP Philippines-supported study on gender bias in the court system, whose findings and recommendations formed the basis for the establishment by the Philippine Supreme Court of a Programme of Action to mainstream gender in the judiciary.

Strengthening the Legal Aid System in the People's Republic of China

In 1999, UNDP started cooperating with the Chinese Government to strengthen the legal aid system through a multi-pronged strategy that included professional training, public awareness raising, legislation and rule-making, and institutional development. In early 2001, only 21 per cent of counties had legal aid centres, with about 500 trained legal aid practitioners. By the end of June 2003, more than 80 per cent of counties had established legal aid offices. UNDP's assistance further contributed to the enactment of local regulations on legal aid services; the Government built on these regulations to establish national rules on legal aid.

Strengthening public defence systems

Public defence systems result from the State obligation to ensure legal assistance for those who cannot afford a lawyer. In developing countries, public systems often suffer from insufficient budget allocation, insufficient staff, high case loads and weak coordination with non-state-funded legal aid providers (pro bono attorneys, paralegals, university legal clinics), in a context of increased demand for services.

State-funded legal aid programmes may adopt a variety of models (see Table 9 for an overview of the different systems):

- **Salaried public defenders.** Public defenders are full-time state employees, usually under a Public Attorney's Office situated under the Department of Justice.
- **State-funded private lawyers (judicare system).** The State funds the private sector to provide services to individuals. Private attorneys apply to be placed with indigent defendants for a fixed fee. This system may be managed by the Department of Justice or directly by the courts.
- **Contracting.** The State subcontracts the provision of mass casework to a private law firm.
- **Mixed systems.** Mixed systems combine two or more of the above components. For example, they can consist of a combination of full-time state employees supervising and referring some cases (e.g., non-criminal matters) to private attorneys contracted to represent individual defendants.

Lesson and recommendations for strengthening public defence systems:

- **Develop adequate skills and competencies to meet needs of poor and disadvantaged groups.** Particularly focus on areas such as criminal, family and administrative law. Training in paralegal skills and alternative dispute resolution mechanisms should be strengthened.
- **Establish mechanisms for client feedback and improve communications strategies.** The creation of "report card" systems can help monitor the performance of public defence systems from the perspective of the clients. In addition, improving information on how to access legal services and the type of alternatives available can help increase efficiency in the system.
- **Decentralize services.** In countries undertaking decentralization processes, devolving direct legal service functions to local government may increase accessibility of services while allowing the national central offices to better plan, coordinate and monitor.
- **Establish low- or reduced-fee systems.** For those who cannot be considered "indigent" but who cannot otherwise afford to pay for private legal services.
- **Review compensation packages and strengthen performance-based systems.** Good compensation packages can facilitate recruitment and retention of quality lawyers; compensation packages should be coupled with performance-based systems. Adequate compensation packages may require granting higher degrees of fiscal autonomy so public defence systems are able to raise funds and accept donations.
- **Strengthen public-private partnerships.** Public defence systems can partner with private entities (law clinics, alternative law groups) in order to address the needs of disadvantaged people in particular areas.
- **Coordinate through intermediary bodies.** Setting up intermediary bodies between government and service providers can help manage legal aid systems in some contexts. These bodies can be called "legal services commissions," "legal aid boards," or be quasi-autonomous non-government organizations. They help to separate the Government from the defendants and the practitioners, and they provide a professional base for developing the provision of services.

Table 9: Advantages and Limitations of Public Defence Systems

| | ADVANTAGES | LIMITATIONS |
|---------------------------|---|---|
| SALARIED PUBLIC DEFENDERS | <ul style="list-style-type: none"> ■ Potential for better-quality service due to higher commitment/orientation to public service; and for specialization in areas of concern to poor and disadvantaged groups (e.g., criminal law) ■ Good potential for quality control ■ Possibility for training and professional development ■ Greater likelihood of keeping statistics and ensuring accountability ■ Greater ease in planning future budgets and tracking expenses | <ul style="list-style-type: none"> ■ Characterized by case overload, insufficient presence (especially in rural areas), and bureaucracy ■ Competition with private sector, combined with low pay, may cause high staff turnover ■ Traditionally limited to criminal matters – may lack capacities to deal with other areas (e.g., family law, administrative law), or alternative dispute resolution mechanisms ■ Guarantees for independence from prosecutors and courts are needed ■ Difficult to gain confidence of the client who may think that the court, prosecutor and public defender are connected |
| JUDICARE | <ul style="list-style-type: none"> ■ Access to skilled, experienced private attorneys ■ Possibility for allowing greater choice by the defendant | <ul style="list-style-type: none"> ■ Difficulty of matching available legal skills with nature of cases ■ Potential to be very costly – competition with private sector ■ Difficulty in ensuring quality of services; does not allow for community feedback |
| CONTRACTING | <ul style="list-style-type: none"> ■ Low administrative and operational burden for the State ■ Some influence on quality of legal services and accountability (non-renewal of contracts), although evaluations show monitoring is often poor ■ Flexibility of advance planning for future budgets and expenses | <ul style="list-style-type: none"> ■ Conflict of interests - risk of not pursuing vigorous client representation in some cases (e.g., administrative complaints) because of dependence on government contracts ■ Instability – difficult to find qualified attorneys to bid, as prices get increasingly higher |
| MIXED SYSTEMS | <ul style="list-style-type: none"> ■ Efficiency of a centrally managed system ■ Leverage of existing resources within private bar ■ Capacity for statistical analysis, transparency and budgetary planning ■ Possibility for training and quality control | <ul style="list-style-type: none"> ■ Mixed systems are recent experiences and innovations seem promising but are yet to be evaluated |

Promoting pro bono lawyering

Pro bono lawyering defines the provision of free legal services by private practitioners to clients who could not otherwise afford them. It is a key source of legal assistance for disadvantaged people in the absence of an adequately funded public defence system.

Clients of pro bono services may include individuals, groups and community organizations. Legal services may range from legal assistance and representation in courts to alternative dispute resolution mechanisms and community legal education.

Access to pro bono services by disadvantaged people may be limited by a series of factors:

- **Urban-rural divide.** Pro-bono work is usually concentrated in urban areas, and it is less affordable for small law firms typical of rural communities. Access to transportation, especially for the poor, is also an important issue.
- **Inadequacy of supply.** A mismatch exists between client needs on the one hand, and the supply (and accessibility) of pro bono legal services, on the other. Available pro bono expertise may be inadequate for many legal needs of poor and disadvantaged people, such as

criminal and family law, personal injury, or migration. Pro bono programmes also face difficulties in finding attorneys with similar language or cultural backgrounds to those of most disadvantaged clients.

- **Conflict of interests.** Firms' willingness to undertake matters in administrative law, an area where disadvantaged clients have significant needs and many firms do have expertise, can be diminished due to perceived "commercial conflicts of interest." For example, firms may worry there will be repercussions in securing government legal work in the future.
- **Weak monitoring systems.** The difficulty of monitoring pro bono work, to ensure it is provided to those who most need it, makes it vulnerable to inefficiency and abuse.

Lessons and recommendations to promote pro bono lawyering

- **Pro bono practice is not a substitute for state responsibility to provide legal aid.** Although it is a key source of assistance for the poor and disadvantaged, pro bono practice cannot and should not be a substitute for publicly funded services. It is essential to distinguish lawyers' professional/ethical obligation to do pro bono work from the Government's responsibility to provide adequate legal aid. However, given the high level of unmet legal need of poor and disadvantaged people, pro bono lawyering can be a key source of legal assistance in the absence of an adequately funded legal aid system.
- **Pro bono lawyering can be established by mandatory, voluntary and mixed systems.** Pro bono systems can be mandatory or voluntary, or a combination. Compulsory systems point to the wide gap between professional rhetoric and actual practice; they propose strategies such as mandatory internship programmes, a minimum number of pro bono cases per year to allow professional practice, and so forth. Critics of compulsory approaches believe that the cooperation of lawyers is key to the success and quality of pro bono work. Their suggestion is to ensure greater encouragement by professional bodies and to establish systems to facilitate referrals, matching client needs with adequate expertise. Mixed systems include both compulsory and voluntary approaches.
- **Responding to client needs requires systems that link skill and demand.** Design and provision of pro bono services should be driven by client needs, not by what lawyers can offer. Mapping client needs is necessary to

determine whether and where legal resources are available, and to recruit and/or equip lawyers with the necessary expertise and backup support. Systems that combine the available skills of pro bono lawyers with the demand for pro bono services are also necessary. For instance, the establishment of "clearing houses" and other systems at national, regional and local levels may facilitate adequate referrals, although flexibility should be allowed as this may otherwise result in unnecessary bureaucratic delays.

- **Ensure quality and ethical standards in the provision of services.** Pro bono clients should expect, and receive, the same high quality of service as all other clients – pro bono services should not be considered as "second-rate justice," or the exclusive domain of young lawyers. Professional associations need to clarify the ethical framework for pro bono legal work. Common problems that may inhibit or compromise the delivery of pro bono services, such as conflicts of interest, also need specific treatment.
- **Involvement of the judiciary is key to strengthening pro bono lawyering.** Involvement of the courts/judiciary is key to promoting and facilitating pro bono lawyering. Strategies may include:
 - Facilitating case handling to pro bono lawyers, for example, through court rules granting waivers of the filing and other court fees, accommodating pro bono cases first on the docket, and so forth;
 - Outreach activities, such as encouragement by the Supreme Court, training seminars for pro bono lawyers and awarding merits.
- **Governments play an essential role in ensuring quality and effectiveness in the system.** Governments can promote pro bono services by:
 - Assisting the judiciary in removing barriers such as court fees and translators;
 - Promoting a pro bono culture among professionals;
 - Improving outreach services and community education;
 - Providing tools and training to willing lawyers;
 - Providing "matchmaking" opportunities to enable skills and resources to be sent from wherever they are located to wherever they are most needed;

- Developing standards for professional practice;
- Facilitating partnership opportunities across different parts of the legal profession, as well as between lawyers and other professional groups (doctors etc.) and community organizations;
- Adequately regulating compulsory, voluntary or mixed systems.
- **Better sharing of information and closer ties with communities and community organizations.** This can improve the effectiveness of pro bono services and provide opportunities for joint advocacy through, for example, exemptions of court fees.
- **Inter-professional cooperation and tapping the expertise of paralegals can strengthen the quality of pro bono work.** By working with paralegals and other professionals such as doctors, accountants, engineers, etc., clients, especially those from disadvantaged groups, can be provided with all the different types of services they require.
- **Monitoring and accountability are needed in pro bono systems.** A common problem in the provision of pro bono work is the difficulty and cost of monitoring, even in the case of mandatory systems. When pro bono work is voluntary, effective rules or social or economic incentives are needed to ensure compliance. Transparent information and reporting to professional bodies is an option.

Expanding Paralegal Activities

Although lawyers' skills are fundamental to the process of formal justice (e.g., representation in court proceedings), they are not always adequate to deal with the everyday needs of poor or disadvantaged people. Disadvantaged groups frequently require advice and assistance that will avoid the need for cases to be tried, including alternative dispute resolution mechanisms and other informal settlements. They also may require advice on whether and where to reach a lawyer (see Chapter 4: Informal Justice Systems).

Such activities can be undertaken by paralegals. Paralegals are persons with specialized training who provide legal assistance to disadvantaged groups, and who often are members of these groups.¹⁰ The use of paralegals has been increasing in many areas of legal practice. Paralegals work together with public defenders, private lawyers or alternative law groups, and with government agencies, community-based organizations, NGOs

and other entities. When paralegals are themselves members of the community or groups whom they serve, they are more familiar with local concerns and able to enjoy the trust of the community.

The argument for expanding the role of paralegals in the provision of legal services is threefold – accessibility, quality of communication, and financial and non-financial costs. The majority of lawyers are inaccessible financially, culturally and geographically to a large number of disadvantaged people. Fortunately, many of the community's needs can be met by paralegals based in the communities themselves, at a much lower cost than professional lawyers. Quality of services may also be higher due to a deeper understanding of community problems, as well as adequate communication skills.

- **Supporting paralegals can widen access to legal education and the legal profession.** When paralegals are members of the community, it is easier for them to develop skills for creative mobilization of the community around issues that it considers important. They can also develop communication and advocacy skills to generate support for the community's effort.

Other capacity development strategies may include:

- **Using Group Legal Services (GLS).** As a form of cooperative movement to serve the interests of particular groups, such as trade unions, credit unions, community housing cooperatives, ethnic groups, neighbourhoods.
- **Involving paralegals in the activities of NGOs, local government, and human rights institutions** to strengthen outreach to disadvantaged groups in an adequate and cost-effective manner.
- **Including paralegal components in development activities.** In order to increase accountability and impact.

Lessons and recommendations to enhance paralegal activities

- **Specificity of training and organization.** Although knowledge of constitutional or international human rights law may be useful for some purposes, paralegals make more use of laws affecting them directly (such as land reform laws). Paralegals should be involved in ongoing development rather than single trainings; being in contact with NGOs, lawyers and law universities can enhance capacity development.

¹⁰ Golub, Stephen 2000. "Nonlawyers as Legal Resources for Their Communities" in *Many Roads to Justice: The Law Related Work of Ford Foundation Grantees Around the World*. McClymont, Mary and Stephen Golub, eds. February 2000. Ford Foundation, USA. [http://www.fordfound.org/publications/recent_articles/docs/manyroads.pdf]

- **Involve lawyers and all concerned stakeholders in the establishment of paralegal programmes.** Although private lawyers employ paralegals in many instances, they can also resist supporting paralegal work. Lawyers may perceive expansion of paralegal services as a threat to their income, or to the quality of legal advice unless they are involved and sensitized on the benefits of paralegals for access to justice. Wherever lawyers are sufficiently available and unemployed in the labour market, training and involving them in paralegal work may be another choice. Paralegals, on the other hand, will always need to have links with lawyers, as it is necessary to receive advice and opinions about legal options.
- **Paralegal activities should be combined with widespread legal awareness, community organizing, and development efforts.** The impact of paralegals' activities can be maximized when they respond to issues prioritized by the community (for example, landlord-tenant disputes, children's well-being), and are complemented by community organizing and livelihood activities.

Supporting alternative lawyering and developmental legal aid

Legal aid is usually divided into two types, "traditional" legal aid and so-called "alternative" lawyering. Whereas traditional legal aid seeks to assist people in the process of reaching a justice remedy; alternative lawyering, or developmental legal aid, tries to demystify the law by bringing it closer to people, and to empower disadvantaged groups to use justice remedies in defending their interests.

Alternative or developmental lawyering seeks to enable people to understand the rules they are told to respect, to abide by them when they seek to defend their fundamental rights, to participate in their modification if they exclude or threaten them, and to draft or participate in the drafting of these rules if they do not exist.¹¹ As alternative lawyering is fundamentally empowering, it may be particularly appropriate in the context of poverty reduction efforts.

Alternative law groups usually concentrate their efforts on three main areas:

- Human rights
- Sectoral assistance to specific disadvantaged groups
- Public interest or "social justice" issues

Alternative or developmental legal aid activities may include:

- Legal literacy or alternative legal education
- Paralegal formation
- Litigation support
- Policy work
- Research and publications
- Lobbying and advocacy
- Networking and coalition building
- Internships for law students

Lessons and recommendations for facilitating alternative/developmental lawyering

- **Alternative or developmental lawyering is helpful for poverty reduction because of its fundamentally empowering approach.** Not only does it help people to reach a justice remedy, but it also helps them to use justice remedies to achieve wider social justice goals. Developmental lawyering seeks to strengthen people's legal self-reliance (e.g., through building the capacity of community paralegals), in order to lessen their dependence on lawyers.
- **Alternative lawyering may be more appropriate to the needs and aspirations of poor and disadvantaged groups.** When it uses a combination of legal and meta-legal strategies, alternative lawyering may be more useful than more "formal" approaches.
- **Alternative lawyering can achieve wider social impacts by fostering legislative and policy reforms.**
- **Alternative law groups work best when they are linked to community-based or sectoral organizations.**

Enhancing professional bar associations

A professional bar association is a voluntary organization of lawyers admitted to the bar of a given country. It is devoted to improving the administration of justice, seeking uniformity of law, and maintaining high standards for the legal profession. It is often composed of different committees that deal with diverse legal topics such as the election law, legal education, legal aid for the indigent, maritime law, professional ethics, and the judicial system. Bar associations can be instrumental in promoting legal reform, justice and the rule of law; securing an independent legal profession with high standards, and safeguarding lawyers' interests and rights.

Professional bar associations can work to improve human rights and access to justice for poor and disadvantaged groups in society in the following ways:

¹¹ Agir le Droit. "View Law as Practiced by the People." [Retrieved from <http://www.agirledroit.org/en/droitsenmain.php>].

- **Increased awareness amongst practicing lawyers and authorities of obstacles to access to justice for poor.** Bar associations can increase awareness amongst their members of social issues and of the impact of lack of access to rights and justice on disadvantaged groups. They can also increase understanding of how laws, law practices and regulations contribute to preserving these existing inequalities. Bar associations can advocate for the removal of obstacles to rights and entitlements of vulnerable groups (e.g., through a designated work group/committee), and mobilize lawyers and authorities to improve the situation. Encouraging members to take up community services after retirement, advocating for the removal of court fees and working to improve information about court cases in relevant languages, are some of many activities that could be undertaken by bar associations.
- **Fee-limitations and oversight.** Members can report lawyers who commit malpractice, thereby helping to ensure that ethical norms and professional standards in the profession remain high. Bar associations issue a code of conduct to which their members must adhere to and can discipline members if they do not. For instance they monitor the fees set by members, and adjudicate over allegations of improper fee setting and charges. Expulsion from the bar association due to misconduct can seriously tarnish a lawyer's professional reputation.
- **Provide incentive systems that promote pro bono lawyering.** Bar associations can provide incentives to encourage pro bono lawyering, such as prizes or awards to the institution, lawyer or firm that has made an important contribution in this regard in the course of the year. Bar associations can also emphasize the 'duty' of individual lawyers and firms to contribute to the public interest.
- **Draw attention to laws that disadvantage vulnerable groups.** Bar associations are often considered an important partner and resource by authorities, law-making bodies and educational institutions and are often consulted and invited to hearings about legal reform. Bar associations can also lobby parliamentarians and other politicians to make them aware of

weaknesses in proposed laws and the judicial system, hence pushing for legal reform.

Lessons and recommendations for enhancing professional bar associations

In countries with weak judiciaries, bar associations often need support. In particular, it is necessary to ensure that they are engaged in issues of access to justice and realize their wider responsibilities to the community as well as to the members of their association. Involving bar associations in reform efforts is crucial for the sustainability of reform and for strengthening democratic institutional development efforts. If given a chance to work to eradicate inequalities and enhance access to justice for poor and vulnerable groups, professional bar associations will often rise to the occasion, but it requires an enabling environment. An enabling environment can be created through the following:

- **Capacity-building of bar associations.** Facilitate exchanges between bar associations from different countries in order to further legal reform and enhance the quality of legal representation.
- **Increased understanding of authorities of the role of bar associations.** It is important to work with authorities to increase their awareness of the important role that professional bar associations can play in promoting legal reform and in overseeing professional standards and ethics amongst legal professionals. Bar associations can also play an important role by keeping lawyers informed about new laws and regulations, for example, through meetings, debates/information on websites, and by regularly publishing and distributing journals to members.

Bar associations provide a permanent platform for advocacy and the promotion of legal reform and should not be overlooked as potential 'agents for change':

- **Sustainability.** Bar associations have the potential to become an important resource and channel for access to justice and reform efforts. Their members include most legal practitioners in a given country. Such wide membership gives them an authority which enhances their chances of successfully lobbying decision-makers.
- **A partner for rights-based legal education.** As an interest-organization, bar associations contribute to the shaping of the conditions in

which their members practice, and can also influence the development of the system in which they learn. One important way bar associations can use their influence in the legal education system is by encouraging the inclusion of access to justice issues and rights-based approaches throughout the legal curriculum. They can also provide support in terms of access to education by assisting poor and disadvantaged groups through scholarships and laws.

Partnering with Bar Associations

A useful and potential partner for UNDP country offices is the International Legal Resource Centre which was formed by the UNDP Legal Resource Centre and the American Bar Association in 1999, "...to support and promote good governance and the rule of law around the world..." It does this largely by assisting UNDP Country Offices to identify suitable legal expertise to undertake various projects in this field.

The International Bar Association (IBA) is a potential partner for reform activities and projects. The IBA is a global law organization for individual legal professionals, bar associations and law societies, and seeks to provide a unique platform for professional development and legal education, networking, and strategy for world law. The IBA's Human Rights Institute works across the Association, helping to promote, protect and enforce human rights under a just rule of law, and to preserve the independence of the judiciary and the legal profession worldwide.

Other legal aid components: financial and psycho-social support

Legal counsel is essential to strengthen people's capacity to navigate the justice system. However, the situation of poor and disadvantaged people may make legal counsel insufficient in the absence of financial and psycho-social support. Physical security may also be fundamental (e.g., through witness protection programmes).

Although financial support and psycho-social support during the legal process are elements of legal aid that do not derive directly from international obligations, they can be critical factors for seeking remedies through the justice system.

- **Costs of litigation.** Legal counsel may be insufficient when poor and disadvantaged clients are compelled to pay for a range of litigation costs, including bail, transcript and filing fees, service notices and pleadings. Together with these costs, other costs include transportation and loss of income for

attending the court as witnesses. Most legal aid systems include provisions exempting indigent litigants from paying some of these costs (e.g., filing fees) when assisted by public defenders. Such exemptions may not apply, however, to pro bono cases and usually do not cover important expenses such as court transcripts and expert witnesses.

- **Psycho-social support.** People with physical disabilities may be unable to communicate through the legal process, while persons with a mental disability may not be identified as such and risk being mistakenly imprisoned. For many litigants (e.g., victims of domestic violence or rape), the process of seeking a remedy may be traumatic and require additional psycho-social support such as counselling or shelter before they will be willing to take on the physical and emotional risks that such a process implies. Psycho-social support may be enhanced through strategies such as:
 - **Support to crisis centres.** Provide more linkages to, and support for, legal aid centres offering a combination of legal and psychological counsel.
 - **Enhancing coordination.** Between public defence/prosecution systems and government departments in charge of social welfare.
 - **Build linkages with legal NGOs and other CSOs working on psycho-social counselling and support.** Strengthening coordination between legal NGOs and other organizations providing psycho-social support can make it easier for clients seeking legal assistance to access the different types of services they need.

Although some strategies have been developed to address these issues, research and comparative analysis are still insufficient to provide a clear set of lessons and recommendations. Most experiences have so far been attempted by non-government organizations, for example, through the establishment of crisis centres.

Cross-practice interventions

Several strategies within UNDP's Access to Justice service line of good governance may serve to overcome some of the barriers highlighted above. However, most obstacles require capacity development strategies in other aspects of governance as well as in other UNDP practice areas, such as poverty reduction, gender equality, HIV/AIDS, conflict prevention or environmental

sustainability. This reveals the urgent need for cross-cutting development in the field of access to justice.

Some suggestions under UNDP’s access to justice service line include:

- **Bring the formal justice system closer to the people**, for example, through decentralization of courts, establishing justices of the peace in rural areas, making buildings accessible, limiting the use of legal jargon, improving communications with the media, and improving community-police relations.
- **Support community organization and networking.**
- **Apply broader criteria for standing in courts**, allowing organizations to represent individuals and accepting collective claims.

- **Support paralegal activities**, especially in countries where lawyers are scarce or unaffordable.
- **Strengthen developmental lawyering.**
- **Re-examine court fees and improve access to financial support for legal expenses**, for example, through micro-credit and micro-insurance schemes.
- **Strengthen accountability systems within the judiciary**, particularly with regard to discriminatory attitudes, corruption and nepotism, recklessness and negligence.
- **Strengthen interfaces between formal and informal systems**, in order to diminish pressure on formal systems, while ensuring discrimination and biases against disadvantaged groups within informal systems can be redressed.

Table 10: Strategies to Strengthen Legal Aid and Counsel

| | ADVANTAGES | LIMITATIONS |
|--------------------------------|--|---|
| LAW CLINICS AND LEGAL RESEARCH | <ul style="list-style-type: none"> ■ Clinical education can improve the quality of lawyers while expanding people’s access to legal assistance ■ Clinics also can provide paralegal services, legal literacy, policy research and advocacy ■ Clinics are most effective when partnered with NGOs and community-based organizations ■ Legal research can be useful when combined with advocacy, litigation or specific reform processes | <ul style="list-style-type: none"> ■ Law clinics and community service ■ Concentration in urban areas ■ Tension between teaching and caseload management needs ■ Inconsistency in case handling due to student turnover ■ Lack of credibility in legal aid provided by students because of their age or experience ■ Legal research ■ Minimum impact as a stand-alone strategy |
| PUBLIC DEFENCE SYSTEMS | <ul style="list-style-type: none"> ■ Critical for poor people and consistent with state obligations ■ Possibility of reaching rural and remote areas ■ Adequate expertise in matters of concern to disadvantaged groups (e.g., criminal law) ■ Potential for monitoring quality and ensuring accountability | <ul style="list-style-type: none"> ■ May be unable to cope with increasing caseload ■ Poor conditions of service may result in high staff turnover ■ May lack capacities in non-criminal matters or non-court procedures |
| PRO BONO LAWYERING | <ul style="list-style-type: none"> ■ Key source of assistance in the absence of an adequately funded public system; it also can contribute to personal fulfilment and development of professional expertise ■ Committed professionals with a sense of public service | <ul style="list-style-type: none"> ■ Not a substitute for state obligations ■ Concentrated in urban areas ■ May result in loss of income for lawyers ■ Mismatch between client needs and availability and accessibility of services ■ Often the domain of young, inexperienced lawyers ■ Gap between professional rhetoric and actual practice ■ Difficult monitoring quality of services and accountability |

| | ADVANTAGES | LIMITATIONS |
|---|--|---|
| PARALEGALS | <ul style="list-style-type: none"> ■ Can provide the type of advice sought by most people, which is usually not complicated ■ Less costly than lawyers ■ When paralegals are members of the community they serve, they are able to perceive better the needs and provide explanations in ways clients can understand. ■ Paralegals also can explain what lawyers do, their fee scales, legal aid availability and whether it is worthwhile consulting a lawyer ■ They bring a different approach to legal problems, which is often more conducive to less traumatic resolution than the formal legal process. Paralegals commonly blend legal and extra-legal strategies ■ Paralegals are most effective when training is specific and they belong to a cohesive community group ■ Paralegals, lawyers and community education work best when they work together ■ Paralegal activities have greater effectiveness when combined with community mobilization or other development activities | <ul style="list-style-type: none"> ■ Lack of uniform systems for training, certification and accreditation ■ They are not a complete substitute for attorneys or broader community education ■ May be resisted by lawyers ■ Not easily sustainable strategy |
| ALTERNATIVE LAWYERING AND DEVELOPMENTAL LEGAL AID | <ul style="list-style-type: none"> ■ Goes beyond ordinary legal and paralegal work by helping people not only to reach a remedy, but also to use it to achieve wider development goals ■ May produce wider impacts from individual cases ■ Greater effectiveness when combined with other development activities | <ul style="list-style-type: none"> ■ Selective in the selection of cases (does not solve mismatch between available services and demand) ■ Not easily sustainable |
| OTHER LEGAL AID COMPONENTS: FINANCIAL AND PSYCHO-SOCIAL SUPPORT | <ul style="list-style-type: none"> ■ May be essential to ensure effectiveness of legal counsel, as these components determine people's capacity to take on the economic, physical and emotional risks involved in the process of seeking justice | <ul style="list-style-type: none"> ■ May not be considered core components of legal aid systems |

DISADVANTAGED GROUPS

CHAPTER



Overview of the Chapter

- 6.1 General Obstacles and Capacity Development Strategies for Disadvantaged Groups
- 6.2 The Rural and Urban Poor
- 6.3 Women
- 6.4 Indigenous Peoples and Minority Groups
- 6.5 Migrants, Refugees and Internally Displaced People
- 6.6 People Living with HIV/AIDS
- 6.7 People with Disabilities

OVERVIEW OF THE CHAPTER

A rights-based approach emphasizes the principles of equality and non-discrimination in developing access to justice programmes. All people should be equal before the law and have equal access to legal remedies. The principle of non-discrimination implies special focus on those groups that do not have access. Accordingly, rights-based programmes should not only be non-discriminatory, but they should also actively promote specific measures that favour previously marginalized or excluded groups (see Chapter 1).

This chapter focuses on the poor and groups who may suffer discrimination (on the basis of gender, ethnicity, disability, etc.). Poverty and discrimination can prompt disadvantaged groups to pursue justice remedies. However, poverty and discrimination can also impede people's ability to access justice remedies, making them more vulnerable to poverty and conflict. This vulnerability can be further exacerbated if they do not receive the necessary support when approaching institutions to assist them in addressing their grievances.

Who is disadvantaged depends on the context; therefore it is necessary to conduct in-depth analysis of each situation. Some specific disadvantaged groups found in the Asia-Pacific region are discussed within this chapter. However, in each situation, the most disadvantaged will need to be identified and other groups (such as the elderly, children, sexual minorities, etc.) may emerge as those who face the most obstacles in accessing justice. It is also important to recognize that the issues faced by different groups may overlap, and multiple disadvantages can compound the barriers to access to justice.

6.1 GENERAL OBSTACLES AND CAPACITY DEVELOPMENT STRATEGIES FOR DISADVANTAGED GROUPS

While each disadvantaged group faces specific barriers in accessing justice, there are some strong similarities between them. Below is a list of common barriers that face disadvantaged groups:¹

Economic barriers

Poverty exacerbates the problems facing disadvantaged groups in accessing justice. The costs of court fees, lawyer fees, form fees, etc. may be too high for disadvantaged groups. In addition, transportation costs, food and living expenses, and accommodation during the trial can be costly, especially if there are court delays. The potential for loss of income/livelihood when involved in a trial is also a deterrent for many disadvantaged groups. Such costs add up and may prevent people with limited financial means from going through the formal court systems. Further, when the judiciary is corrupt, the poor are significantly disadvantaged as they cannot afford to pay bribes.

The high cost of justice is not the only economic barrier faced by poor people – additional barriers include illiteracy, lack of awareness, and lack of support in challenging powerful interests.

Legal and institutional discrimination

Laws may also discriminate against disadvantaged groups. They may ignore the special needs of certain groups or else actively discriminate against them, preventing them from seeking justice through the formal system. Even when laws themselves are not discriminatory, systematic or de facto biases and discrimination against disadvantaged groups may result in unfair rulings, inappropriate conduct or inadequate services for disadvantaged groups. Informal systems can be as equally discriminating against certain groups, as traditional laws may benefit those who are in positions of power.

Nepal is a party to 16 international human rights instruments, including the CEDAW, yet it still has at least 118 legal provisions in 54 different laws, that are discriminatory towards women.

Forum for Women, Law and Development, Nepal

Insensitivity/lack of awareness of particular needs

Even when disadvantaged groups are able to access the formal system, they may not receive the services they require or may be mistreated by legal

professionals or law enforcement officials. Legal personnel may not be aware of the particular needs of disadvantaged groups or the institutions may not be equipped to provide disadvantaged groups with the services that they need.

Insensitive comments by legal personnel may discourage disadvantaged groups from seeking their assistance.

Insufficient outreach to disadvantaged groups

The formal justice system may be too far removed from the realities of many disadvantaged groups who may not even be aware of their rights or how to seek justice when their rights have been violated. It is part of the duty of the formal justice system to reach out to disadvantaged groups and provide them with access to information through legal awareness and literacy programmes so that they know what services are available and how to seek remedies for their grievances.

Legal aid and awareness programmes can target their activities and information to particular disadvantaged groups. For example, if women's legal aid programmes focus on laws that are relevant to women, it arms women with knowledge of what to do to lodge a complaint.

Insufficient support for alternative mechanisms

Alternative mechanisms include civil society organizations, formal and informal Alternative Dispute Resolution (ADR) methods, as well as traditional and indigenous justice systems. These mechanisms are an extremely important component of access to justice programmes as they may be more widely available and disadvantaged groups are able to use them more easily. Civil society organizations can be effective in targeting and reaching disadvantaged groups, especially when working at the grassroots level. While formal and informal ADR methods as well as traditional justice systems can provide easier access for disadvantaged groups, it is necessary to make sure that monitoring mechanisms are put in place to oversee these alternative mechanisms in order to protect the rights of disadvantaged groups and prevent elite capture (see Informal Justice Systems in Chapter 4).

Limited communication

Language and literacy is a significant barrier for most disadvantaged groups. Disadvantaged groups may not only be intimidated by formal court processes and language (the courtroom atmosphere may be too formal or the legal jargon too complicated), but they also may not be able to communicate in the official language. In addition,

¹ As the common barriers are listed here, they are not repeated within the specific sections. It is advised that practitioners refer to this section in conjunction with the relevant disadvantaged groups section.

many members of disadvantaged groups may be illiterate which poses a huge obstacle when court procedures require forms to be filled out.

Even when people use their own strategies to overcome obstacles to accessing justice (such as collective organization, social integration, strengthening of collective institutions, and economic emancipation), there is often a lack of recognition of their initiatives .

Fear/lack of trust of formal institutions

Because of existing or perceived discrimination, disadvantaged groups often fear formal justice systems. Fear and the lack of trust in formal institutions may cause them to not exercise their right to remedy even when their rights have been violated. Despite enduring grievances, they may fear that if they turn to the formal system, not only will they not receive remedies for their grievances, they may face additional violations. For example, in many rape and sexual abuse cases, women are reluctant to report the crime, as they fear their own reputation will be tarnished.

Communication is a problem for many migrants and various minority ethnic groups and indigenous peoples. It may also be a significant barrier for people with sight, hearing, or mental disabilities.

Fear of reprisal/social ostracism

Social stigma can be a significant barrier for many disadvantaged groups. While they are already in a vulnerable position in society, they fear that if they make a complaint or seek redress for a grievance (especially if they oppose someone more powerful) through the formal justice system, they may face further social pressure or ostracism, or threats of reprisal. In addition, they may be ostracized by their community or they may be accused of destroying 'social harmony'. Intangible costs such as these can prevent disadvantaged groups from seeking out formal systems.

In 1996, a young woman was abducted and sexually assaulted by 42 men in Kerela, India. When she reported the crime, the police were unsupportive, the investigation was delayed, her privacy was violated, and the media was unsympathetic.

Lack of physical access

Physical access to formal justice systems is another difficulty for members of some disadvantaged

groups. Courts can be far away and claimants may need to travel long distances to get to them. Further, for people with disabilities, physically getting into the courthouse may prove to be difficult.

Access to Justice in Viet Nam – Survey from a People’s Perspective

The UNDP Access to Justice Survey conducted in Viet Nam in May 2004 revealed that only 6% of interviewees had used the services of a lawyer. Of those that had used lawyers, 13% were from high-income groups, while only 3% were from low-income groups. The rural-urban divide is also significant – 12% of those living in urban areas had accessed lawyer services, compared to only 2% living in rural areas and 1% in mountainous areas. A further 35% of those interviewed thought lawyers’ fees were too high.

UNDP Viet Nam

Designing and Implementing Capacity Development Strategies

In order to address the challenges mentioned above, capacity development strategies need to utilize a rights-based approach to specifically address the problems of disadvantaged groups and work with them to create solutions (for example, through participatory consultations). When doing this, it is necessary to adopt a holistic approach to providing support, since legal advice is often not the most pressing need of disadvantaged groups. For example, those suffering from torture or rape should be immediately provided with medical and psychological support along with options for legal assistance. Other assistance such as literacy programmes, food, health services, drug counselling, employment schemes, housing support, credit, etc. need to go hand-in-hand with legal aid. For those who suffer from harassment or other human rights abuses, counselling and victim services as well as medical services should be provided along with advice on how to file complaints.

Civil society can also be a powerful actor in facilitating access to justice for disadvantaged groups. They can help to fill organizational, networking and technical gaps within and among disadvantaged groups. As the needs of disadvantaged groups are sometimes neglected by the State, civil society organizations can play an especially important role in developing strategies to address problems facing disadvantaged groups. See the section on Civil Society Oversight in Chapter 4 for additional information on the role of civil society in promoting access to justice. Chapters 4 and 5 also list different types of capacity development strategies that can be undertaken to enhance the ability of disadvantaged groups to demand and receive justice remedies.

6.2 THE RURAL AND URBAN POOR

The poor are not a homogenous group and it is necessary to recognize that even within the categories of the rural poor and the urban poor, there are distinct groups of individuals who have specific concerns. For example, the urban poor include homeless people, those living in slums, street children, beggars and street vendors, people struggling with addictions, commercial sex workers, etc. In rural areas, the poor can include peasants, migrant labourers, livestock herders and subsistence agriculturists. Though there may be some overlapping concerns for both the urban and rural poor (e.g., economic constraints prevent both groups from seeking justice), each group has their own particular legal needs and distinct sets of barriers that they have to overcome. It should also be noted that there is a higher likelihood of disadvantaged groups being poor as their disadvantaged situation keeps them in poverty. Hence, the linkages between poverty and discrimination need to be taken into consideration when developing programmes on access to justice.

The UDHR and Access to Justice

“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.”

*Article 8, Universal Declaration of Human Rights
Adopted and proclaimed by General Assembly resolution
217 A (III) of 10 December 1948*

International human rights instruments

The International Bill of Human Rights², consisting of the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR) and its two Optional Protocols, applies to all human beings and sets the basic level of rights and protection that should be guaranteed for all (see Chapter 3). For the rural and urban poor, as well as for all other disadvantaged groups, this cluster of rights should be the starting point from which national laws are derived and the framework under which legal protection is extended.

Article 2 of the UDHR recognizes that everyone is entitled to all the rights and freedoms set forth in the declaration without distinctions of any kind. Additionally, the UDHR specifically states that everyone should be provided the protection of the law (especially from discrimination, arbitrary arrests, detention, exile, etc.), presumed innocent till proven guilty, and have access to remedies and receive a fair trial (see especially Articles 6 through Article 12 of the UDHR).

The ICCPR builds on the UDHR and recognizes that every individual has the right to life (Article 6), to liberty and security of the person (Article 9) and to additional protection during the judicial process including the guarantee of equality before the law (Article 14).

Discrimination against Urban Pavement Dwellers

For urban pavement dwellers in Mumbai, India, the legal system often works against their rights rather than protecting them. For example, as they do not qualify as slum dwellers, they are ineligible to apply for protection or free housing. As a result they are more vulnerable to abuse and are often ignored by the formal system.

Enviro-legal Defense Firm, 'Access to Justice for the Poor and Disadvantaged People in India', January 2004

The ICESCR outlines basic social, economic and cultural rights including provisions for just and favourable work conditions, the right to join trade unions, the right to an adequate standard of living (food, clothing, housing, etc.), the right to the highest attainable standard of mental and physical health and the right to education. The rural and urban poor need to be aware of, and know how to, claim these rights in order to ensure their survival and well-being.

In addition, the Declaration on the Right to Development was adopted by the United Nations General Assembly in Resolution 41/128 on December 4, 1986.³ Although it is non-binding, it outlines people's right to development and the State's responsibilities in providing for those rights. In particular, Article 5 highlights the responsibility of the State to eliminate flagrant violations of human rights and Article 6 outlines the importance of protecting human rights, promoting non-discrimination and giving equal importance to social and economic rights along with civil and political rights.

Challenges

Legal and institutional discrimination

Not only individual laws, but the way the legal system itself has been set up may be biased against the rural and urban poor. Existing laws can pose barriers for the poor in claiming their rights. Discrimination can also be perpetuated by ignorance. For example, the rural poor are oftentimes invisible to lawmakers who are based in urban areas. Hence, legal resources and services are rarely made available to them. The urban poor are also often legally 'invisible' because they are not registered (e.g., for voting, births, etc.) and are not accounted for in censuses. As a result, data about

² See OHCHR Fact Sheet on the International Bill of Human Rights [<http://www.unhcr.ch/html/menu6/2/fs2.htm>].

³ UNHCHR. [<http://www.unhcr.ch/html/menu3/b/74.htm>].

their actual situation is often scarce and policymakers are unable to target their specific problems.

Intimidation and Repression in Urban and Rural Areas

In Bangladesh, in order to intimidate slum dwellers off public land, the police were accused of attempting to evict and arbitrarily arrest them despite a ruling that alternative accommodation must be provided for the slum dwellers beforehand. In rural areas, governments may also act brutally to repress the population, as is alleged in the case of the suppression of demonstrations by the Montagnards in the Central Highlands of Viet Nam.

Insecurity, fear and lack of trust of formal systems

As a result of negative encounters with government officials (the police, local government, army, etc.), the rural and urban poor may be unwilling to use formal legal channels to resolve disputes. This fear is a significant barrier for the poor in accessing justice. If they believe that the very people that are supposed to protect them (i.e. the police) are not on their side, then the poor may lose faith in the justice system as a whole. For the rural poor, land rights and environmental justice are crucial issues which may be in conflict with more powerful and wealthy interests. Lack of support in challenging these interests may cause disillusionment with the justice system with disadvantaged groups believing that it only assists those with wealth and 'connections'.

Physical access to information and services

For the rural poor, because they are often in remote areas, the formal court system can be too far away for them to access. Even if they can afford the cost of travelling to the nearest district court, court delays may cause them to abandon their claims. Access to information is also a critical barrier as outreach and awareness activities are rarely conducted in rural areas. Similar problems of access (including access to other basic services such as health, education, clean water, etc.) may also arise for the urban poor as they too are often overlooked by governmental institutions.

Capacity Development Strategies

Poverty poses a huge barrier for the rural and urban poor in accessing their rights. Hence, access to justice programmes need to take into account the root causes of poverty. For example, inequitable land distribution or control of land is one of the main obstacles preventing the rural poor from overcoming poverty. Laws can be put in place to guarantee more land rights for the poor or

policies can be promoted that advocate for land reform. Laws and policies that introduce other poverty elimination strategies – including education and employment – also need to be put in place. For example, support for informal sector workers' rights or micro-credit and small enterprise programmes.

More immediate service oriented interventions can include:

- **Waiving or subsidizing the cost of various court processes.** Court fees and other court costs could take into consideration the financial situation of the litigant before setting the fee.
- **Providing housing assistance and transportation to courts.**
- **Setting up mobile legal clinics** to reach those in remote areas (see Chapter 5: Legal Aid and Counsel).
- **Strengthening legal aid services** in rural areas and in urban poor communities, for example pro bono lawyer and paralegal assistance (see Chapter 5: Legal Aid and Counsel).
- **Targeting legal aid** to particular groups (even within the urban and rural poor) and establishing legal aid centres directed at specific communities. For example, urban justice centres can specialize in providing advice and services for the homeless, people living in slums, commercial sex workers, people with mental illness, people with addiction, etc. The rural poor also need specialized advice and NGOs working with them need to be knowledgeable about land rights and property law, human rights law, etc. (see Chapter 5: Legal Aid and Counsel).
- **Conducting legal awareness initiatives** among poor groups, focusing on aspects of institutional legal reform that affect them (see Chapter 5: Legal Awareness).
- **Police and judicial reform** including reducing the corruption of the judiciary (see Chapter 4: The Judiciary).
- **Institutional reforms** can also include locating courts at the regional or district level so that the rural poor have easier access to them.
- **Strengthening informal dispute resolution** mechanisms such as ADR and traditional justice that can be more easily accessed by the rural and urban poor (see Chapter 4: Informal Justice Systems).
- **Initiating reforms within prisons and police** so

that the poor are not arbitrarily arrested and detained (see Chapter 4: Enforcement).

6.3 WOMEN

The barriers faced by women in accessing justice are many and often overlap. Different issues often work in conjunction with each other preventing women from using the formal justice systems to address their problems. Since any programme to counter discrimination faced by women and to strengthen their access to justice will always challenge existing patriarchal power structures, it is important to be aware of the ways in which the interventions might be considered threatening for men. Therefore, strategies to deal with such perceptions should be developed at the same time. To implement successful access to justice programmes for women, it is important to understand culture, tradition, gender-relations, and the roles of important non-state and local actors. Additional research on the particular obstacles faced by women and the manner in which they cope with injustice or resolve conflicts is necessary in order to develop strategies in this area.

International Human Rights Instruments

Discriminatory laws and denial of equal rights not only impedes women's access to justice, but also exacerbates women's vulnerability to abuse and exploitation. International human rights instruments protect the rights of women. Specific instruments have also been established to address particular vulnerabilities faced by women all over the world. One example is the Convention for the Elimination of all forms of Discrimination against Women (CEDAW).⁴ CEDAW is the main convention that seeks to protect and promote the rights of women. It was adopted in 1979, and 178 states are party to the Convention.⁵ CEDAW is supported by an Optional Protocol that came into force in 2000. While CEDAW focuses on the roles and responsibilities of the State with regard to guaranteeing the rights of women, the Optional Protocol establishes a complaint mechanism for individuals.

Challenges

Legal discrimination/lack of legal protection

The formal legal framework of many countries reinforces discriminatory practices towards women. Laws can actively discriminate against women and condone violations of women's rights through the lack of adequate legal protection. Some areas of concern are:

Reporting on CEDAW

CEDAW requires that States that are party to the Convention report on the activities they have undertaken to implement CEDAW in their countries. Often, along with the official report submitted by the Government, 'Shadow Reports' are submitted by national civil society organizations based on their own analysis of implementation of CEDAW within the country.

- **Personal Status Laws or Family Law.** For example, discriminatory provisions relating to marriage, inheritance, and custody of children.
- **Criminal Law/Penal Codes.** Many violations of women's rights are not considered as crimes despite international legal standards. Other concerns include criminalization of female victims of violence and the differential principles of defence and evidentiary requirements applied to men and women.
- **Labour Laws.** For example, discriminatory provisions with regard to maternity leave, childcare, and lack of regulation in the informal sector.
- **Lack of Domestic Violence Legislation.** This includes the lack of recognition of rape within marriage, laws on incest and sexual abuse, etc.

Gender insensitivity in the justice system

A woman's decision to seek legal remedies can involve huge risks and costs: financially, socially and psychologically. Even when they do overcome their fears and attempt to seek justice, women often face an additional hurdle because of institutionalized gender discrimination at all levels of the justice system. For example:

- **Stereotypical views about women** can lead to discriminatory judgements being passed in the courts. Sanctions for crimes committed against women are often not comparable to those for other violent crimes. Principles of defence may discriminate against women, and defences such as honour or provocation allow perpetrators to escape criminal responsibility. Women may face further victimization by court proceedings, which do not comply with international standards for victim and witness protection.
- **Systemic gender discrimination** is evident among the police, who are often negligent in responding to reports of crimes against women (particularly in cases of domestic violence), and often do not take action to

⁴ UNHCHR. [<http://www.unhchr.ch/html/menu3/b/e1cedaw.htm>].

⁵ As of October 5, 2004. See [<http://www.un.org/womenwatch/daw/cedaw/states.htm>] for details.

investigate or prevent further crimes. Victims may suffer harassment, physical and sexual assault when reporting cases.

■ **Informal justice systems often promote traditional patriarchal values** and traditions which may violate women's rights and reinforce existing gender discrimination.

■ **Prisons and correctional facilities may not have adequate facilities** to protect female prisoners from abuse. Additionally, despite the fact that women in detention are vulnerable to sexual abuse and rape, they often have no means of complaining when such crimes are committed against them.

Such discriminatory attitudes and practices mean that women often have very little faith in the justice system and therefore are reluctant to take their complaints to courts or the police.⁶

Lack of institutional technical capacity and services

There is a general lack of understanding of gender-based violence in the police, a poor quality of police investigative techniques, and little protection of the crime scene or collection of forensic evidence. These are all serious barriers that prevent women from obtaining remedies. In addition, the lack of facilities and services responding to women's needs such as one-stop centres where victims of violence can receive legal, medical and other services, special women's desks at police stations, medical and psycho-social support and shelters serve as obstacles. Women who are victims of rape, sexual assault and domestic violence are generally treated insensitively, and are not provided with legal advice or given access to necessary support services.

Fear of reprisal or social ostracism

The cultural values and norms of many countries in the region may consider it shameful for women to seek a remedy in the justice system especially with regard to sexual crimes. Women wanting to go to court are therefore not supported by their families and may face outright resistance. This results in fear of social ostracism, which is especially widespread in cases of rape, sexual assault and domestic violence where there may be social pressure to preserve the victim and her family's honour rather than to punish the offender. Sometimes, families of the victim and the perpetrators negotiate a settlement among themselves in order not to involve the authorities and public.⁷ Further, in cases of sexual crimes, women may be unwilling to bring charges against the perpetrators for fear of being publicly labelled and ostracized by their communities.

Inadequate public services and outreach of NGOs

The lack of social support combined with the lack of information and economic independence means that women whose rights are violated need greater support from national institutions, and programmes and policies for the promotion and protection of their rights. The most successful initiatives are ones that involve partnership with civil society and women's organizations (also see Civil Society Oversight in Chapter 4).

Lack of economic independence

Women are among the poorest of the poor in most Asia-Pacific countries. Control of family resources is most often in the hands of the male head of the house. This can lead to women having a lack of power in household decision-making and priority setting. Their disadvantaged economic situation can lead them to becoming dependant on others and mean that they cannot contest violations of their rights in the context of the family, the workplace, government institutions, etc.

Reaching out through Civil Society and the Media

Women's Aid Organization (WAO), a Malaysian NGO, not only provides shelter and counselling for victims of domestic violence, but also works on raising awareness and conducting advocacy work to promote law reform. One strategy adopted by WAO is to publicize the issue and raise awareness through live talk shows on the radio. In addition, messages about why domestic violence is a crime and what people can do about it are aired two to three times a day. As radio reaches out to around 800,000 Malaysians, it has resulted in more people seeking assistance and information about addressing domestic violence.

'Education through Radio', Isis International

Capacity Development Strategies

Support legal reform programmes to change discriminatory laws and regulations

An effective and impartial legal framework is a good starting point in recognizing gender equality and women's rights. International treaties and conventions such as CEDAW and the Optional Protocol, ICCPR, etc. provide international standards on women's rights which countries should be encouraged to sign, ratify and implement. Accordingly, the national legal frameworks should be reformed so that women are ensured protection and their rights are guaranteed under national law. Antiquated laws (e.g., unequal inheritance laws) should be reformed and new laws (for example, recognizing rape within marriage) should be established to protect the

⁶ Asian Human Rights Commission-Human Rights Solidarity. 2000. "Impact of Corruption on the Criminal Justice System on Women." [<http://www.ahrchk.net/hrsolid/mainfile.php/2000vol1ono02/1911>].

⁷ Such settlements have a risk of violating the rights of the victim, for instance when it is decided by the family of a girl who has been raped that she must marry her rapist to save her, as well as the family's, honour.

rights of women. To promote these types of reforms, advocacy programmes can be undertaken in partnership with United Nations agencies such as OHCHR and UNIFEM to encourage the Government to take a progressive attitude towards legal and institutional reform. Support to legal reform programmes to change discriminatory civil and criminal justice laws and regulations, including reconciliation between international instruments and national laws should also be considered (see Chapter 3). Support could also be given to research into court judgments to highlight gender insensitive verdicts.

Capacity development of law enforcement personnel and agencies

Police, judges, prosecutors, prison staff and other judicial staff need to receive training on gender and women's rights. Training and educating judicial personnel can help to make them more sensitive and responsive to crimes suffered by women. However, training may not always be sufficient for attitudinal and behavioural change and other measures may need to be put in place. For example, incentives could be offered to encourage law enforcement personnel and agencies to adopt gender sensitive approaches, with appropriate mechanisms put in place for oversight. Support could also be given to specialized programmes that assist police officers and medical personnel in handling sexual assault, rape and domestic violence cases, especially in areas such as human rights, gender and violence, investigation and the use of forensic evidence. (Also see Chapter 4, particularly sections concerning Enforcement and the Court System).

In addition, it is important to recruit people within law enforcement that are gender sensitive. Specific gender focal points and gender desks could be established to support women through the justice system. Links to protective services such as witness protection, women's shelters and victim support, could also be established to facilitate women's access to the formal legal system and assistance. Family courts could also be established that would expedite the legal process for women as well as reduce case backlog in other courts.

Support NGOs and CSOs for better legal service

Since NGOs are generally better able to work at the grassroots levels, support should be given to them to tailor their services to meet the legal needs of disadvantaged women. Support to strengthen networking between women's groups and NGOs working in the legal sector should also be facilitated. In general, partnership building between civil society and public agencies is most effective in addressing challenges from a more holistic and integrated approach. Financial support could be

provided for civil society-based organizations (such as self-help groups) since these groups are often the first place women turn to when they have a grievance.

Promoting champions from within the system

In order to accomplish widespread reform, more investment needs to be made in terms of both financial and human resources and it is necessary to have "champions" within the judicial system who are willing to support these reforms and investment of resources. Strategies can include promoting positive discrimination by placing women in decision-making positions. For example, in India, laws were passed "reserving" a third of parliamentary seats for women. This provides women with the opportunity to reform laws and invest in building capacity of institutions so that they may become more gender sensitive. However, it is equally as important to cultivate male champions both within and outside the system so that they can support gender sensitive policies and refrain from blocking reforms initiated by female representatives or from pressuring them to vote a certain way.

Ensure that the judicial system is responsive to women's needs by establishing accountability mechanisms

Institutions such as National Women's Commissions can work with other civil society organizations to monitor the performance of the judicial system with respect to women and promote effective affirmative action policies. Reporting on implementation of CEDAW to the CEDAW Committee, and reporting to other treaty bodies, is another way to facilitate dialogue and ensure accountability. States that have ratified CEDAW are required to report on their compliance at least every four years. Civil society and the Government could work together to ensure that their country adheres to these reporting requirements by submitting the National CEDAW report as well as a shadow report prepared by NGOs.

Support and strengthen gender-sensitive dispute resolution mechanisms

Fear of unfair results in courts, corruption, abuse and harassment mean that women often prefer to use traditional justice systems (where available) or alternative dispute resolution (ADR) mechanisms like mediation. ADR can be a cost effective and timely alternative to the formal system. However, ADR and traditional systems can also be problematic as they may perpetuate gender biases, therefore clear guidelines should be introduced and mechanisms should be put into place to monitor these systems. Further, formal and

informal systems should establish clear links and should be able to refer to each other. Serious crimes, such as rape, domestic violence and sexual abuse, should be referred to the formal system as it has better enforcement mechanisms as well as services such as witness protection, victims' assistance and shelters (see section on Informal Justice Systems in Chapter 4).

Increase representation of women in the legal system

To improve women's access to justice, it is important to ensure that women are represented in the justice system – both in formal and informal processes. For example, it often makes a difference if women police officers or female counsellors and psychologists are available for women victims of violence. Female judges, mediators and lawyers may be better able to understand and relate to women victims and be better able to support them through legal process. Judicial reform should seek to equalize the gender balance of judicial personnel, including recruiting women in leadership positions. At the same time, gender balance must be pursued with the ultimate goal of ensuring that the unique problems facing women are understood by the justice system. In order to do so, it may be important in some cases that a gender balance is achieved by recruiting women who are from vulnerable groups such as ethnic minorities rather than assuming that all women are willing and able to represent other women.

Design and support legal programmes with cross-practice linkages

Legal literacy programmes should be designed in an integrated way so that they empower women and can assist them to organize and mobilize for change. Legal literacy can be a powerful tool in developing women's capacities to understand, reflect on and critique laws and to take action to change those laws that limit their rights. Legal literacy is a process in itself; therefore, flexibility and innovations are important for any successful legal literacy programmes.

Legal literacy cannot be promoted in a vacuum, and cross-practice linkages to assist women in claiming their rights must be encouraged as well. For example, establishing literacy classes, micro-credit programmes or promoting entrepreneurship along with legal literacy programmes may be more effective than conducting legal literacy programmes alone.

Legal education should not merely provide legal information. Even women who know their rights may lack the self-confidence and support to exercise them in the face of social and family pressures.⁸ To overcome such social and cultural obstacles, legal programmes should combine legal

education with awareness raising and other activities so that legal knowledge can be translated into action (e.g., community organizing, mediation, or litigation).⁹ Chapter 5 on Legal Empowerment discusses these issues in further detail.

6.4 INDIGENOUS PEOPLES AND MINORITY GROUPS

Indigenous peoples and minority groups (ethnic, religious, linguistic, etc.) are often marginalized by the State and society. Their culture and traditions are commonly ignored, or worse, systematically erased. Dominant groups have historically pursued various policies of assimilation, apartheid, oppression or discrimination. The rights of indigenous peoples and minority groups are often unprotected and they face considerable obstacles when they attempt to seek justice through formal channels. Indigenous peoples and minority groups often live on the margins of society, enduring disproportionately high levels of poverty relative to the rest of the society. This is directly related to high rates of crime and victimization. A disproportionate number of people from minority groups are accused of crimes and face trial and there tends to be a high number of them imprisoned. This may result in a deep sense of alienation from a justice system that seems to them foreign and inaccessible. Their movements may be restricted, traditional laws disregarded or violated, and rights to ancestral land ignored.

International Human Rights Instruments

Human rights instruments protecting the rights of minorities and indigenous peoples also include guarantees on access to justice. These instruments include:

- Universal Declaration of Human Rights (1948)
- Convention on the Prevention and Punishment of the Crime of Genocide (1948)
- ILO Convention No. 107 (1957)
- International Convention on the Elimination of All Forms of Racial Discrimination (1965)
- International Covenant on Civil and Political Rights (1966)
- International Covenant on Economic, Social and Cultural Rights (1966)
- UNESCO Declaration on the Principles of International Cultural Cooperation (1966)
- Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981)
- Declaration on the Right to Development (1986)
- ILO Convention on Indigenous and Tribal Peoples, Convention No. 169 (1989)
- Rio Declaration on Environment and Development (1992)
- Convention on Biological Diversity (1992)

⁸ Vene Klazen, L. 1992. "Women's Legal Rights Organizing and Political Participation in Africa" in *Legal Literacy: A Tool for Women's Empowerment*. Margret Schuler & Sakuntala Kadirgamar-Rajasingham (eds.) Washington, DC: Women, Law and Development/OFF International.

⁹ Asian Development Bank (ADB). 2001. "Legal Empowerment: Advancing good governance and poverty reduction." Overview Report. [http://www.adb.org/Documents/Others/Law_ADB/lpr_2001_Part_2.pdf].

- Mattatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples (1993)
- UNESCO Universal Declaration on Cultural Diversity (2000)
- UN Draft Declaration on the Rights of Indigenous Peoples

The following conventions outline some of the specific rights that should be guaranteed for indigenous peoples and minority groups while the Declaration proclaims the commitment of member states to prevent discrimination based on religion and belief.

ILO Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries (1989) revised the earlier ILO Convention 107 Indigenous and Tribal Populations Convention and Recommendation (1957).¹⁰ It seeks to ensure that indigenous peoples stand on an equal footing with other members of society. It also aims to promote the realization of the rights of indigenous peoples with respect to their identity, customs, traditions, and institutions.

Reaffirming the Universal Declaration of Human Rights

“Discrimination between human beings on the grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations, and shall be condemned as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and enunciated in detail in the International Covenants on Human Rights, and as an obstacle to friendly and peaceful relations between nations.”

Article 3, Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, Proclaimed by General Assembly resolution 36/55 of 25 November 1981

The International Convention on the Elimination of All Forms of Racial Discrimination seeks to address all necessary measures for eliminating racial discrimination in all forms and manifestations, to prevent racist doctrines and practices, and to promote an international community free from all forms of racial segregation and discrimination.¹¹ Its provisions include revising national laws and policies, amending or eliminating discriminatory legislation, and promoting and enforcing non-discrimination especially in public institutions, and guaranteeing the right to equal treatment before the law. The Committee on the Elimination of Racial Discrimination monitors compliance with the Treaty.

General Assembly Resolution 36/55 proclaimed the Declaration on the Elimination of All Forms of

Intolerance and of Discrimination Based on Religion or Belief on November 25, 1981. This declaration affirms the freedom of thought and beliefs, advocates for tolerance and calls for repealing discriminatory laws.

Challenges

Lack of legal protection

Laws and the legal system in many countries may be biased against indigenous peoples and minority groups and provide little protection for the rights of minority communities. In many places, even when their rights are legally protected, the Government does little to uphold the rights of such groups. In the Philippines, for example, the Indigenous Peoples Rights Act was passed in 1997; however, many challenges still remain to be overcome with regard to reconciling local/customary laws with formal laws. The UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples visited the Philippines in 2002 and reported that while there were many complaints and some cases have gone to court, adequate remedial measures had not been taken by the authorities to redress the grievances of indigenous peoples. Further, while the Indigenous People’s Rights Act provides protection for indigenous peoples, it is not consistently applied.

Lack of awareness and cultural sensitivity/negative social attitudes

In addition to unprotected rights of indigenous peoples and minority groups, there is a general lack of awareness and sensitivity to the needs of diverse cultures, a mindset that tends to be institutionalized within justice systems. In cases where indigenous peoples demand recognition, the State may even go as far as to arrest, threaten, and pursue other aggressive policies against the indigenous community. Seeking redress for such violations through official channels is often difficult since the official channel may not be impartial or may be corrupt. Further, indigenous peoples may be in direct conflict with business and other more powerful interests (for example, in land disputes) and as they may not have the economic means to pursue litigation, their situation is often left unresolved. Indigenous peoples and minority groups may also be negatively stereotyped and the prevailing political climate may be biased against them. Indigenous laws and customs may be ignored, there may be racial profiling by law enforcement officials, they may be negatively portrayed in the media, or there may be aggressive campaigns against movements by indigenous groups. As a result, there can be high levels of disillusionment on the part of indigenous peoples and minority groups and they may mistrust and avoid the formal justice system.

¹⁰ Adopted on June 27, 1989 by the General Conference of the International Labour Organization at its seventy-sixth session; came into force September 5, 1991. [www.unhcr.ch/html/menu3/b/62.htm].

¹¹ Adopted and opened for signature and ratification by GA resolution 2106 (XX) of 21 December 1965; came into force January 4, 1969 in accordance with Article 19. [www.unhcr.ch/html/menu3/b/d_icerd.htm].

Institutional discrimination

Minority groups may be discriminated against by members of the judicial system itself, which can also prevent them from seeking redress for their grievances. They may be mistreated in police custody, abused in prisons or may not receive a fair trial because of prejudice against them. In situations of conflict, animosity between different minority groups can result in an increase of discriminatory practices: there may be arbitrary arrests based solely on the ethnic or religious identity of the individual, basic rights might be denied, people may be segregated along ethnic/religious lines, etc. All these discriminatory practices pose an additional, and often insurmountable barrier, for members of minority groups seeking justice.

Language/literacy barriers

As most court proceedings are undertaken in the official language, indigenous peoples and minority groups commonly face a linguistic barrier as they often have their own languages and may not be able to understand or follow the official court language very well. Even if they understand the language used, they may not be able to speak or write it fluently, limiting their ability to fill out forms or to express themselves in court. Services, such as interpreters or translated legal information material, may also not be readily available.

Capacity Development Strategies

Establish clear laws protecting indigenous peoples and minority groups

To ensure that the rights of indigenous peoples and minority groups are respected, the State needs to first make sure laws are put into place that protects their rights. For example, states can be encouraged to ratify ILO Convention No. 169 and to adopt the UN Draft Declaration on the Rights of Indigenous Peoples as a sign of their commitment to protecting the rights of indigenous peoples. Along with guaranteeing protection and recognizing the specific situation of indigenous peoples and minority groups, it is necessary for governments to outline their own responsibility and role in ensuring that these laws are enforced. Committees can be set up to monitor the Government's activities and to make sure that the interests of indigenous peoples and minority groups are represented. Advocacy campaigns for legal reforms and combating negative social attitudes towards indigenous peoples and minority groups can also be promoted.

Sensitize legal and law enforcement personnel on their duties and responsibilities

Law enforcement personnel, judges, lawyers, etc. need to be sensitized to the particular issues and concerns of indigenous peoples and minority communities. Courts should be established at the local level for easier access and personnel should be aware of issues related to the indigenous/ethnic communities in which they work. Police and prison officials also need to be trained not to discriminate against people of different religious or ethnic backgrounds.

Advocacy for and establishing multi-ethnic justice institutions

The State needs to have the political will to commit financial resources to promote access to justice for indigenous peoples and minority groups. Judges and lawyers from minority groups should be encouraged and members from under-represented backgrounds should be actively recruited into the legal system.

Work with traditional and indigenous justice systems

Indigenous communities may also have their own laws and traditions. Ignorance of traditional laws on the part of legal aid providers can also become an obstacle in their capacity to provide appropriate services. Developing paralegal capacities among indigenous peoples may help in documenting traditional laws and practices. Indigenous peoples and minority groups may trust and prefer to use internal dispute resolution mechanisms rather than formal court systems. It is, therefore, necessary for legal aid providers to understand the traditional justice system and ensure that in applying the formal system, the cultures and customs of indigenous peoples and minority groups are taken into account.

Reduce the number of indigenous peoples and members of minority groups in prison

Incarceration is a key issue as a disproportionate number of people from minority backgrounds are imprisoned. These high rates of imprisonment point to flaws in the official system in providing adequate access to justice. Below are some ways to address the high incarceration rate:

- **Address language barriers.** Inability to communicate because of language barriers or stereotyping of minority groups by justice officials may be a significant factor in the high number of minorities that are sent to prison. Legal aid provided to prisoners in their own language provides them with an awareness of their rights and knowledge of how to claim those rights.

■ **Non-custodial measures may be more effective than imprisonment.** For example, Australia has begun implementing ‘circle sentencing’, a restorative and rehabilitative approach to sentencing based on traditional practices in certain areas for cases involving members from the Aboriginal community.

■ **Pay attention to technical details.** Technical details such as limited capacity to maintain proper records may keep many indigenous people within prisons. By maintaining clear records and ensuring that minority prisoners receive legal aid, it may help to reduce the number of prisoners that overstay their prison sentence.

Enhance accountability

One way accountability can be ensured is by encouraging the establishment of quasi-judicial institutions such as an Indigenous Peoples’ Commission or Equal Opportunity Commission. These commissions could play a role in monitoring the activities of the State and holding it accountable to the international treaties it is party to and to national legislation. They can investigate human rights violations by the State and serve as a means through which minority groups and indigenous peoples can file complaints against the State and can advocate for changes to improve the situation for minority groups (see National Human Rights Institutions in Chapter 4).

6.5 MIGRANTS, REFUGEES AND INTERNALLY DISPLACED PEOPLE

All over the Asia-Pacific region people are moving across borders – through both legal and illegal means. They may be smuggled across in boats by human traffickers, pay large sums of money to employment agencies promising them a future in foreign lands, forcefully trafficked to be sold as sex workers, or as victims of conflict who have been forced to leave their homes. They find themselves in situations where they are exploited and have no way of addressing their grievances. Along with being in new and unfamiliar environments, migrants, refugees and the internally displaced¹² face many constraints – from racial/ethnic/religious discrimination at the community and policy levels, to exploitation by those seeking to make a profit at their expense, to lacking access to health and education facilities because of their irregular status or because they are poor. Migrants and internally displaced people may have to endure inhumane living and working conditions, physical and sexual abuse and degrading treatment. As the disadvantages faced by both migrants (legal and irregular) and internally displaced people are similar this section addresses their concerns together.

Key Issues Concerning Indigenous Peoples Include:

- **Cultural Integrity** – Right to their own language, culture, religion, traditional practices and freedom from outside cultures being imposed or being forced to assimilate.
- **Land and natural resources** – Right to own land (individually or collectively) that has traditionally been theirs and right to access all resources within that land. For indigenous peoples, land is more than possession of property. It signifies a deep cultural connection and intangible value placed on the land. Land is very much linked to survival and survival of the community and traditions. Control over the management and conservation of land and resources that are part of indigenous property should be placed in their power. Additionally, the State should allow for varying definitions of property and recognize indigenous ways of defining property rights.
- **Participation** – Right to participate within their traditional structures as well as the choice to participate in the State system, especially in all issues that concern indigenous peoples. Participation goes beyond merely consulting indigenous peoples, and implies decision-making power is vested in the indigenous peoples. Any policies affecting indigenous peoples should only be pursued with their informed consent.
- **Indigenous knowledge** – Safeguard indigenous knowledge of the natural world, their customs and practices. Intellectual property rights issues over indigenous music, stories, scientific knowledge, etc. may be a serious concern as non-indigenous people may gather this knowledge and accrue the benefits from it, while indigenous communities themselves may not receive anything in return.
- **Self-determination and self governance** – As a part of their right to self-determination indigenous peoples seek devolution of power from the central government and a recognition by the State of the traditional governance and judicial institutions within indigenous communities.
- **Collective rights** – Respect collective rights of indigenous peoples as a group along with individuals. Indigenous peoples seek to be recognized as a people and not just as individuals. Even within the community, often priority is given to the welfare of the group over that of the individual. This also is relevant for issues of land, where land is often collectively owned. For example, communal land rights over forests and grazing lands should be respected.

International Human Rights Instruments

The International Convention on Protection of Rights of the Migrant Workers and Members of Their Families was developed within the framework of prior International Labour Organization conventions concerning forced labour and migration for employment.¹³ It entered into force in July 2003, however many States have yet to sign it. The Convention establishes norms and lays out basic principles concerning the treatment of migrant workers and members of their families. It also reiterates the fact that migrants are guaranteed their fundamental human rights and member States need to ensure that these are not violated. In particular, Part IV of the Convention (Articles 64-71) encourages States to promote policies and laws that protect the rights of migrants and clearly outlines the responsibilities of different parties including the responsibility of the State to provide adequate information and appropriate services (see also ILO Convention No. 97 on Migration for Employment and ILO Convention No. 143 on Migrant Workers - Supplementary Provisions).

Designing Innovative Approaches Tailored to Enhance Access to Justice

In Kosovo, efforts were made to promote a professional, independent, impartial and multi-ethnic judiciary and prosecution service. A multi-ethnic judiciary, especially at the local level, can help in taking action against ethnic bias and to build trust between different communities. For example, the Judicial Integration Section (JIS) was, "tasked with increasing minority participation in the judiciary and prosecution service, ensuring access to justice for minorities and tracking the treatment of minorities by the justice system."

Other ways in which the JIS addressed obstacles facing ethnic minority communities included:

- Shuttle services to and from the community to courts in order to overcome restrictions on freedom of movement.
- Court liaison officers to facilitate access to courts by providing advice and outreaching to different ethnic groups.
- Oversight bodies to monitor investigations, court processes and judges to ensure impartiality.
- Victim assistance units to provide comprehensive assistance including legal services, shelter services, psycho-social support, medical assistance, education, income generation and compensation.

United Nations Interim Administration Mission in Kosovo (UNMIK)

The Guiding Principles on Internal Displacement seek to protect the rights of internally displaced people.¹⁴ They were developed over several years, pursuant to the 1992 mandate by the Commission on Human Rights. The principles address the specific needs of internally displaced people worldwide and establish the duty of international authorities to provide protection and humanitarian assistance to these individuals. They serve as an international standard to guide governments and international humanitarian and development agencies in providing assistance and protection to internally displaced people, ensuring that they enjoy the same rights and freedoms as other persons in their country. It also details the responsibility of the State to prevent displacement, protect internally displaced people during displacement and rehabilitate them, including compensating for loss and lack of access to property.

Challenges

Legal and institutional discrimination

Legal and institutional discrimination of migrants (particularly irregular migrants) and internally displaced people exist at many levels. Xenophobia may be deeply rooted in the countries that receive migrants (including within the police, legal system and judiciary), which may manifest itself in the stringent immigration policies or lack of protection for migrants. Even where international protections for migrants exist, States receiving migrants are reluctant to sign on to treaties or conventions. Similarly, though there are Guiding Principles for Internally Displaced People, governments may not have the capacity to provide adequate protection or services to them or may even be hostile towards them.

The Human Cost of Migration

"More than 800,000 Filipinos leave home each year to work overseas. Up to 7,000 Nepali women and girls are trafficked to India each year, mostly for sex work, and 4,500 a year from Bangladesh, also mainly for sex work. Sri Lanka is a major labour exporter with close to a million migrant workers, 70 per cent of whom are women....The human costs the workers face is real — hardship in coping in alien lands, discrimination, rules that work against reproductive health, the difficulties of re-integration and the breakdown of traditional family structures."

From 'On the Asian Migration Trail', IPS New, 2002
<http://www.ipsnews.net/migration/project.html>

¹² Internally Displaced Persons (IDPs) are defined in the UN Guiding Principles on Internal Displacement as "...persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border."

¹³ UNHCHR. [http://www.unhchr.ch/html/menu3/b/m_mwctoc.htm].

¹⁴ UNHCHR. [<http://www.unhchr.ch/html/menu2/7/b/principles.htm>].

Negative social attitudes towards migrant and internally displaced people

Local populations often don't understand the benefits migrants can bring in terms of the economy and enriching the diversity of the community. They see migrants as a liability and they often become scapegoats during economic downturns – and are blamed for taking away jobs and for increasing criminality. Anti-terrorism policies may also heighten tensions between migrants and local communities making it more difficult for migrants to live and work within the community. Internally displaced people are also subject to negative perceptions from local populations who may be hostile towards them as they may see them competing for jobs or humanitarian aid.

Conflict-induced and Development-induced Displacement

“The two forms of internal displacement of critical concern in Asia are conflict-induced displacement and development-induced displacement. Indeed, the two are often linked. Forced displacement caused by development policies and projects often produces internal conflicts and violence within societies, especially over land and resources, directly leading to conflict-induced displacement. Violations of human rights, whether civil, political, economic, social or cultural, often accompany both kinds of displacement.”

Summary Report, Regional Conference on Internal Displacement, Bangkok Thailand, Feb 22-24, 2000

Economic constraints

Migrants and internally displaced people are among the most vulnerable members of society. They tend to live in the poorest neighbourhoods and do not have adequate support systems. Due to their economic vulnerability, they may have to take any work that is available including that which is abusive or exploitative. Despite abuses committed against them, they may refrain from using the formal justice system because of the fear of being deported or because the costs associated with lawyers and court processes may be too great for them. For example, immigration lawyers may be unaffordable for those working without the necessary papers even though they may be the ones who need them the most.

Inability/lack of political will to provide services

Governments are often unable to provide the necessary legal services to migrants and internally displaced persons, and in times of conflict, often do not consider it a priority to address the legal needs of their internally displaced populations. Even after

conflict, the police and the judiciary may not have the capacity to properly investigate and address issues of property rights, gender-based violence or other kinds of human rights violations against the internally displaced. Migrants also need specialized services to deal with immigration concerns. However, government agencies are often constrained by limited resources – both human and financial. Also migrants and internally displaced people may be reluctant to seek out the formal system to voice grievances or to receive services because of the fear of being caught, deported, or blacklisted.

Basic Human Rights for Migrants and Internally Displaced Peoples

As the International Convention on Protection of Rights of the Migrant Worker and the Guiding Principles on Internal Displacement note, these instruments merely reaffirm that migrants and internally displaced people are entitled to the same basic human rights guaranteed to all. Though States may have different policies regarding immigration, they still need to adhere to overall human rights standards and follow their guidelines in developing laws and policies related to migrants and internally displaced peoples.

Capacity Development Strategies

Support for legal reforms to eliminate discrimination

To address discrimination against migrants and internally displaced people, it is first necessary to ensure that the laws in place follow international human rights standards and norms. After reviewing the laws, efforts can be made to repeal discriminatory laws and ensure that laws are put in place that guarantee and protect the rights of migrants and internally displaced people. For example, governments can be encouraged to adopt international conventions and treaties protecting migrant workers as well as incorporate the Guiding Principles into their policies regarding internally displaced people.

Capacity development of law enforcement personnel and agencies

Police, judges and lawyers can be sensitized to be more aware of the rights of migrants and internally displaced people. Law enforcement personnel and agencies should also be sensitized to avoid discriminatory attitudes and actions (e.g., racial profiling). This can be done through workshops and training programmes that encourage them to think through the consequences of their actions. For example, in Europe, the European Commission has set up a programme called NGOs and Police

Against Prejudice (NAPAP), which seeks to educate police about migrant issues by encouraging members of minority ethnic groups to take part in the training courses, as well as encouraging local immigrant groups to run day courses for the police, promoting social integration of immigrants within the community, and making police more aware of the problems that arise in a multicultural society.¹⁵

Support and strengthen community dispute resolution mechanisms

Migrant and internally displaced communities may have their own dispute resolution mechanisms that they prefer to use rather than pursuing formal legal mechanisms. Decentralized non-formal justice systems can be encouraged, especially within the community, as long as they don't contradict the justice system already existing in the country and conform to human rights standards. In addition, specific courts can be set up that are more accessible for migrant and internally displaced populations.

Support for civil society organizations that work with migrant and internally displaced populations

As migrants and internally displaced people can be hard to reach populations, civil society organizations (CSOs) can be useful in providing assistance to these populations, especially when they need to navigate their way through the justice system. They may already have a presence in migrant communities and in camps for internally displaced people and may be trusted by the population there. Specifically, they can provide pro bono services, raise awareness and disseminate information about the rights of migrant and internally displaced people, set up help desks that specially cater to the needs of migrant or internally displaced populations, and work to organize these populations so that they are better able to claim their rights from the State. In addition, CSOs can also conduct public education programmes for communities and government personnel on tolerance and respecting diversity as well as counter negative myths and stereotypes (see Chapter 4: Civil Society Oversight and Chapter 5).

6.6 PEOPLE LIVING WITH HIV/AIDS

In Asia alone, 5.2 million men, 2 million women and 168,000 children are living with HIV.¹⁶ However, HIV/AIDS is not just a public health issue, it is also a human rights issue. Therefore, HIV/AIDS should also be addressed within a human rights framework. This means recognizing the vulnerability of people living with HIV/AIDS (PLWHA) and the additional measures that need to be taken to ensure that their

needs are addressed and their rights are protected. Unless measures are taken to protect them, PLWHA are likely to face discrimination, be stigmatized, and be denied access to the same opportunities and rights as everyone else. For example, hospitals may refuse to admit them or they may be mistreated by hospital staff, they may face discrimination in hiring practices, they may be reluctant to go to courts for fear of being publicly labelled and stigmatized. Further, when implementing prevention measures that seek to reduce the spread of HIV/AIDS, policy makers should ensure that they do not violate the rights of PLWHA. Below are some obstacles faced by PLWHA and some capacity building measures that can help in addressing these obstacles.

International Human Rights Instruments

The UN General Assembly adopted a resolution in 2001 that declared the commitment of States to undertake a coordinated effort to address the problem of discrimination against PLWHA which is also detrimental to social and economic development and compromises human dignity and enjoyment of human rights. The Declaration of Commitment on HIV/AIDS recognizes that HIV/AIDS particularly affects people in developing countries and that those from disadvantaged groups are even more vulnerable to its effects.¹⁷ In particular, paragraphs 58-61 of the Declaration make specific references to HIV/AIDS and human rights.

The International Guidelines on HIV/AIDS and Human Rights is also a useful document that is relevant when working on programming for access to justice for PLWHA.¹⁸ The Guidelines explains the kinds of obligations applicable to duty bearers (especially governments) to which capacity building strategies could be directed.

“By 2003, enact, strengthen or enforce as appropriate legislation, regulations and other measures to eliminate all forms of discrimination against, and to ensure the full enjoyment of all human rights and fundamental freedoms by people living with HIV/AIDS and members of vulnerable groups; in particular to ensure their access to, inter alia education, inheritance, employment, health care, social and health services, prevention, support, treatment, information and legal protection, while respecting their privacy and confidentiality; and develop strategies to combat stigma and social exclusion connected with the epidemic;”

*Paragraph 58,
The Declaration of Commitment on HIV/AIDS
Adopted by General Assembly resolution
S-26/2 of 27 June 2001*

¹⁵ López, Asbel. 1999. "Police Against Racism." *UNESCO Courier*. [http://www.unesco.org/courier/1999_12/uk/ethique/txt1.htm].

¹⁶ *The global statistics on HIV/AIDS is even more alarming. In 2003, there were 3 million deaths from AIDS and 40 million people living with HIV worldwide. See [www.unaids.org] for global statistics and [http://www.youandaids.org] for statistics in Asia.*

Challenges

Legal and institutional discrimination

National laws may discriminate against people living with HIV/AIDS. Moreover, there may not be adequate laws in place to protect PLWHA. Policies such as mandatory blood testing before marriage or before being offered employment violate basic rights (see above). Further, when governments implement hastily and ill thought out laws that seek to prevent the spread of HIV, they may have an adverse effect, by actually increasing the spread of the disease by driving high-risk activities underground.

Fear of consequence of institutional bias

HIV high-risk groups such as commercial sex workers (CSWs), injecting drug users (IDUs) and men who have sex with men (MSM), may be reluctant to use the formal justice system when their rights are violated for fear that they will be penalized for their activities. In addition, fear of discrimination by lawyers, judges and other court officials on the basis of their HIV status may prevent PLWHA from seeking remedies from the formal systems. There also may be an inherent bias against PLWHA on trial, thereby influencing the opinion of the judge or jury. Long court processes constitute another institutional barrier for PLWHA in many Asian countries, as sufferers may not be able to attend court proceedings because of their illness, or they may not live to the end of their trial, as the lack of access to proper treatment means many have a greatly reduced life span.

Targeted Violence Against People Living with HIV/AIDS

Police and powerful criminals in Bangladesh target abuse at commercial sex workers, men who have sex with men and injecting drug users – all who are at a high risk of HIV infection. Human Rights Watch has recorded cases of abduction, beatings, rape, gang rape, and extortion on the part of the police force. Victims of such types of violence are unable to make official complaints, as their complaints are not taken seriously. They are ostracized from society and have little support when they face such abuses. These types of human rights violations not only expose the corruption of the law enforcement system, but can also serve as a setback in the fight against HIV/AIDS.

Human Rights Watch, 2003

Negative social attitudes

Negative social attitudes towards PLWHA pervade all sections of society and the justice system is no

exception.¹⁹ PLWHA may be stereotyped and marginalized because of their HIV status. Law enforcement personnel, judges, lawyers, doctors, and so on may be biased against PLWHA, placing them at an unfair disadvantage when seeking assistance from the justice system. These attitudes may prevent PLWHA from receiving adequate care and support, especially when they need it the most.

The stigma faced by PLWHA exists in many variations. The stigmatization they feel may be further amplified if they are also a member of another marginalized group. Members of other disadvantaged groups can also discriminate against PLWHA, even if they are part of that group (e.g., if a woman is also HIV positive, she may not receive the support of other women who are not HIV positive). In addition, PLWHA may also be stigmatized and discriminated against even when they do not belong to other stigmatized groups, e.g., the assumption that all men who have AIDS are MSMs or that all women who are HIV positive are commercial sex workers exacerbates discriminatory attitudes towards them.

Lack of technical capacity to provide remedies

Legal aid services that are aware of and well versed on the issues facing PLWHA should be established. Support for NGOs conducting outreach programmes to communities that are vulnerable to HIV/AIDS need to be encouraged. Laws, once reformed, also need to be publicized. Further, the lack of adequate facilities for PLWHA needs to be addressed -- not only do PLWHA suffer from outright discrimination, but they are often not provided with the facilities they require within the judicial system. One area in particular that needs to develop greater sensitivity to PLWHA is the prison system. When people from high risk groups are arrested, e.g., injecting drug users or commercial sex workers, the limited prevention measures taken in prisons may increase HIV infection within prisons, through sharing of needles or through unprotected sex.

Economic constraints

The cost of going through official legal channels often serves as a deterrent for PLWHA in accessing justice, especially when they are already facing high medical costs for their treatment or are unable to work due to discrimination or physical weakness or illness as a result of AIDS.

Capacity Development Strategies

Support for legal reforms to eliminate discrimination

Widespread legal reform should be encouraged in order to protect PLWHA. Non-discrimination and equality before the law are basic protections that should be available to PLWHA. Laws should follow

¹⁷ UN. [<http://www.un.org/ga/aids/coverage/FinalDeclarationHIVAIDS.html>].

¹⁸ See <http://www.ohchr.org/english/issues/hiv/guidelines.htm>

¹⁹ See Bharat, S., Aggeleton, P, Tyrer, P. August 2001. 'India: HIV and AIDS-related Discrimination, Stigmatization and Denial', UNAIDS, Geneva, Switzerland. The report examines the types of discrimination faced by PLWHA and includes recommendations.

international guidelines that establish minimum standards for policies relating to PLWHA. These policies should be publicized so that the general public is aware of them and the consequences of discriminatory practices against PLWHA. Confidentiality of PLWHA also needs to be protected and adequate measures taken when these rights are violated. Partnership strategies with CSOs and other organizations working on HIV/AIDS, such as UNAIDS, should be promoted.²⁰

Capacity development for law enforcement personnel and agencies

Along with establishing non-discriminatory policies and laws, it is just as important that once these policies are in place they are enforced. Law enforcement personnel and other employees of the judicial system need to be educated about HIV/AIDS and internal policies need to be in place that do not discriminate against PLWHA. In addition, prison systems need to be evaluated to ensure that they protect the rights of PLWHA, i.e. protection of confidentiality, HIV/AIDS education, and access to condoms, clean syringes and treatment. Further, prisoners with HIV/AIDS should not be stigmatized or isolated, while at the same time measures must be taken to protect other prisoners from infection (also see section on Prisons in Chapter 4).

Higher Risk of HIV Infection within Prisons

Problems in the justice system can actually increase people's vulnerability to HIV/AIDS. In Thailand, studies suggest HIV prevalence is 20% among IDUs who have never been in jail, 38% among those who have been in jail but do not report injecting drugs while in jail and 49% among those who injected while incarcerated (AIDS in Asia: Face the Facts). The sharp increase in HIV prevalence among those who have been in prison points to the urgent need for prison systems to develop clear policies on HIV/AIDS including measures to prevent the spread of HIV/AIDS among prisoners.

Establish a complaint body

A complaints body, such as a Commission on HIV/AIDS, could be set up as an oversight mechanism to protect the rights of PLWHA. Further, in addition to monitoring laws to ensure they do not discriminate against PLWHA and working to mainstream HIV/AIDS prevention into government policies, the Commission could also work as a complaints body. This would provide PLWHA with a means through which they could file complaints, which could be faster and less costly than going through a court process. It could also allow them to file complaints anonymously, which would protect their privacy. HIV/AIDS Commissions

could work in conjunction with the National Human Rights Commission to lobby the Government to protect the human rights of PLWHA (also see National Human Rights Institutions in Chapter 4).

Encourage involvement of PLWHA in the justice system

PLWHA should be encouraged to overcome the stigma associated with HIV/AIDS and to become actively involved in promoting the rights of PLWHA including access to justice. For example, they could work with police and law enforcement officials to ensure that sufficient training and education about HIV transmission and prevention as well as on the rights of PLWHA is provided to police officers on a regular basis. Other areas of involvement could include participation in National HIV/AIDS Commissions to promote issues and concerns related to them. They could also become involved in promoting legal aid and raising legal awareness for other PLWHA as well as the community in general, and they could participate in informal systems and be trained as mediators so that community mediation boards become more inclusive.

Reforms to Protect the Rights of PLWHA

National Human Rights Institutions, NGOs and government agencies working on HIV/AIDS need to lobby for the recognition of HIV/AIDS as not just a medical problem, but as a development problem that has a human rights dimension as well. PLWHA often have their rights violated and organizations should work to reform the legal framework to protect PLWHA from stigma and abuse (i.e. anti-discrimination policies and legislations), investigate complaints of discrimination (in order to enforce the law), as well as educate and advocate for the rights of PLWHA.

In India, for example, the National Human Rights Commission organized a conference on National Human Rights and AIDS in 2000 and produced a report with recommendations and action points in order to address HIV/AIDS and human rights. More recently, the National AIDS Control Organization has begun working with a Member of Parliament to develop comprehensive laws that protect the rights of PLWHA and those vulnerable to infection. The process involves, 1) comparative research of other countries' HIV/AIDS policies, 2) drafting legislation based on the research, 3) undertaking consultation with stakeholders about the legislation, and 4) submitting the legislation to Parliament.

To bring about legislative changes and to ensure that laws that have been reformed are enforced, it is necessary to build coalitions across organizations (recognizing the cross cutting nature of HIV/AIDS) and to work towards building political will to implement changes.

²⁰ Also see UNAIDS site on HIV/AIDS, human rights and law. [http://www.unaids.org/en/in+focus/hiv_aids_human_rights/unaid+activities+hr.asp]. In particular, see 'Handbook for Legislators on HIV/AIDS, Law and Human.

Treatment Action Campaign (TAC), access to justice, and the right to health

The experiences of the Treatment Action Campaign (TAC) in South Africa provide vivid illustrations of how access to justice strategies can save lives in the context of promoting the right to health and fighting the HIV/AIDS pandemic.

In response to continued pressure by civil society groups and to the rising AIDS crisis, the government of South Africa amended the Medicines and Related Substances Control Act 1965 in an attempt to reduce the price of publicly available drugs, and encourage pharmacists to provide cheaper generic drugs. The Pharmaceutical Manufacturers Association (PMA) and 39 drug companies challenged these amendments, arguing that they violated the WTO's intellectual property rights agreements. TAC then intervened, counter-claiming that the legislation was valid and necessary in light of the government's positive duty to fulfill the right to health. With the public pressure following TAC's intervention, the PMA and the drug companies withdrew their case. An indirect result was that the price of anti-retroviral medicine fell from about 4,000 rand a month to 1,000 rand a month.

TAC also moved on to try to compel the national and provincial governments to provide antiretroviral drugs to pregnant women to prevent the transmission of HIV from mothers to their children. The government appealed to the Constitutional Court, after TAC secured a successful decision. The Constitutional Court acknowledged that it was impossible to provide antiretrovirals to all HIV sufferers immediately, but that the government must make reasonable steps to fulfill constitutional socio-economic rights on a progressive basis. It found that the state policy of not making antiretroviral available at hospitals and clinics was unreasonable. The court ordered the government to take reasonable steps to rectify the situation and to provide testing and counseling services at the hospitals and clinics in question.

Of course, obtaining successful judgements and negotiated settlements is one thing; ensuring and monitoring implementation is another. Successful litigation strategies can never be seen as purely 'legal.' TAC's experiences show how legal literacy, social mobilisation, working with the media, political campaigning and strategic litigation can together help to overcome bureaucratic and political obstacles to human rights realisation, with potentially dramatic results.

6.7 PEOPLE WITH DISABILITIES

People with disabilities include those with intellectual, physical, sensory (hearing, vision, and/or speech), psychiatric/mental illness, or acquired disabilities. People with disabilities are often marginalized and socially excluded. They tend to be older²¹, poorer, less educated and have less employment opportunities than those without disabilities. In countries like Viet Nam, Laos, Cambodia, and Afghanistan, many people are disabled as a direct result of conflict – either as a result of combat wounds or due to landmines. Access to justice for people with disabilities often means overcoming obstacles of discrimination, communication, and physical access. They are at a higher risk of becoming victims of crime and exploitation, they may be unknowingly used by others for criminal purposes, they may be denied opportunities because of their difference, and they may lack access to facilities and resources they need, including courts and other legal institutions.

International Human Rights Instruments

Several international instruments have been formulated to address the rights of people with disabilities, which go beyond just providing social services and rehabilitation. On December 20, 1971, in resolution 2856 (XXVI), the UN General Assembly

proclaimed the Declaration on the Rights of Mentally Retarded Persons.²² This was followed by UN General Assembly Resolution 3447 (XXX) on December 9, 1975 with the proclamation of the Declaration on the Rights of Disabled Persons.²³ Both these Declarations affirm the commitment of member states of the UN General Assembly to protect and promote the rights of people with disabilities and provide the appropriate legal framework and policy measures to ensure that they are guaranteed rights equal to that of non-disabled people.²⁴ The Overview of International Legal Frameworks for Disability Legislation lists a number of additional international human rights instruments relevant to people with disabilities.²⁵

Challenges

Absence of adequate laws and policies to protect people with disabilities

As with other disadvantaged groups, people with disabilities need laws that protect their rights. They are some of the most vulnerable members of society and without specific guarantees of their rights, their needs may be overlooked and they may not have any means of protecting themselves when faced with discriminatory practices.

²¹ *The elderly are more vulnerable to disease that can result in range of mental and physical disabilities.*

²² UNHCHR. [http://www.unhchr.ch/html/menu3/b/m_mental.htm].

²³ UNHCHR. [<http://www.unhchr.ch/html/menu3/b/72.htm>].

²⁴ *Exceptions for people with mental disabilities can be found on paragraph 7 of the Declaration on the Rights of Mentally Retarded Persons. PGeneral Assembly resolution 2856 (XXVI) of 20 December 1971.*

²⁵ UN. [<http://www.un.org/esa/socdev/enable/disovlf.htm>].

Discrimination and exclusion

People with disabilities are often negatively stereotyped and marginalized by the rest of society. They are isolated and often made to feel their participation in activities, programmes or public life is not welcome. Law enforcement officials and other employees of the justice system may also have discriminatory attitudes towards people with disabilities, which may serve as a disincentive to using official channels. Also, because of the negative public perception and the social attitudes others have towards people with disabilities, 'issues of prejudice, low self esteem, fear of discrimination and retribution and communication problems' are exacerbated and often crimes committed against them go unreported.²⁶

"Disabled persons shall be able to avail themselves of qualified legal aid when such aid proves indispensable for the protection of their persons and property. If judicial proceedings are instituted against them, the legal procedure applied shall take their physical and mental condition fully into account."

Paragraph 11, Declaration on the Rights of Disabled Persons, Proclaimed by General Assembly resolution 3447 (XXX) of 9 December 1975

Lack of adequate facilities

The lack of physical access to buildings, public transport, etc. is one of the major obstacles for people with disabilities, preventing them from being able to access the justice system. Infrastructure barriers, like the lack of wheelchair ramps or lifts, mean that it is difficult for people with disabilities to even access the court premises and processes. Even if laws are in place calling for all public buildings to be accessible for people with disabilities, it is necessary to facilitate and enforce implementation of these laws. This includes providing funds to make these buildings accessible.

Barriers in communication

For people with disabilities, especially those with psychiatric, mental, speech, or hearing disabilities, communication with legal practitioners can be very difficult. Legal practitioners may not be able to understand or communicate with their clients, as they may not have the adequate interpretation facilities. "Hidden" disabilities such as mental, psychological, and intellectual handicaps may go undetected by legal practitioners, presenting a danger of misrepresentation and inappropriate sentencing. In such cases, it is important to include

psychologists or social workers so that when people with disabilities talk to prosecutors they do not implicate themselves unknowingly. Mechanisms should be put in place to conduct proper assessments, especially for people with mental disabilities. For people with hearing or vision-related disabilities participating fully in court proceedings can be very difficult unless interpreters are provided. Further, the formality and adversarial nature of court proceedings may intimidate and hinder people with disabilities from communicating their complaints. This can be compounded by the lack of experience people with disabilities have participating in public life.

Lack of awareness/information

People with disabilities often suffer from a lack of awareness of their rights and appropriate procedures to demand justice when their rights have been violated. They may not be aware of the options available to them and, if they suffer from psychiatric disabilities, they may not understand or may not be able to make a decision even when their rights are explained to them. They may also be used in criminal activities without being aware of it. In some cases, they may be dependent on family members or be housed in an institution and they may not know who they should get in touch with or how when their rights are violated.

Capacity Development Strategies

Legal reform

To facilitate the ability of people with disabilities to access justice, it is necessary to prioritize the concerns of people with disabilities. Laws need to be instituted that guarantee their basic rights and include special considerations for their needs so that inappropriate sentencing can be avoided.

Types of legal and institutional reform include:

- **Ensuring unimpeded access to public facilities.**
- **Requiring signage and communication that is sensitive to the needs of people with disabilities.**
- **Instituting anti-discrimination laws.**
- **Providing access to professionals such as interpreters and psychologists at all points in the judicial process.**

As a first step, consultations with people with disabilities about their needs and concerns is one way that the State can get the information

²⁶ Schetzer, Louis and Judith Henderson. August 2003. "Access to Justice and Legal Needs: A project to identify legal needs, pathways and barriers for disadvantaged people in NSW. Stage 1, Public Consultations" Law and Justice Foundation of NSW, Sydney, Australia. [<http://www.lawfoundation.net.au/publications/reports/a2jln/1C/summary.pdf>].

necessary to create relevant laws and programmes addressing their concerns. It is essential that these laws are not only created, but also effectively monitored and implemented.

Simplify court procedures

Court procedures can be confusing in general, but they are even more intimidating and complicated for people with disabilities (especially mental disabilities). The language used in courts should be as simple as possible and legal advisors must learn to communicate in a way that can be understood by their clients. If necessary, interpreters and social workers should be present to make the client comfortable and facilitate the process. Legal personnel need to be trained to be sensitive to the needs of people with disabilities, avoid discriminatory practices and attitudes, and be aware of the issues they face in order to refer them to appropriate agencies and services. In addition, court delays should be avoided and systems need to be put in place that will expedite the court process. This is a crucial issue for people with disabilities as they often need extra support and care, which the State may not be able to provide for an extended period of time.

Offer a range of services for people with disabilities

Along with legal support for people with disabilities, it is necessary to ensure that other services are available to them as well. Psycho-social assistance for people with disabilities who are victims of crime, medical psychiatric care for those in need, and economic support for those who are homeless or have no way of supporting themselves are also issues that need to be taken into consideration when addressing the problems of people with disabilities. Facilities for people with disabilities should also be provided for people in prisons and alternative institutions for people with mental disabilities. It should also be recognized that the disadvantages faced by people with disabilities are often compounded by the fact that they face many other obstacles simultaneously. People with disabilities are often poor, can be women, internally displaced persons, HIV positive, and so on, and in such cases, overcoming these other obstacles is even more challenging. It is necessary then, for State and non-State actors, to support people with disabilities and assist in protecting their basic rights so that they are able to access the justice system when they need it.

Asia and Pacific Decade of Disabled Persons

The Asia and Pacific Decade of Disabled Persons which was originally intended to end in 2002 has been extended for another decade (2003-2012) to ensure that the momentum and progress of the previous decade will be built upon. The Biwako Millennium Framework for Action towards an Inclusive, Barrier-free and Rights-based Society for Persons with Disabilities in Asia and the Pacific (BMF) that emerged out of the 1st Decade of the Disabled Person includes specific strategies that nations need to adopt, including those promoting rights-based legislation for disabled people. The strategies include:

- Reviewing and adopting non-discrimination policies
- Encouraging national human rights institutions to protect the rights of people with disabilities
- Actively involving persons with disabilities in policy formulation
- Promoting the ratification of international human rights treaties
- Calling for governments to support the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities
- Consulting and including the persons with disabilities in drafting laws and procedures that affect them

*Focus on Ability, Celebrate Diversity:
Highlights of the Asian and Pacific Decade of Disabled Persons, 1993-2002
Social Policy Paper No. 13, 2003
ST/ESCAP/2291*

JUSTICE IN POST-CONFLICT SITUATIONS

CHAPTER



Overview of the Chapter

7.1 The Justice System in Post-Conflict Situations

7.2 Access to Justice and Post-Conflict

7.3 Programmatic Challenges for Access to Justice
in Post-Conflict Situations

7.4 Strategic Entry Points in the Post-Conflict Context

OVERVIEW OF THE CHAPTER

Many countries in the Asia-Pacific region are either facing an ongoing conflict or are recovering from a conflict. This chapter focuses on the specific types of obstacles experienced in post-conflict situations and suggests some entry points for UNDP in improving access to justice in the context of conflict and post-conflict.¹

Post-conflict refers to the aftermath of a conflict and usually applies to post-war situations, but can also include internal rebellion against an authoritarian regime. Post-conflict conditions in a country where much of the infrastructure and capacities of the State have been dismantled or severely weakened create a challenging situation for UNDP. However, it can also be an opportunity for UNDP to work with the State to address structural problems and to put into place systems and institutions that can contribute to long-term development where, right from the outset, there is an awareness of the importance of a rights-based approach and a focus on access to justice for the most disadvantaged.

Often in post-conflict situations, there is the added dimension of dealing with human rights violations that may have been the cause of the conflict and have inevitably been exacerbated during the conflict (torture, illegal detention, rape, murder, etc.). For the society to confront the legacy of, and recover from, these human rights abuses it is often necessary to set up a transitional justice system that holds perpetrators accountable and plays a role in addressing the violations of the past and ensuring that the most disadvantaged have access to these transitional systems of justice. If there is no justice accessible in the aftermath of conflict, or if there is only unequal access, the risk of a re-emergence of violent conflict increases.

Root Causes of Conflict

“...many conflicts are rooted in the real or perceived breakdown of justice where individuals and groups are not able to obtain a fair remedy for their grievances; where political, legal and institutional biases marginalize segments of the population such that they resort to violence. Even where the justice system per se may not be the cause of the conflict, with the continuation and the escalation of the conflict over time, the judicial and legal system generally becomes less able to cope with the injustices of war, thus compounding the perception that the judicial establishment is either unable or unwilling to fulfil the demands for justice. As such, any attempts to facilitate a process of moving from conflict to democratization and/or peace, if they are to be successful, must take into account the causes of the conflict including the absence of an effective justice and human rights mechanism that allows the aggrieved to claim their right to redress. To be sure, the success or failure of UN peacekeeping missions has often hinged on whether a preparatory process involving issues such as criminal justice and human rights protection has been implemented...”

From “Governance in Post Conflict Situations: Justice, Security and Human Rights”, UNDP and Chr. Michelsen Institute, Bergen Seminar Series, Norway, 5-7 May 2004.

¹ Adapted from UNDP and Chr. Michelsen Institute. 2004. “UNDP Background Paper for Working Group Discussions: Governance in Post-Conflict Situations - Justice, Security and Human Rights.” Bergen Seminar Series. Tomas, Amparo. 2004. “Background Paper for UNDP Indonesia”, UNDP Indonesia.

7.1 THE JUSTICE SYSTEM IN POST-CONFLICT SITUATIONS

Previous or existing problems faced by the justice system are compounded in situations of conflict, leading to even greater difficulties in being able to provide justice remedies. Court closures, destruction of infrastructure, drastic decreases in the numbers of cases filed as a result of restricted access, and the departure of legal personnel from conflict-affected areas due to fear or intimidation are typical effects of conflict on the justice system.

The lack of a functioning system affects the poor and other groups in conflict zones in a number of ways:

- It creates an environment where small, solvable disputes can lead to broader social conflict;
- The presence of vigilantes generates localized village-level violence and legitimizes acts of revenge;
- Legitimate grievances of internally displaced populations remain un-addressed, particularly

in regards to land and other assets in places of origin;

- Abuses by military, officials, or extremist groups against individuals or groups of individuals are overlooked and the perpetrators are allowed to act with impunity;
- Communities have limited avenues to claim basic rights such as land, or access to basic services; and
- The formal court system is perceived as biased on the basis of political and/or ethno-religious identities, and as a result communities do not trust their neutrality, perceive them as unfair, and are reluctant to deal with them.

The following sections will begin by exploring access to justice issues in post-conflict situations, then examine programmatic challenges for access to justice in post-conflict situations as well as strategic entry points for UNDP, and conclude by offering some long-term considerations.

Direct Impact of Conflict on the Justice System

- Debilitating impact on local governance institutions, including government infrastructure and departure of staff
- Segregation of bureaucracy along ethnic or religious lines
- Militarization of civil administration and decision-making
- Refocusing of policy, programmes and funds on conflict
- Lack of credible institutions through which to channel grievances
- Lack of participation in decision-making increases disenfranchisement
- Lack of faith in policing apparatus leads to militia formation

Some General Strategies to Overcome the Challenges:

- Strengthening institutions of democratic governance and increasing participation, accountability and transparency
- Enhancing access to justice to enable disputes to be resolved peacefully
- Strengthening of conflict-sensitive development planning and service delivery

7.2 ACCESS TO JUSTICE AND POST-CONFLICT

Access to justice is an integral element of any peace-building and long-term development process after conflict. Concepts of redress and justice are central to peace, trust and confidence-building. Immediate results need to be balanced with long-term goals and an overall strategy needs to be in place to coordinate recovery efforts.

Access to Justice and Conflict Prevention and Recovery in Indonesia

The 'Strengthening Access to Justice and Rule of Law for Governance, Conflict Prevention and Recovery' project implemented by the Government of Indonesia and supported by UNDP seeks to undertake an access to justice assessment in five provinces in Indonesia. The assessment has a strong orientation towards conflict prevention and recovery. From a recovery point of view, the assessment aims to clarify what has been the impact of conflict on the capacity of the justice system to deliver speedy, fair and impartial justice, particularly for poor and disadvantaged groups. On the other hand, conflict prevention requires building sufficient capacities in the justice system so that it can provide effective remedies to offences that may breed violent conflict. Thus, from a conflict prevention point of view, the assessment should provide a concrete picture of what are the existing capacities in the justice system with regard to offences that pose risks of outbreaks of inter-ethnic and inter-community violence.

Access to justice is a cross-cutting issue which is present in three major components of conflict prevention and recovery:

- **Strengthening mediating institutions.** Neutral, transparent and accountable institutions in the justice system are key for effective conflict management and the establishment of trust and confidence among communities deeply affected by conflict – by assuring them there is no impunity for those who commit major grievances and offences.
- **Developing capacities in civil society.** This allows civil society to manage its own mechanisms for conflict prevention. Informal conflict resolution mechanisms in communities are fundamental for preventing the recurrence of violent conflict. Transparency and accountability of such mechanisms (e.g., through community leaders, and a greater involvement of civil society in reform processes) are critical to ensuring successful peace-building efforts.

- **Justice and reconciliation.** There is a debate on the extent to which justice and reconciliation objectives in a post-conflict context may undermine each other. However, such goals need not be seen as oppositional, but rather as reinforcing each other. Impunity and the deterioration of the justice system put peace and development at risk in the long-term. At the same time, reconciliation goals demand a careful analysis of the type of 'justice' needed and for whom, taking into consideration the legitimate demands and aspirations of the communities affected.

Capacity development of institutions to provide justice and for people to claim remedies needs to go hand-in-hand with strategies aimed at minimizing critical risks influencing the justice process. The significant risks of justice include – economic loss, physical or emotional injury, social ostracism, etc. Even when the capacities to perform key functions (e.g., legal awareness) exist, people may still consider the risks involved in seeking or delivering justice remedies too great.

Risk becomes particularly acute in conflict and post-conflict settings. The influence of risks (such as threats or intimidation) is significant not only for poor and disadvantaged populations, who often live in situations of high insecurity, but also for individual and institutional operators in the justice system – judges, lawyers, prosecutors, police, etc. Other risks include:

- **Risk of recurrence of conflict.** This risk increases if the main stakeholders are interested in destabilizing the situation in order to avoid being held accountable or brought to justice. They might also press for amnesties.
- **Ignoring the violations committed.** This runs the risk, firstly, of not meeting victims' expectations and thus diminishing their trust in the State, and secondly, of inconsistency with the international framework which outlines the obligations of States and the entitlements of individuals. The longer the abuses are ignored, the more likely they are to damage hopes for peace.²

Access to justice programming needs to be part of a comprehensive approach towards justice and security sector reform, particularly in post-conflict settings. Therefore, access to justice-related strategies may also involve security bodies such as military and other armed groups.

² International Crisis Group. 2003. "Afghanistan: Judicial Reform and Transitional Justice." *International Crisis Group Asia Report 45*. Kabul/Brussels.

Key actors in the Justice and Security Sector (JSS) Community

Criminal justice organizations: Police, judiciary (including courts, prosecutors, and defence counsel), traditional conflict resolution mechanisms, and correctional services;

Management and oversight bodies: Executive branch of government (presidential and/or prime ministerial); legislative branch of government, including national, provincial, and municipal legislatures/assemblies, their committees and commissions; ministries of internal affairs, justice, defence; financial management bodies (ministries of finance, budget offices, auditor general's offices); other oversight bodies such as human rights ombudsman, police commissions; civilian review bodies;

Military and intelligence services: Armed forces, paramilitary forces, coast guards, militias, and intelligence services; and

Non-core institutions: Customs and other uniformed bodies.

The above four categories of actors comprise the JSS. However, it is important to also take into account:

Non-statutory security forces: Liberation armies, guerrilla armies, traditional militias, political party militias, private security companies; and

Civil society: Professional organizations, research institutes and think tanks, advocacy groups, religious organizations, non-governmental organizations, and the media.

7.3 PROGRAMMATIC CHALLENGES FOR ACCESS TO JUSTICE IN POST-CONFLICT SITUATIONS

Reconciling the need for immediate results without jeopardizing long-term structural reform efforts

The demand for immediate justice and protection of human rights is often well beyond the capacity of post-conflict administrations, which may be deeply affected by the destruction of physical and human infrastructure. The inability to meet this demand may result in a further erosion of credibility and public confidence in the justice system. Therefore, it is of critical importance that public faith in the justice system is restored quickly halting the possibility of a return to extra-judicial measures such as vigilantism and 'mob-justice' or 'victors' justice'.

The call for immediate results can, however, detract from long-term reform and capacity building. For this reason, efforts should be made to reconcile the need for immediate results with long-term structural reform efforts. While many immediate post-conflict interventions focus on short-term capacity building, infrastructure rehabilitation and transitional justice initiatives (e.g., truth commissions), these initiatives should be part of a broader strategy aimed at developing a legal and institutional framework that focuses on the rights and access to justice of the poor and underprivileged in the mid to long term.

How to balance the relationship between traditional and formal/official justice when justice is weakly institutionalized or perceived as alienating by poor and disadvantaged populations

Post-conflict justice reforms tend to focus on the formal institutions at the expense of national human rights institutions, traditional justice, customary law and civil society organizations. This is not only likely to diminish the overall impact of reforms (by overlooking critical components of the justice system); it also limits opportunities to strengthen the access to justice of poor and conflict-affected communities – by ignoring mechanisms which are used by, and are more accessible to, these groups.

Poor and conflict-affected communities often prefer traditional forms of justice, which are largely conciliatory, as they help to preserve social cohesion. However, it is important to recognize that traditional justice may not be rights-respecting and is not always consistent with basic human rights norms, e.g., in terms of access by specific groups (e.g., women), due process or punishments. Although the need to balance the relationship between formal/official justice and traditional justice is now widely recognized, development experience in this field is limited (See Chapter 4: Informal Justice Systems).

In line with its UN mandate, UNDP's support to traditional systems should be guided by minimum standards, particularly with regard to non-discrimination, transparency and

Disadvantaged Groups and Situations of Conflict

Conflict exacerbates the vulnerabilities of disadvantaged groups. During conflict situations, disadvantaged groups are under increased pressure and stress, and the few social networks for support they may have had often break down. As violence and insecurity increases, there is little protection available for the most disadvantaged and human rights abuses against them increase sharply. For example:

- Ethnic and religious tensions can be heightened;
- Violence against women rises (domestic abuse as well as rape and other gender specific violence);
- Displacement and migration increases as people are driven away from their homes;
- People suffer from increased disabilities as a direct result of conflict, e.g., victims of land mines, psychological trauma, victims of violence, etc.,
- Increased spread of HIV as a result of an increase in prostitution during conflict or the use of rape as tool of war;
- People living with HIV/AIDS no longer receive the support or care they need;
- Indigenous peoples and other minority groups may be specifically targeted for violence;
- Women may face additional burdens within the household as many of the men may have left to fight, or may have been killed or may be disabled; and
- Shifting priorities and increased responsibilities of girls results in their being less likely to attend school.

In conflict situations, and in the aftermath, strategies that the Government and the donor communities develop need to focus on the least privileged and worst affected section of society which are invariably from disadvantaged groups (see Chapter 6).

accountability, and adequate process and punishments. Strengthening linkages between formal and traditional systems (e.g., through appeal to and oversight of the judiciary) can enhance due process and reduce the likelihood of impunity.

How to reconcile the need for a comprehensive approach towards justice reforms with a scarcity of resources and limited capacity

A holistic approach goes beyond merely strengthening adjudication mechanisms. It also focuses on improving access to these institutions, especially by the disadvantaged; ensuring the establishment of a sound legal basis; and the institution of adequate enforcement mechanisms. Such an approach should involve numerous entities: from the executive to the legislature and from the judiciary to civil society.

Scarcity of resources may, however, increase the tendency towards 'piecemeal' reforms. This could not only lead to a less than optimum use of resources, but also to a situation where disadvantaged groups entering the justice system could fall through the cracks and be subjected to serious human rights violations.

In many, if not most, crisis and post-conflict countries there is a gap between the level of reforms recommended and the capability of

national governments to institute the changes implicit in the reform agenda.³ This may increase citizen's frustration with the system and exacerbate the potential for conflict.

It is, therefore, of critical importance to focus attention on coordination mechanisms among the different components of the justice system, particularly when these are undergoing simultaneous processes of reform. At the same time, UNDP strategies need to be coherent and complementary with those being supported by other donors, in order to maximize the overall impact of development assistance.

Lack of Coordination between Judicial Institutions

In Timor-Leste, for example, prisons have been flooded with persons whose detention orders have long expired because of the lack of coordination between the courts, the prosecutors, the public defenders and the prisons.

How and when to foster demand for access to justice-related reforms when official support for the process is lacking

Access to justice programming is an inherently political endeavour, and there may be strong

³ See proceedings of the UNDP Conference on Justice and Security Sector Reform: Coherence, Cooperation and Comparative Strengths, Oslo, 10-11 April 2003.

resistance to substantive reform processes, particularly by elites and groups whose positions of power may be eroded or subject to stricter controls, as a consequence of such processes. At the same time, political controversies may inhibit donors from engaging in substantive reform processes, creating a tendency toward 'superficial' reform that does not alter the structural conditions under which the justice and security systems operate.

A failure to engage in meaningful reforms can aggravate social and political tensions, jeopardize chances for sustainable development, and increase the risk of a reoccurrence of violent conflict. Therefore, there is a need to identify 'change agents' within the justice and security systems in order to strengthen their role and capacities to promote and sustain reform processes. Similarly, potential 'losers' or 'spoilors' of reform programmes need to be identified, and strategies for their positive engagement or neutralization set in place. This implies ongoing analysis of potential sources of conflict in reform processes, and systematic inclusion of conflict mediation mechanisms in such processes.

7.4 STRATEGIC ENTRY POINTS IN THE POST-CONFLICT CONTEXT

Suggested entry points

Activities oriented towards obtaining a better understanding of the major access to justice issues arising in the post-conflict context

- **Rapid assessment and diagnosis**, encompassing both formal and informal systems of justice.
- **Identifying high-priority human resource management and administrative needs** within each institution.

Property Rights in the Post-Conflict Context

Recovering registries, clarifying titles, and supporting dispute resolution mechanisms to deal with conflicting claims can all be important entry points in a post-conflict situation. However, the concept of registering private property may vary according to culture, therefore, representatives from local communities must participate in determining appropriate solutions. For example, in the Philippines, UNDP supported the implementation of the Indigenous People's Rights Act by assisting the National Commission of Indigenous Peoples to map land titles and assist civil society through the provision of paralegal support to communities to enhance their understanding of the law and how to use it.

Activities oriented towards enhancing the capacities of civil society and informal/traditional justice mechanisms, particularly with regard to their interface with the formal justice system

- **Examining the potential of traditional mechanisms of justice**, and strengthening linkages between formal and informal systems (see Chapter 4: Informal Justice Systems).
- **Establishing property rights and providing legal services** and human rights protection to internally displaced persons (see Chapter 6: Migrants and IDPs).
- **Strengthening the capacity of national human rights institutions and local human rights groups**, as well as the capacity of legal advocacy and aid civil society organizations to advocate for reforms and provide services to disadvantaged people, and the creation of advocacy networks (see Chapter 4: National Human Rights Institutions).
- **Using mass media** (e.g., T.V., radio, newspapers, etc.) to reach disadvantaged populations, particularly geographically isolated communities, and exploring the effectiveness of ICT programmes.

- **Promoting the creation of advocacy groups** to demand for transparency and accountability in order to minimize the risk of threats against individuals or organizations. Building networks and coalitions also helps to reduce the potential for impunity in cases where the justice system is perceived to be complicit or inefficient.

Activities oriented towards strengthening formal justice systems

- **Greater professionalism and accountability** of formal justice institutions.
- **Reviewing and revising relevant sections of the Constitution, penal code and criminal procedure code** to ensure that the independence of the judiciary, human rights are protected and that specific attention is paid to the situation of disadvantaged groups (see Chapter 3).
- **Developing selection, vetting and recruitment processes and criteria**, and strengthening accountability mechanisms within the justice system, especially to address corruption and lack of accountability.
- **Providing necessary support, either through infrastructure, short-term training or additional personnel**. Innovative solutions

appropriate to the particular setting, such as mobile courts, may be needed, as well as the setting up of legal services and providing human rights protections to returning refugees and internally displaced persons (e.g., citizenship rights, obtaining records, facilitating return, etc.).

- **Identifying critical risks** faced by those working in or accessing the justice system (e.g., threats, intimidations, and reprisals), and establishing strategies for minimizing those risks. UNDP could, for example, facilitate dialogue on these issues in order to strengthen protection to judges, prosecutors, defence counsels, police officers, as well as victims and witnesses.
- **Strengthening law enforcement** as weak enforcement is a critical impediment to sustainable peace-building. However, police reform processes can be extremely difficult and highly political (see Chapter 4: Police).
- **Facilitating coordination** between institutions in the criminal justice system and disseminating information on ongoing reform processes. Encouraging the establishment of a coordinating committee to address mutual problems can lead to a more holistic approach, enabling reform of the entire justice system.
- **Evaluating the impact of training activities** related to pro-poor and human rights legislation, and supporting systems for the dissemination legislation and court decisions. A strategic niche for UNDP support may be in (a) ensuring training on pro-poor and human rights related legislation and procedures is incorporated into the professional curriculum of relevant institutions, and (b) evaluating the impact of donor-supported programmes on policy and attitudinal change, and identifying other necessary strategies (e.g., reforms in recruitment systems, improvements in working conditions, etc.).

Support Transitional Justice Mechanisms (TJM)

Initial considerations when developing activities to support TJMs should include

- **An understanding of the needs of the people who will have to live with the consequences of any agreement on the utilization of TJMs.** It is up to each society to negotiate its own path toward truth and reconciliation, and the international community should pursue a policy of “solidarity not substitution” in facilitating justice and peace.⁴ Therefore, the consultation, participation and empowerment of marginalized groups are crucial for designing effective TJMs. This would also ensure that TJMs have relevance and legitimacy for those they aim to assist.
- **Awareness that a single TJM may fail to address all the objectives of transitional justice.** Therefore, a combination of TJMs, which consider that the failings of one may impact the other, is advisable. Any combination of TJMs should also take into account existing justice mechanisms and coordination of donor assistance.
- **Defining clear and realistic goals** - otherwise the danger of unmet expectations could diminish the positive influence of TJMs.
- **Ensure due process standards.** Realization that in implementing a strategy to provide accountability and justice for past abuses, there is a risk that further human rights violations will be committed. Therefore, respect for due process standards has to be ensured.
- **Need for external oversight of TJMs.** Until national civil society bodies are able to effectively carry out this function, oversight presents an entry-point for international involvement.⁵

Building Support to Undertake Rights-based Police Reform

Police reform is part of the mandate of UNDP as it is crucial for ensuring the rule of law. However, donor agencies can be resistance to police reform as they do not see it as a ‘development’ problem. The Government and police itself can also be resistant, and may be unwilling to subject themselves to human rights standards. In such cases, support should be built from both within these organizations and outside. It may also be necessary to ‘tone down’ human rights language, while pursuing the goal of upholding human rights standards.

⁴ International Center for Transitional Justice. February 2004. “Workshop on Transitional Justice for Senior Managers of the United Nations – Summary of Discussions.” February 2004, New York, NY.

⁵ Alexander, Jane. 2003. “A Scoping Study of Transitional Justice and Poverty Reduction.” DFID. United Kingdom.

In addition, the International Center for Transitional Justice (ICTJ) provides suggestions on steps that could be taken to strengthen civil society's ongoing efforts on transitional justice. These include supporting the networking capabilities of civil society (e.g., through the establishment of a transitional justice coalition, or a transitional justice newsletter).

Further, communicating information to affected populations about how violence erupted, without necessarily seeking to lay legal blame, can be critical to preventing the eruption of violence in the future. These types of initiatives may adopt different forms, including the establishment of truth commissions.

UNDP access to justice assessments should aim to understand the specific aspirations of conflict affected communities with regard to transitional justice. The ICTJ report from Indonesia, for example, concluded that while almost all civil society institutions consulted agreed that truth-seeking

measures are an important part of addressing Indonesia's legacy of abuse, investigations into past violations are not listed as a priority. The ICTJ report also found that activists had different perceptions of reconciliation. For example, some rejected the idea because they felt it meant forgiving and forgetting the role of the perpetrators and colluding with the political elite. Others felt that human rights violations were a part of the past and must be forgotten if Indonesia wishes to avoid reawakening of old trauma and national disintegration.⁶

The existence of militia groups is a powerful impediment to peace building efforts and a major threat to access to justice. The operation of militia groups in post-conflict areas jeopardizes the success of ongoing reform and peace efforts. Exploring the potential initiatives for disarmament, demobilization, resettlement and reintegration (DDRR) of militia groups and initiating dialogue on this issue may constitute a strategic entry point for UNDP support.

Types of Transitional Justice Mechanisms (TJMs)

Criminal prosecutions: Domestic courts, international tribunals, hybrid judicial mechanisms.

Transnational justice mechanisms: Criminal prosecutions and civil suits in foreign courts.

Quasi-traditional justice mechanisms: Incorporation of mechanisms or processes that exist outside the formal state framework, as elements of a transitional justice strategy.

Commissions: Primarily truth commissions set up on a temporary basis to investigate specific human rights abuses.

Lustration/vetting processes: Excluding certain individuals from holding public office or employment through dismissal, forced retirement or establishing certain criteria which must be met by future candidates for public positions.

Reparations: Relieving suffering of, and affording justice to, victims to achieve satisfaction through restitution, compensation, rehabilitation and guarantees of non-repetition.

Amnesty: Act by which an individual or a group of people is granted immunity from criminal prosecution, and in some cases civil liability, for a crime committed in the past.

Adapted from: "A Scoping Study of Transitional Justice and Poverty Reduction", Jane Alexander for DFID, January 2003.

⁶ Farid, H., and R. Simarmatra. 2004. "The Struggle for Truth and Justice: A Survey of Transitional Justice Initiatives throughout Indonesia." Occasional Paper Series, International Center for Transitional Justice. New York, NY.

Focus on Long-term Stability

In post-conflict situations, sustainable capacity building and just self-governance are central to long-term stability. Therefore, the emphasis should be on the development of human resources and on institutional reform which focuses on the most disadvantaged people.

Achieving such goals requires the adoption of a constitution to provide legal protection for all individuals and to define the competencies and responsibilities of the State. Further, legal drafting should specify the roles of State actors. Emphasis should be given to drafting the necessary procedure codes to ensure non-discrimination and inclusion of international human rights standards.

Not only is it necessary to establish a legal framework which adheres to international

standards, it is also important to ensure such a framework can be implemented effectively. This requires that all key actors are accountable, that independence of the judiciary is ensured, and that governance is democratic. It also requires that legal aid systems are in place to assist people in seeking justice, and that citizens have the capacity to monitor the justice system. CSOs also play a key role, and strengthening them will enhance their ability to monitor the judiciary.

A rights-based approach to programming in post-conflict countries is crucial. As in all access to justice programming, non-discrimination, accountability, and participation are all key to ensuring an inclusive process in rebuilding the justice system in the aftermath of conflict. As a result, although post-conflict rebuilding brings many unique challenges, the strategies outlined in other sections of this Guide may also be applicable.

A Rights-based Approach to Post-Conflict Situations

- From a procedural point of view a rapid assessment of the situation and the people's needs has to be undertaken. Participation, that is, national ownership of all reforms has to be ensured right from the beginning. Although there may be a lack of capacity, e.g., due to death or displacement of qualified people, meaningful participation is fundamental to sustaining the reforms.
- Enhancing the capacities of duty-bearers to enable them to be accountable involves defining their tasks, improving their administrative capacities and raising their awareness through training. Duty-bearers include staff of ministries, judiciary, prosecutors, quasi-judicial bodies, traditional justice mechanisms, police and law enforcement.
- The principle of non-discrimination calls for a focus on marginalized groups and their needs, as well as their participation and empowerment. The most disadvantaged tend to be minorities, refugees, internally displaced, prisoners, ill and disabled people, widows and orphans. For these groups, formal justice processes may be hard for them to access, perhaps due to lack of knowledge or lack of financial resources. In these cases traditional justice mechanisms may be more appropriate. Further, a gender perspective needs to be introduced into programming as women face particular challenges as refugees or as dependants of ex-combatants (see UNSC Resolution 1325).
- Linkages to international human rights standards are necessary to ensure that basic human rights, especially those of disadvantaged groups, are protected. Linking any approaches to human rights standards means familiarizing those who are part of the justice system or are implementing TJMs with the relevant standards.

ANNEXES

ANNEX 1

GUIDING PRINCIPLES IN HUMAN RIGHTS-BASED PROGRAMMING

| GUIDING PRINCIPLE | WHAT ARE THE IMPLICATIONS FOR PROGRAMMING? | COUNTRY OFFICE EXAMPLES |
|------------------------------------|--|-------------------------|
| PARTICIPATION | <ul style="list-style-type: none"> ■ Create channels especially for participation of poor and disadvantaged people (non-discrimination) ■ Participation needs to be active, free and meaningful – time and resources to develop these capacities, especially with regard to disadvantaged groups may be needed ■ Developing capacities for participation is an important result in itself (empowerment) | |
| ACCOUNTABILITY | <ul style="list-style-type: none"> ■ Guidance to set responsibilities ■ Focus capacity development on fulfilment of accountabilities (build on existing strengths and address weaknesses) ■ Think of how to strengthen accountabilities through external (e.g., civil society oversight) and project mechanisms | |
| NON-DISCRIMINATION | <ul style="list-style-type: none"> ■ Identify most vulnerable groups and focus on them explicitly ■ Give disadvantaged groups a voice in programme design (through participation) ■ Ensure that there is no discrimination through the project against other groups. ■ Develop data disaggregation to better identify disadvantaged groups | |
| EMPOWERMENT | <ul style="list-style-type: none"> ■ Identify capacities that are needed to claim and exercise rights (build on existing strengths and solutions, target weaknesses and vulnerabilities) | |
| LINKAGES TO HUMAN RIGHTS STANDARDS | <ul style="list-style-type: none"> ■ Familiarize with the relevant standards (e.g., see prison section in Chapter 4) in order to take them into account when designing project results ■ Stress on monitoring progressive results and assessing the risk of setbacks | |

ANNEX 2

SAMPLE IN-DEPTH INTERVIEW GUIDELINES FOR AN NGO MAPPING PRIOR TO AN ACCESS TO JUSTICE ASSESSMENT

NAME OF THE ORGANIZATION:

NAME OF THE INTERVIEWEE AND POSITION:

Briefing on the purpose of the interview:

- We are conducting a mapping exercise of civil society initiatives in fields related to access to justice.
- We are doing this mapping because UNDP will soon support the Government in conducting an assessment of access to justice in five provinces in the country (including both non-conflict and post-conflict areas).
- The purpose of the assessment is to better understand ways to improve people's access to the justice system, and the quality of the justice system to provide effective remedies to people. The assessment also seeks to find out what has been the impact of conflict on access to justice. That is the reason why the assessment includes both non-conflict and post-conflict areas.
- The purpose of this mapping is to find out what type of initiatives in access to justice-related fields have already been done by non-governmental organizations in the country, so the assessment can build on existing knowledge.

By access to justice, we broadly mean the extent to which people can access the justice system to seek solutions when they are victims of crime, human rights violations and other offences; as well as the extent to which the justice system can provide people with adequate remedies, that is remedies that are in conformity with human rights.

By justice system we mean both formal and informal justice mechanisms. By formal mechanisms we mean the courts, the police, the prosecutors, and the prisons. By informal mechanisms we mean traditional systems, such as village-level dispute resolution councils, and other informal mechanisms to resolve disputes at the community level.

We appreciate your time in providing us with basic information for the preparatory stage of the assessment. This interview may take around an hour and a half to two hours. If you have any further questions on the purposes of this interview, you may ask them now, or at any moment during the course of the interview. Please feel free to decline answering any of our questions (ask whether the interview can be recorded, and indicate to the interviewee that he/she can ask to stop recording at any moment during the interview if he/she feels more comfortable answering particular questions that way).

1. HOW LONG HAVE YOU BEEN WORKING IN THIS ORGANIZATION?

2. WHEN WAS THE ORGANIZATION ESTABLISHED?

3. CAN YOU GIVE US A BRIEF DESCRIPTION OF THE HISTORY OF THE ORGANIZATION?

4. HOW WOULD YOU DESCRIBE THE ORGANIZATION'S MAIN LINE OF ACTIVITY ?

5. WHAT IS YOUR PERSONAL OPINION ABOUT THE MOST URGENT ACCESS TO JUSTICE PROBLEMS IN THE COUNTRY? (Indicate responses to this question will be confidential and remind the interviewee that he/she can ask not to record his/her answer to this question).

6. PLEASE PROVIDE YOUR PERSONAL OPINIONS ON THE MOST URGENT PROBLEMS IN THE FOLLOWING FIELDS: (allow duplication with Question 5 and indicate responses to this question will be confidential, and remind the interviewee that he/she can ask not to record his/her answer to this question).

The legal system
 Courts
 Prosecutors
 Police
 Legal Aid
 Traditional law and/or traditional systems of justice

7. WHAT TYPE OF CIVIL SOCIETY RESPONSES IS THE ORGANIZATION SUPPORTING TO DEAL WITH SUCH PROBLEMS (IF ANY)?

8. HAS THE ORGANIZATION CONDUCTED ANY TYPE OF RESEARCH IN THE FOLLOWING FIELDS? WHAT WAS THE SCOPE (IF RELEVANT)?

The legal system
 Courts
 Prosecutors
 Police
 Legal Aid
 Traditional law and/or traditional systems of justice

9. HAS THE ORGANIZATION RESEARCHED IN ANY OTHER FIELDS? IF SO, WHICH ONES AND WHAT WAS THE SCOPE?

10. DOES THE ORGANIZATION HAVE ANY PUBLICATIONS/REPORTS RELATED TO ITS RESEARCH?

11. DOES THE ORGANIZATION HAVE ANY PERIODICAL PUBLICATION? IF SO, WHAT IS THE SCOPE?

12. WHAT ARE THE ORGANIZATION'S CURRENT MAIN ACTIVITIES IN THE FOLLOWING FIELDS (IF RELEVANT)? (Allow duplication with Question 4).

Advocacy
 Campaigning
 Monitoring
 Service delivery

13. WHAT OTHER ORGANIZATIONS (GOVERNMENT AND NON-GOVERNMENT) DO YOU USUALLY PARTNER WITH IN THE COURSE OF YOUR WORK?

14. TOTAL NUMBER OF STAFF AND TYPE OF STAFF (e.g., researchers, campaigners, management, etc., and how many):

15. STAFF PROFILE (e.g., lawyers, social scientists, etc., and how many)

16. WHO SHOULD WE CONTACT SHOULD WE NEED FURTHER INFORMATION ON THE RESEARCH YOU HAVE MENTIONED IN THIS INTERVIEW?

17. DO YOU HAVE ANY SUGGESTIONS ON WHAT OTHER ORGANIZATIONS WE SHOULD CONTACT FOR THIS MAPPING?

18. DO YOU HAVE ANY SUGGESTIONS ON THE MOST IMPORTANT ISSUES THE ACCESS TO JUSTICE ASSESSMENT SHOULD FOCUS ON?

19. WOULD YOUR ORGANIZATION BE WILLING TO COLLABORATE ON THE ACCESS TO JUSTICE ASSESSMENT UNDP IS PLANNING TO SUPPORT (e.g., by providing information, participating in workshops and research activities, etc.)?

20. DO YOU HAVE ANY PARTICULAR COMMENTS ON THIS INTERVIEW, OR IS THERE ANY OTHER ISSUE YOU WOULD LIKE TO RAISE?

(Finalize the interview by thanking the interviewee for his/her time and responses, and by providing him/her with a name and address of people in UNDP he/she could contact to obtain information on the follow-up to the interview)

ANNEX 3

SAMPLE MAPPING FRAMEWORK AND METHODOLOGY FOR AN ASSESSMENT OF ACCESS TO JUSTICE

| PARAMETER | MAPPING AREA | METHODOLOGY FOR DATA COLLECTION |
|--|---|---|
| CITIZENS' TRUST IN THE JUSTICE SYSTEM | Range of citizen's perceptions on the responsiveness of laws and formal justice institutions to people's concerns on safety and security | FGDs Secondary data (previous surveys) |
| | Range of citizen's perceptions on the responsiveness of customary norms and informal and traditional justice systems to people's concerns on safety and security | FGDs Secondary data (previous surveys) |
| | Range of citizen's perceptions on the type of positive and negative features of (a) informal and traditional adjudication, (b) administrative adjudication, (c) police, (d) prosecutors, (e) lawyers, (f) the judiciary, and (g) independent bodies (e.g., National Human Rights Institution, Ombudsman office) to ensure effective access to justice | FGDs Secondary data (previous surveys) |
| | Range of citizen's perceptions on the independence and neutrality of (a) informal and traditional adjudication, (b) administrative adjudication, (c) police, (d) prosecutors, (e) lawyers, (f) the judiciary, and (g) independent bodies (e.g., National Human Rights Institution, Ombudsman office) | FGDs Secondary data (previous surveys) |
| | Range of citizen's perceptions on the type of obstacles to independence and neutrality in (a) informal and traditional adjudication, (b) administrative adjudication, (c) police, (d) prosecutors, (e) lawyers, (f) the judiciary, and (g) independent bodies (e.g., National Human Rights Institution, Ombudsman office) | FGDs Secondary data (previous surveys) |
| | Type of perceived incentives and disincentives for people, particularly poor and vulnerable groups, to take cases to (a) formal justice system (police and courts) and (b) informal justice system, when they perceived to have been victims of crimes and offences | FGDs Secondary data (previous studies and surveys) |
| LEGAL PROTECTION OF RIGHTS AND REMEDIES | | |

| PARAMETER | MAPPING AREA | METHODOLOGY FOR DATA COLLECTION |
|--|---|--|
| <p>Parameter 1: Coherent legal framework regulating the functioning of the justice system</p> | <p>Main laws and constitutional provisions regulating the functioning of (a) the judiciary, (b) prosecutors, (c) the police, and specific mandates envisioned for each of these institutions</p> <p>Legal vacuums/legal contradictions in laws, regulations and ordinances regarding:</p> <ul style="list-style-type: none"> ■ Distribution of competences among the judiciary, prosecutors and police ■ Separation of roles and competences between the police and the army ■ Distribution of competences among civil courts, religious courts, military courts, human rights courts and traditional systems of justice ■ Independence of the judiciary, prosecutors, police and lawyers | <p>In-depth interviews FGDs Desk review of existing laws, regulations and ordinances</p> |
| <p>Parameter 2: Adequate normative recognition of rights and entitlement to remedies in the justice process</p> | <p>Main laws and constitutional provisions recognizing fundamental human rights in the Universal Declaration of Human Rights</p> <p>Main laws establishing limits to the exercise of fundamental human rights in the Universal Declaration of Human Rights</p> <p>Legal vacuums/ legal contradictions in laws, regulations and ordinances regarding:</p> <ul style="list-style-type: none"> ■ Access to legal information by the public ■ Access to legal counsel by detainees ■ Access to free legal counsel for those who cannot afford to hire a lawyer ■ Lawyer’s prompt access to sufficient information on the case ■ Protection against intimidation to (a) lawyers, (b) prosecutors, (c) judges and (d) police ■ Witness protection ■ Standards of conduct for (a) lawyers, (b) prosecutors, (c) judges and (d) police ■ Disciplinary procedures and sanctions for (a) lawyers, (b) prosecutors, (c) judges and (d) police ■ Registry of citizen’s complaints ■ Issuance of warrants ■ Procedures for detentions and searches ■ Use of force and firearms ■ Access to records on arrests and detentions ■ Revision of the legality of detention by an independent judicial authority ■ Revision of the legality of pre-trial detention ■ Revision of the legality of detention pending trial ■ Revision of the legality of administrative detention ■ Revision of the legality of incommunicado detention ■ Victims’ protection and rehabilitation ■ Separation of juveniles from adults in detention centres and prisons ■ Separation of men and women in detention centres and prisons | <p>In-depth interviews FGDs Desk review of existent laws, regulations and ordinances</p> |

| PARAMETER | MAPPING AREA | METHODOLOGY FOR DATA COLLECTION |
|--|--|--|
| Parameter 2: Adequate normative recognition of rights and entitlement to remedies in the justice process | <ul style="list-style-type: none"> ■ Use of alternatives to pre-trial detention and to detention pending trial ■ Prohibition of the use of torture, inhuman or degrading treatment and punishment ■ Prohibition of slavery ■ Notification on arrests, detentions and transfers of prisoners and detainees ■ Information to detainees on (a) reasons for arrest, (b) charges against them, (c) right to legal counsel, (d) right not to testify against themselves ■ Access to bail | In-depth interviews FGDs Desk review of existent laws, regulations and ordinances |
| Parameter 3: Responsiveness of the legal system to people's needs and concerns | Laws related to the justice system (formal and informal) approved by national and provincial legislative bodies since 1999 (and % with respect to total laws approved) | Legislative records at national and provincial levels Desk review of laws and regulations |
| | Regulations and ordinances related to the laws above approved by competent authorities since 1999 | |
| | Pending bills related to the justice system (formal and informal) since 1999 (and % with respect to total bills pending) | |
| | Type of non-government actors who were consulted during the legal drafting process of both approved laws and pending bills | Legislative records at national and provincial levels In-depth interviews |
| | Type of capacity-building strategies for the implementation of approved laws and regulations in implementing agencies | In-depth interviews FGDs Agencies' reports |
| LEGAL AWARENESS | | |
| Parameter 1: Adequate understanding of rights and of the possibility to seek remedies through formal justice systems | Government and non-government providers of information on rights and remedies and on the functioning of the justice system | In-depth interviews FGDs Secondary data |
| | Means of dissemination of information on rights and remedies and on the functioning of the justice system to the public | In-depth interviews FGDs Secondary data |
| | Type of costs incurred by the public when accessing information on rights and remedies | In-depth interviews FGDs Secondary data |
| | Type of perceived incentives and disincentives for citizens to seek information on rights and remedies | In-depth interviews FGDs |
| Parameter 2: Accessibility of legal information (e.g., new laws and regulations, court decisions, etc.) by the legal profession | Means of dissemination of legal information to legal professionals | In-depth interviews FGDs |
| | Type of costs incurred by professionals when accessing information | In-depth interviews FGDs |
| | Type of perceived incentives and disincentives for professionals to seek legal information | In-depth interviews FGDs |

| PARAMETER | MAPPING AREA | METHODOLOGY FOR DATA COLLECTION |
|---|--|---|
| LEGAL AID AND COUNSEL | | |
| Parameter 1: Sufficient availability of legal aid | Type and number of providers of professional legal counsel (government and non-government) in urban and rural areas (data since 1999) | In-depth interviews and FGDs with legal professionals administrative data (Bar Associations) |
| | Type of providers of non-professional legal counsel in urban and rural areas | In-depth interviews and FGDs with paralegal organizations and NGOs |
| | Public budget for free legal assistance (at provincial and district levels) (data since 1999) | Administrative data (Supreme Court) |
| Parameter 2: Accessibility of legal aid | Access to clients (when and where do lawyers have access to clients) | In-depth interview and FGDs with paralegal organizations and NGOs |
| | Private lawyers' fees (type of fees collected by lawyers (regular and irregular) | In-depth interviews and FGDs with legal professionals |
| | Minimum rate for lawyers (per specific type of case specific activity) | Administrative data (Bar Associations) |
| | Type of costs involved in a litigation process (regular and irregular) | In-depth interviews and FGDs with legal professionals |
| | Type of costs (regular and irregular) incurred by legal aid providers in the handling of a case | In-depth interviews and FGDs with legal aid providers |
| | Type of costs covered by legal aid schemes – e.g., advice, trial representation, writing legal briefs, hiring expert witnesses, travel costs | Administrative data (Supreme Court) |
| | Fees/salaries for government-provided lawyers (data since 1999) | Administrative data (Supreme Court) |
| | Other forms of support to legal aid providers (e.g., facilities, etc) | In-depth interviews and FGDs with legal aid providers Administrative data (Supreme Court) |
| | Eligibility criteria for free legal counsel (government and non-government funded) | In-depth interviews and FGDs with legal aid providers Administrative data (Supreme Court) |
| | Procedures to access free legal counsel during (a) detention, (b) arraignment, (c) trial – authority making the decision on legal aid, procedures to assign lawyers to clients | In-depth interviews with legal professionals Administrative data (Supreme Court) |
| Type of documents that need to be presented to be granted legal aid | In-depth interviews with legal professionals Administrative data (Supreme Court) | |

| PARAMETER | MAPPING AREA | METHODOLOGY FOR DATA COLLECTION |
|---|---|---|
| Parameter 2: Accessibility of legal aid | Protection against intimidation to lawyers <ul style="list-style-type: none"> ■ Type of threats, intimidation and reprisals ■ Legal provisions, policies and resources to protect lawyers against intimidation ■ Remedies to intimidation | In-depth interviews and FGDs with legal professionals |
| Parameter 3: Adequacy of legal aid | Guarantees to lawyer's sufficient access to information on the case (evidence, case files, documents, places of detention, transfers, etc) <ul style="list-style-type: none"> ■ Location of records ■ Procedures to access records ■ Costs | In-depth interviews and FGDs with legal professionals Administrative data (Ministry of Justice, Supreme Court) |
| | Availability of special counsel for disadvantaged groups (e.g., women, children, IDPs) | In-depth interviews and FGDs with legal professionals Administrative data (Supreme Court) |
| | Other forms of support to poor and disadvantaged litigants (e.g., reduction/waivers of court fees to poor litigants, support schemes to bail, translation facilities, etc.) | In-depth interviews and FGDs with legal professionals Administrative data (Supreme Court) |
| Parameter 4: Accountability in the provision of legal counsel | Existence of professional standards of conduct | Administrative data (Bar Associations) |
| | Accountability mechanisms in case of violation of standards <ul style="list-style-type: none"> ■ Procedures to report violations of standards ■ Sanctions | In-depth interviews with legal professionals Administrative data (Bar Associations) |
| INVESTIGATION | | |
| Parameter 1: Responsiveness to victims | Procedures to register complaints | In-depth interviews with police FGDs with legal aid providers and victims |
| | Incentives/ disincentives for registry of complaints | In-depth interviews with police FGDs with legal aid providers and victims |
| | Ratio complaints/ investigations | Administrative data (police) |
| | Training (regular and non-regular) in counselling and attention to victims | In-depth interviews with police |
| | Medical and psychological services to victims (financial, human and material resources) (data since 1999) | In-depth interviews with police FGDs with legal aid providers and victims |
| Parameter 2: Quality and adequacy of investigations | Number of police officers at provincial, district, sub-district and village levels (data since 1999) | Administrative data (police) |
| | Number of police vacancies (data since 1999) | Administrative data (police) |

| PARAMETER | MAPPING AREA | METHODOLOGY FOR DATA COLLECTION |
|---|--|--|
| <p>Parameter 2: Quality and adequacy of investigations (continued)</p> | Number of material resources (vehicles, communication hardware, computers and typewriters) (data since 1999) | Administrative data (police) |
| | Type of human and material resources devoted to investigation | In-depth interviews with police Administrative data (police) |
| | Police salaries (data since 1999) | Administrative data (police) |
| | Type of threats/ intimidations faced by investigators | In-depth interviews with police |
| | Procedures and type of methods to ensure protection against threats/ intimidation | In-depth interviews with police Administrative data (police) |
| | Type of methods used for the collection of evidence | In-depth interviews with police |
| | Scope of professional training (regular and non-regular) in investigation methods (regular and non-regular) | In-depth interviews with police Administrative data (police) |
| | Number of police officers trained in investigation methods (data since 1999) | Administrative data (police) |
| | Ratio cases investigated/ cases prosecuted (data since 1999) | Administrative data (police and Attorney General's Office) |
| | Administrative mechanisms to expedite the investigation process | In-depth interviews with police and prosecutors |
| | Existence of special services for disadvantaged groups at police stations (e.g., women, children) | In-depth interviews with police Administrative data (police) |
| | Procedures for the protection of evidence | In-depth interviews with police |
| | Procedures for the protection of crime sites | In-depth interviews with police |
| | <p>Parameter 3: Accountability of investigations</p> | Actors responsible for the oversight of investigations/ procedures for oversight of investigations |
| Existence of standing orders emphasizing legal safeguards for investigations | | In-depth interviews with police Administrative data (police) |

| PARAMETER | MAPPING AREA | METHODOLOGY FOR DATA COLLECTION |
|--|--|---|
| Parameter 3: Accountability of investigations (Continued) | Procedures to report non-compliance with legal safeguards | In-depth interviews with police and judges Administrative data (police) |
| | Type of incentives/ disincentives to report non-compliance | In-depth interviews with police, legal professionals and former detainees |
| | Range of sanctions for non-compliance with legal safeguards | In-depth interviews with police Administrative data (police) |
| | Range of sanctions for non-compliance with legal safeguards | In-depth interviews with police Administrative data (police) |
| DETENTION | | |
| Parameter 1: Lawfulness of detentions | Legal provisions for the issuance of warrants/ court orders in detentions and searches (actors involved, procedures and time limits) | In-depth interviews with police, prosecutors and judges Administrative data (police, Supreme Court, AGO) |
| | Circumstances when unwarranted detentions and searches are permitted | In-depth interviews with police, prosecutors and judges Administrative data (police, Supreme Court, AGO) |
| | Provisions to have legality of detention reviewed (actors involved, procedure and time limits) | In-depth interviews with police, prosecutors and judges Administrative data (police, Supreme Court, AGO) |
| | Grounds for administrative detention and provisions for judicial supervision of administrative detention (actors involved in supervision, procedure and time limits) | In-depth interviews with police, prosecutors and judges Administrative data (police, Supreme Court, AGO) |
| | Sanctions and remedies to illegal detentions and searches | In-depth interviews with police, prosecutors and judges Administrative data (police, Supreme Court, AGO) |
| | Time limits for pre-trial detention | Desk review of legislation |
| | Time limits for detention pending trial | Desk review of legislation |
| | Actors involved in monitoring respect for time limits in (a) pre-trial detention, (b) detention pending trial | In-depth interviews with police, prosecutors and judges Desk review of legislation |
| | Procedures to monitor respect for time limits in (a) pre-trial detention, (b) detention pending trial | In-depth interviews with police, prosecutors and judges Desk review of legislation |

| PARAMETER | MAPPING AREA | METHODOLOGY FOR DATA COLLECTION |
|---|---|---|
| <p>Parameter 2: Accountability for the violation of legal safeguards</p> | Existence of standing orders on arrest procedures | In-depth interviews with police Administrative data (police) |
| | Existence of standing orders on the use of force and firearms | In-depth interviews with police Administrative data (police) |
| | Existence of standing orders on the prohibition of torture, inhuman or degrading treatment | In-depth interviews with police Administrative data (police) |
| | Existence of standing orders prohibiting slavery in detention centres | In-depth interviews with police Administrative data (police) |
| | Internal methods/procedures to report violations of legal safeguards | In-depth interviews with police Administrative data (police) |
| | Type of incentives and disincentives for reporting violations of legal safeguards in detention | In-depth interviews with police |
| | Disciplinary procedures and range of sanctions for violations of legal safeguards in detention | In-depth interviews with police Administrative data (police) |
| <p>Parameter 3: Access to information on detentions</p> | Procedure for notifications on arrests, detentions and transfers of prisoners and detainees | In-depth interviews with police and legal professionals Administrative data (police) |
| | Records of arrests and interrogations – type of information contained in records, procedures to access records | In-depth interviews with police and legal professionals Administrative data (police) |
| | Guarantees for access by independent bodies (e.g., National Human Rights Institutions) to places and records of detention | In-depth interviews with police and Kommas HAM officers |
| | Management of confidential information – standard procedures | In-depth interviews with police |
| <p>Parameter 4: Access to legal counsel by detainees</p> | Responsibilities and procedures to ensure information to detainees on (a) reasons for arrest, (b) charges against them, (c) right to legal counsel, (d) right not to testify against themselves | In-depth interviews with police, prosecutors, judges and legal professionals |
| | Access to legal counsel by detainees – Actors involved, responsibilities and procedures | In-depth interviews with police and legal professionals |

| PARAMETER | MAPPING AREA | METHODOLOGY FOR DATA COLLECTION |
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| Parameter 5: Alternatives to detention | Range of alternatives for pre-trial detention | In-depth interviews with police, prosecutors and judges |
| | Range of alternatives for detention pending trial | In-depth interviews with police, prosecutors and judges |
| Parameter 6: Access to bail | Considerations in the determination of bail | In-depth interviews with prosecutors, judges and legal professionals Desk review of legislation |
| | Availability of loan schemes for bail and procedures to access them | In-depth interviews with legal professionals Administrative data (Ministry of Justice, Supreme Court) |
| | Grounds of denial for bail | In-depth interviews with prosecutors, judges and legal professionals Desk review of legislation |
| Parameter 7: Adequate detention facilities | Type of officially recognized places of detention | In-depth interviews with police |
| | Number of detainees per detention centre (data since 1999) | Administrative data (detention records) |
| | Type of legal and material provisions guaranteeing the separation of juveniles/ adults in places of detention, facilities to ensure separation | In-depth interviews with officials in detention centres |
| | Type of legal and material provisions guaranteeing the separation of men/women in places of detention, facilities to ensure separation, number of female staff guarding female detainees | In-depth interviews with officials in detention centres and legal aid providers |
| | Type of special facilities for pregnant women and nursing mothers | In-depth interviews with officials in detention centres and legal aid providers |
| | Access by non-governmental organizations (e.g., humanitarian, religious) to places of detention, procedures for access | In-depth interviews with officials in detention centres and NGOs |
| | Total budget for health and hygiene, food and clothing per detention centre (data since 1999) | Administrative data (detention centres) |

| PARAMETER | MAPPING AREA | METHODOLOGY FOR DATA COLLECTION |
|---|--|---|
| PROSECUTION | | |
| Parameter 1: Independence, impartiality and neutrality of prosecution | Procedures and criteria for: <ul style="list-style-type: none"> ■ Recruitment ■ Appointment ■ Promotions ■ Disciplinary sanctions | In-depth interviews with prosecutors Administrative data (Attorney General Office – PPS) |
| | Status of prosecutors and conditions of service, including legal provisions for security of tenure | In-depth interviews with prosecutors Desk review of legislation and regulations |
| | Scope of judicial or quasi-judicial functions performed by prosecutors | In-depth interviews with prosecutors and judges Desk review of legislation and regulations |
| | Procedures for the allocation of cases to prosecutors | In-depth interviews with prosecutors Desk review of regulations |
| | Procedures to initiate the prosecution of a case | In-depth interviews with prosecutors Desk review of regulations |
| | Type of perceived incentives/disincentives to initiate prosecution | In-depth interviews with prosecutors |
| | Remuneration and welfare schemes | Administrative data (Attorney General Office – PPS) |
| | Salaries for prosecutors (data since 1999) | Administrative data (Attorney General Office - PPS) |
| | Type of perceived incentives and disincentives to independence and impartiality of prosecutors | In-depth interviews with prosecutors, judges and legal professionals |
| | Protection against intimidation/threats to prosecutors <ul style="list-style-type: none"> ■ Type of threats, intimidation and reprisals ■ Legal provisions, policies and resources to protect prosecutors against intimidation/threats ■ Remedies to intimidation/threats | In-depth interviews with prosecutors Desk review of laws and regulations |

| PARAMETER | MAPPING AREA | METHODOLOGY FOR DATA COLLECTION |
|--|--|--|
| Parameter 1: Independence, impartiality and neutrality of prosecution (Continued) | Guarantees for free professional association | In-depth interviews with prosecutors Desk review of laws and regulations |
| | Percentage of female prosecutors at provincial and district levels | Administrative data (Attorney General's Office – PPS) |
| Parameter 2: Quality and efficiency of prosecution | Number of prosecutors at provincial, district and sub-district levels (data since 1999) | Administrative data (Attorney General's Office – PPS) |
| | Number and type of support staff (data since 1999) | Administrative data (Attorney General's Office – PPS) |
| | Number of vacancies (data since 1999) | Administrative data (Attorney General's Office – PPS) |
| | Number of material resources (vehicles, communication hardware, computers and typewriters) (data since 1999) | Administrative data (Attorney General's Office – PPS) |
| | Total budget and internal allocation of budget (data since 1999) | Administrative data (Attorney General's Office – PPS) |
| | Scope of professional training | In-depth interviews with prosecutors |
| | Prosecutors caseload (data since 1999) | Administrative data (Attorney General's Office – PPS) |
| | Process of case management | In-depth interviews with prosecutors |
| | Legal provisions to refuse evidence obtained through illegal means and initiate proceedings against those involved | In-depth interviews with prosecutors Desk review of laws and regulations |
| | Type of records and information systems | In-depth interviews with prosecutors |
| | Coordination mechanisms with police, judiciary, lawyers and other investigative bodies (e.g., National Human Rights Commission and Ombudsman office) | In-depth interviews with prosecutors, judges, legal professionals, Kommas HAM officers |
| Parameter 3: Adequate protection to victims and witnesses | Actors responsible for protecting witnesses and victims | In-depth interviews with prosecutors, judges, legal professionals and victims |
| | Policies and legal provisions on witness and victims protection | In-depth interviews with prosecutors Desk review of policies and regulations |
| | Type of methods/strategies to ensure protection to witness and victims | In-depth interviews with police and prosecutors |

| PARAMETER | MAPPING AREA | METHODOLOGY FOR DATA COLLECTION |
|--|--|---|
| Parameter 2: Quality and efficiency of prosecution (Continued) | Financial, human and material resources devoted to witness and victims' protection (data since 1999) | Administrative data (Attorney General's Office) |
| Parameter 4: Accountability of prosecution | Codes of conduct for prosecutors | In-depth interviews with prosecutors Administrative data (Attorney General's Office – PPS) |
| | Disciplinary procedures and type of sanctions | In-depth interviews with prosecutors Administrative data (Attorney General's Office – PPS) |
| | Type of incentives and disincentives to report violations of codes of conduct | In-depth interviews with prosecutors |
| JUDICIAL ADJUDICATION | | |
| Parameter 1: Independence of the judiciary | Constitutional guarantees for the separation of powers | Desk review of constitution and legislation |
| | Scope of capacities of the executive and the legislative powers regarding amnesties and pardons | Desk review of constitution and legislation |
| | Procedures and requirements for: <ul style="list-style-type: none"> ■ Recruitment ■ Appointment ■ Promotions ■ Disciplinary sanctions | In-depth interviews with judges Administrative data (Supreme Court) |
| | Process of case management | Desk review of legislation |
| | Legal guarantees for judicial autonomy in the determination of questions of competence | Desk review of legislation |
| | Legal guarantees for judicial autonomy in questions of internal administration, personnel and finance | Desk review of legislation |
| | Coordination mechanisms with police, judiciary, lawyers and other investigative bodies (e.g., National Human Rights Commission and Ombudsman office) | In-depth interviews with prosecutors, judges, legal professionals, Kommas HAM officers |
| | Guarantees for free professional association | In-depth interviews with judges Desk review of legislation |
| | Protection against intimidation to judges <ul style="list-style-type: none"> ■ Type of threats, intimidation and reprisals ■ Legal provisions, policies and resources to protect judges against intimidation ■ Remedies to intimidation | In-depth interviews with judges Desk review of legislation |

| PARAMETER | MAPPING AREA | METHODOLOGY FOR DATA COLLECTION |
|---|---|-------------------------------------|
| Parameter 2: Impartiality of the judiciary, neutrality and non-discrimination | Procedures for the assignment of cases to judges | In-depth interviews with judges |
| | Type of incentives and disincentives to corruption | In-depth interviews with judges |
| | Remuneration schemes for judges | Administrative data (Supreme Court) |
| | Salaries for judges (data since 1999) | Administrative data (Supreme Court) |
| | Legal safeguards against bias and discrimination | Desk review of legislation |
| | Percentage of female judges at provincial and district levels (data since 1999) | Administrative data (Supreme Court) |
| | Legal safeguards against trial of civilians by Military Courts | Desk review of legislation |
| Parameter 3: Judicial efficiency | Number of judges at provincial and district levels (data since 1999) | Administrative data (Supreme Court) |
| | Number and type of support staff (data since 1999) | Administrative data (Supreme Court) |
| | Number of vacancies (data since 1999) | Administrative data (Supreme Court) |
| | Type and number material resources (vehicles, communication hardware, computers and typewriters) – data since 1999 | Administrative data (Supreme Court) |
| | Number of vacancies (data since 1999) | Administrative data (Supreme Court) |
| | Total budget and internal allocation of budget (data since 1999) | Administrative data (Supreme Court) |
| | Scope of professional training (entry-level and regular) | In-depth interviews with judges |
| | Processes of case management, including (a) registration, (b) distribution of cases, (c) trial, (d) verdict, (e) reviews, (f) post-verdict, (e) archive | In-depth interviews with judges |
| | Court caseload (data since 1999) | Administrative data (Supreme Court) |
| | Legal time limits for the disposition of cases | Desk review of legislation |

| PARAMETER | MAPPING AREA | METHODOLOGY FOR DATA COLLECTION |
|---|---|--|
| <p>Parameter 3: Judicial efficiency (Continued)</p> | Type of reasons for the postponement of hearings | In-depth interviews with judges, prosecutors and legal professionals |
| | Type of reasons for the archiving of cases | In-depth interviews with judges, prosecutors and legal professionals |
| | Type of archives, records and information systems | In-depth interviews with judges |
| | Procedures to monitor (a) quality of verdicts and (b) execution of verdicts | In-depth interviews with judges, prosecutors and legal professionals |
| | Legal provisions to refuse evidence obtained through illegal means | Desk review of legislation |
| | Type of incentives and disincentives to refuse evidence obtained through illegal means | In-depth interviews with judges, prosecutors and legal professionals |
| | Coordination mechanisms with police, prosecutors, lawyers and other investigative bodies (e.g., National Human Rights Institutions and Ombudsman offices) | In-depth interviews with judges, prosecutors, legal professionals, Kommas HAM officers |
| <p>Parameter 4: Accountability of the judiciary</p> | Codes of conduct for the judiciary | In-depth interviews with judges Administrative data (Supreme Court) |
| | Disciplinary procedures and type of sanctions | In-depth interviews with judges Administrative data (Supreme Court) |
| | Type of incentives and disincentives to report violations of codes of conduct | In-depth interviews with judges |
| <p>Parameter 5: Adequate sentencing</p> | Type of legal sources used by the judiciary as the basis for sentencing | In-depth interviews with judges Desk review of legislation |
| | Procedures to examine the quality of verdicts | In-depth interviews with judges Desk review of legislation |
| <p>ADMINISTRATIVE DISPUTE RESOLUTION</p> | | |
| <p>Parameter 1: Impartiality, neutrality and non-discrimination of administrative dispute resolution</p> | Procedures and requirements for: <ul style="list-style-type: none"> ■ Appointment ■ Allocation of cases ■ Disciplinary sanctions | In-depth interviews with adjudicating officers Desk review of legislation |
| | Type of perceived factors undermining impartiality and neutrality of administrative dispute resolution | In-depth interviews with adjudicating officers, legal professionals and users |
| <p>Parameter 3: Due process in administrative dispute resolution</p> | Procedures to initiate administrative dispute resolution | In-depth interviews with adjudicating officers, legal professionals and users |

| PARAMETER | MAPPING AREA | METHODOLOGY FOR DATA COLLECTION |
|---|--|--|
| Parameter 3: Due process in administrative dispute resolution (Continued) | Type of representation for litigants in administrative dispute resolution | In-depth interviews with adjudicating officers, legal professionals and users |
| | Appeal procedures in administrative dispute resolution | In-depth interviews with adjudicating officers, legal professionals and users |
| | Procedure for judicial review of administrative dispute resolution | In-depth interviews with judges, adjudicating officers, legal professionals and users |
| Parameter 4: Accountability of administrative dispute resolution | Legal provisions for reasoned decisions in administrative adjudication | Desk review of legislation |
| | Standards of conduct, disciplinary procedures and sanctions | In-depth interviews with adjudicating officers |
| INFORMAL AND TRADITIONAL DISPUTE RESOLUTION | | |
| Parameter 1: Independence, impartiality and neutrality of informal and traditional dispute resolution | Actors involved in informal and traditional dispute resolution | In-depth interviews with operators and users of traditional justice mechanisms FGDs with NGOs and community-based organizations |
| | Type of perceived factors undermining impartiality and neutrality of informal dispute resolution | In-depth interviews with operators and users of traditional justice mechanisms FGDs with NGOs and community-based organizations |
| Parameter 2: Due process in informal and traditional dispute resolution | Type of perceptions on the meaning of “due process” in informal and traditional dispute resolution | In-depth interviews with operators and users of traditional justice mechanisms |
| | Scope of competency of traditional dispute resolution on criminal matters | In-depth interviews with operators and judges |
| | Procedures/scope for judicial review and oversight of traditional dispute resolution | In-depth interviews with operators and judges |
| | Type of representation for litigants in informal and traditional dispute resolution | In-depth interviews with operators and users of traditional justice mechanisms |
| Parameter 3: Transparency of informal and traditional dispute resolution | Systems for recording actions and documenting decisions | In-depth interviews with operators |
| Parameter 4: Adequate sentencing | Types of compensation, reparation and other forms of settlement in informal dispute resolution | In-depth interviews with operators and users of traditional justice mechanisms |

| PARAMETER | MAPPING AREA | METHODOLOGY FOR DATA COLLECTION |
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| Parameter 4: Adequate sentencing (Continued) | Procedures to examine the quality of settlements | In-depth interviews with operators and users of traditional justice mechanisms FGDs with NGOs and community-based organizations |
| Parameter 5: Accountability of informal and traditional dispute resolution | Disciplinary procedures against actors of traditional and informal dispute resolution involved in improper/unethical conduct in the performance of their functions | In-depth interviews with operators FGDs with NGOs and community-based organizations |
| ENFORCEMENT | | |
| Parameter 1: Responsive and accountable enforcement | Responsibilities and procedures to enforce summons | In-depth interviews with judges, police, prosecutors and legal professionals Desk review of legislation |
| | Responsibilities and procedures for the execution of court orders and decisions | In-depth interviews with judges, police, prosecutors and legal professionals Desk review of legislation |
| | Responsibilities and procedures for the execution of administrative decisions | In-depth interviews with judges, police, prosecutors and legal professionals Desk review of legislation |
| | Responsibilities and procedures for the execution of decisions and settlements emerging from informal mechanisms of dispute resolution | In-depth interviews with operators and users of traditional justice mechanisms |
| | Disciplinary procedures for non-execution of orders and decisions in formal and informal systems; type of sanctions | In-depth interviews with judges, police, prosecutors and legal professionals In-depth interviews with operators and users of traditional justice mechanisms Desk review of legislation |
| | Administrative complaints process against prison officials/ administration and type of remedies and sanctions | In-depth interviews with legal aid providers and prison administration officers |
| Parameter 2: Adequate prison conditions | Number of prisons (data since 1999) | Administrative data (prisons) |
| | Numbers of prisoners, disaggregated by gender (data since 1999) | Administrative data (prisons) |
| | Number of juvenile prisoners (data since 1999) | Administrative data (prisons) |
| | Budget for prisons and internal allocation of budget (data since 1999) | Administrative data (prisons) |
| | Procedures for the release of prisoners after completion of sentences | In-depth interviews with legal aid providers and prison administration officers |

| PARAMETER | MAPPING AREA | METHODOLOGY FOR DATA COLLECTION |
|---|--|---|
| Parameter 2: Adequate prison conditions (Continued) | Legal and material provisions for the separation of juveniles and adults/ men and women in prisons | In-depth interviews with legal professionals and prison administration officers Desk review of legislation |
| CIVIL SOCIETY AND PARLIAMENTARY OVERSIGHT | | |
| Parameter 1: Civil society capacity to perform oversight functions on access to justice | Type of non-governmental organizations involved in monitoring activities on the justice system | In-depth interviews and FGDs with civil society organizations |
| | Type of non-governmental organizations involved in research activities on the justice system | In-depth interviews and FGDs with civil society organizations |
| | Type of non-governmental organizations involved in advocacy on access to justice-related issues | In-depth interviews and FGDs with civil society organizations |
| | Type of incentives and disincentives for collaboration among non-governmental organizations with regard to (a) exchange of information and experiences, (b) monitoring, (c) reporting, and (d) advocacy | In-depth interviews and FGDs with civil society organizations |
| | Type of incentives and disincentives for media reporting on access to justice-related issues | In-depth interviews and FGDs with civil society organizations and media professionals |
| | Laws and regulations providing for the involvement of non-governmental organizations in (a) policy development, (b) legal reforms, (c) institutional reforms, and (d) appointments and promotions of judges and prosecutors | Desk review of legislation |
| | Type/scope of existing initiatives for developing capacities in the civil society to engage on access to justice-related issues | In-depth interviews and FGDs with civil society organizations |
| | Type of issues prioritised by non-governmental organizations with regard to access to justice | In-depth interviews and FGDs with civil society organizations |
| Parameter 2: Freedom from threats and intimidation | Protection against intimidation to journalists and human rights defenders <ul style="list-style-type: none"> ■ Type of threats, intimidation and reprisals ■ Legal provisions, policies and resources to protect journalists/human rights defenders against intimidation ■ Remedies to intimidation | In-depth interviews and FGDs with human rights advocates and media professionals |
| Parameter 3: Capacity of legislative powers to perform oversight functions on access to justice | Type/scope of legislative commissions performing oversight functions on the justice system | In-depth interviews with parliamentarians |
| | Type/scope of involvement of the legislative powers in disciplinary procedures related to (a) police, (b) prosecution, (c) judiciary | In-depth interviews with parliamentarians Desk review of legislation |

GLOSSARY



GLOSSARY

Access to justice

Describes people's ability to solve disputes and reach adequate remedies for grievances, using formal or traditional justice systems. The justice process has qualitative dimensions, and it should be in accordance with human rights principles and standards.

Adjudication

Describes the process of determining the most adequate type of redress or compensation (remedy). Means of adjudication can be regulated by formal law, as in the case of courts and other quasi-judicial and administrative bodies, or by traditional legal systems. The process of adjudication in the formal system includes stages such as (i) investigation, (ii) prosecution, and (iii) decision-making. A basic guarantee in the justice process is that decisions of lower bodies can be appealed at a higher level if one of the parties is in disagreement.

Alternative Dispute Resolution (ADR)

An adjudication mechanism in which a third party acts as an arbiter, conciliator or mediator between two (or more) parties involved in a dispute. The goal of ADR is to seek conciliation or negotiation among the parties, rather than solving the dispute through the involvement of a court. ADR systems can be attached to administrative bodies or to the courts, or they can exist in the community in an informal way (e.g. through village or religious leaders). Traditional systems are generally based on alternative dispute resolution. The use of ADR is a voluntary choice of the parties, who are also free to reject the ADR decision and take the dispute to a formal court of law. In certain instances, the initiation of court procedures requires that ADR has been attempted previously, without success.

Capacity

Describes the ability to solve problems, perform functions, and set and achieve objectives. Capacities exist at individual, social and institutional levels.

Defence

Party in the judicial process that seeks to defend a particular person, group of persons, or institution, from the charges presented by the prosecution against them, or to mitigate such charges.

Development programming

Describes the process of designing and implementing a development initiative through a set of activities that seek explicit goals.

Development effectiveness

Extent to which development processes produce results that are pro-poor and promote equity.

Enforcement

Relates to the implementation of orders, decisions and settlements emerging from formal or informal adjudication. Enforcement bodies include police and prisons, and administrative bodies in particular cases. Traditional systems may also have specific mechanisms of enforcement. Enforcement systems are key to ensure accountability and minimize impunity, thus preventing further injustices.

Grievance

Act that causes a person (or group of persons) to suffer a gross injury or loss, and that is originated in the actions or omissions of others.

Human development

Process of expanding human capabilities or expanding choices and opportunities so that every person can live a life of respect and value.

Human rights

Legal norms protecting individuals and groups, that apply to all human beings without discrimination, and that defend fundamental interests for human dignity and well-being. Human rights claims give rise to corresponding duties in others to act in a way that ensures protection.

Human rights approach to development

A framework for the process of human development that is normatively based on, and operationally directed towards, the development of capacities for the protection of human rights.

Investigation

Relates to the process of collecting the necessary evidence to initiate justice procedures against a particular person, group of persons, or institution. Investigation can be conducted by the police, or by the police with the involvement of the prosecution. Some institutions (such as ombudsman offices and National Human Rights Commissions) also perform investigative functions.

Justice system

Includes formal justice institutions and procedures, such as police, prosecution, courts and prisons, as well as Alternative Dispute Resolution (ADR), and other informal and traditional systems (e.g. a council of elders). The justice system includes coordination and other arrangements among its different components that influence overall outcomes on access to justice

Justice remedy

Redress provided by the justice system to a particular grievance. Justice remedies are legal remedies that typically involve a third party (the justice institution or mechanism), whose functioning is also regulated by norms, in settling the dispute. Justice remedies in civil and in criminal justice are different. Civil justice remedies can involve restitution, compensation and other forms of redress. Criminal remedies may also result in penalties and punishments that seek preventive and restorative purposes (e.g. incarceration and community work). On some occasions, civil justice may also involve the award of punitive damages.

Legal aid

Includes legal counsel and other facilities (e.g. financial facilities through reduction in court fees, translation services for deaf-mute litigants, psycho-social support to victims of trauma) that people need to navigate the legal process. Legal aid is fundamental to reducing the economic, social and emotional risks involved in the process of seeking justice.

Legal awareness

A person's knowledge of the possibility of seeking redress through the justice system, whom to demand it from, and how to start a formal or traditional justice process.

Legal counsel

Includes the capacities (from technical expertise to representation) that people need to initiate and/or pursue justice procedures. Adequate legal counsel serves to facilitate in the case of public defence systems and pro bono lawyering), laypersons with legal knowledge, who are often members of the community they serve (paralegals) or both. Legal counsel is one component of the wider concept of legal aid.

Legal protection

Provision of legal standing in formal or in traditional law, or both. It involves the recognition of people's rights within the scope of justice systems, thus giving entitlement to remedies either through formal or informal mechanisms. Legal protection determines the legal basis for all other stages in the access to justice process. Legal protection can be enhanced through: (a) treaty ratification and their implementation in domestic law, (b) constitutional law, (c) national legislation, (d) implementing rules and regulations and administrative orders, and (e) traditional and customary law.

Litigant

Person, group of persons, or institution, who use the justice system in order to resolve a dispute.

Prosecution

Party in the judicial process that seeks a decision condemning a particular person, group of persons, or institution.

Remedy

Measures that redress some of the harm caused by people, institutions or private entities, in the context of disputes and conflicts of interests. Remedies may be delivered through various means (political, economic, social, judicial, etc.). When remedies are protected by law or by customary norms, they are called legal remedies.

Risks

Actual or perceived threats that a person, group of persons, or institution face as a consequence of their participation in the justice process.

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RECOMMENDED READING



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Chapter One: Introduction To Access To Justice

Fukuda-Parr, S., C. Lopes and K. Malik, (eds.) 2002. "Capacity for Development: New Solutions to Old Problems." United Nations Development Programme.

Available at <http://www.undp.org/dpa/publications/capacity.html>

This book discusses new approaches to capacity development by focusing on areas of ownership, civic engagement and knowledge.

United Nations Development Programme. December 2004. "Access to Justice Practice Note."

Available at <http://www.undp.org/governance/docs/A2J%20PN%20Final.doc>

This practice note suggests strategies for UNDP support for access to justice, particularly for the poor and disadvantaged, including women, children, minorities, and persons living with HIV/AIDS and disabilities.

United Nations Development Programme. June 2003. "Human Rights and Poverty Reduction: A Practice Note."

Available at http://www.undp.org/governance/docshurist/030610PracticeNote_Poverty.doc

This practice note outlines UNDP's approach to human rights and poverty reduction. It argues that poverty is a denial of human rights and proposes a framework for human rights integration in poverty reduction strategies.

Chapter 2 – Ten Steps to Developing an Access to Justice Programme

Center for Democracy and Governance. 1998. "Handbook of Democracy and Governance Program Indicators." USAID.

Available at http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacr211.pdf

The handbook explains indicators in the context of strategic planning and performance monitoring. It provides guidance on developing indicators that are useful for management decisions and performance monitoring. However, as the handbook is geared towards strategic objective teams, it is rather exhaustive and technical.

Hijab, N. June 2003. "Human Rights-Based Reviews of UNDP Programmes – Working Guidelines" HURIST.

Available at <http://www.undp.org/governance/docshurist/030617Guidelines.doc>

A revision of the Working Guidelines issued by UNDP in October 2002 which sought to encourage UNDP programmes to include a human rights perspective in all its work. This paper includes the UN Common Understanding on Human Rights and the methodology for human rights-based reviews as well as an HRBA Checklist.

International Council on Human Rights Policy. 2004. "Enhancing Access to Human Rights." ICHRP, Versoix, Switzerland.

Available at <http://www.ichrp.org/ac/excerpts/150.pdf>

This study examines the steps beyond law and legal reform to ensure that rights and entitlements are available and accessible to all. The report considers internalized inhibitions and external factors contributing to the systematic vulnerability of the poor and disadvantaged groups. The paper further explores the responses of institutions, civil society, and informal systems and identifies remedies that would provide access.

Teehankee, J. C., Ph.D. 2003. "Background Paper on Access to Justice Indicators in the Asia-Pacific Region." La Salle Institute of Governance (with the support of the United Nations Development Programme).

The paper uses the UNDP rights-based approach framework to develop indicators that can be used for comparing access to justice in the Asia-Pacific region. The indicators, collected from various government and international organization sources, are categorized by their inputs, outputs, outcomes, and impacts.

Theis, J. 2004. "Promoting Rights-Based Approaches: Experiences and Ideas from Asia and the Pacific" Save the Children.

Available at <http://seapa.net/external/resources/crp.htm>

A collection of experiences from the Asia-Pacific region in utilizing a rights-based approach to programming. It provides an overview of rights-based approaches, how they can be implemented in different situations, and provides some examples. It also has a list of web resources on rights-based approaches and some tools that may be useful for analysis, planning and monitoring and evaluating.

Vera Institute of Justice. November 2003. "Measuring Progress toward Safety and Justice: A Global Guide to the Design of Performance Indicators across the Justice Sector." New York.

Available at <http://www.vera.org/indicators>

The guide provides an in-depth discussion on the role of indicators, the different levels of indicators, and their design process. It also includes examples of policy goals that require different indicators and a description of the strengths and weaknesses of these suggested indicators. The guide covers indicators that cut across the safety and justice sector.

Chapter 3 – Normative Protection

Bulloven, H. P. 2002. "Cultural and Legal Barriers to Justice in Guatemala." UNDP Guatemala. Part of the UNDP conference on UNDP's Role in Access to Justice. March 3-6 2002. Oslo, Norway.

Available at <http://www.undp.org/governance/cd/document/34.pdf>

The paper relays UNDP Guatemala's experience in implementing judicial reforms in a post-conflict environment. It discusses the role of Mayan customary law and the new opportunities for reform created by the Guatemalan Peace Accords of 1996. The paper concludes with a list of barriers to accessing justice and an outline of complementary projects to UNDP judicial system capacity strengthening measures, e.g., support of civil society and customary law as a low conflict solution, and radio programming to answer legal questions.

Dinnen, S. 2003. "Interfaces between Formal and Informal Justice Systems to Strengthen Access to Justice by Disadvantaged People." Paper presented at the UNDP Access to Justice: Practice in Action Workshop. October 2003, Sri Lanka.

This paper provides a historical and social background to the ongoing efforts for law and justice reform in the Melanesian context and discusses the significance of such systems and states why the informal justice systems in Melanesia need to be appreciated. The paper mainly argues that the operations of both formal and informal justice systems should ideally be complimentary, however, it also clarifies from the outset that 'traditional' and informal justice systems should be recognized and supported when they are consistent with the rule of law and respect for human rights.

Department for International Development. 2002. "Better Livelihoods for Poor People: The Role of Land Policy." Consultation Paper. DFID, UK.

Available at <http://www.eldis.org/static/DOC11008.htm>

This DFID consultation paper examines the importance of land, land rights and land reform in developing countries, and considers how land policies can contribute to poverty reduction and the achievement of the Millennium Development Goals. It advocates a rights-based approach to land through advocacy and representation of the poor in land management, and suggests a series of recommendations.

Department For International Development. July 2002. "Safety, Security and Accessible Justice: Putting policies into practice." DFID, UK.

Available at <http://www.dfid.gov.uk/pubs/files/safesecureaccjustice.pdf>

Meant for advisors, managers and officials, this guide offers a series of suggestions on how to implement the Safety, Security & Accessible Justice (SSAJ) policy to make the justice system work better, particularly for the poor and vulnerable. Information and examples are given to establish user perspective and sector breakdowns, to further identify linkages and entry points, as well as outlining of common problems faced.

Faundez, Julio. 2001. 'Legal Reform in Developing and Transition Countries', in "Comprehensive Legal and Judicial Development: Towards an Agenda for the 21st Century," Puymbroeck, R. (ed.). The World Bank, Washington, DC.

Available at http://www4.worldbank.org/legal/legop_judicial/ljr_conf_papers/Faundez.pdf.

From the proceedings of a World Bank Conference held in Washington, DC. 5-7 June 2000. The article addresses obstacles to and models for legal reform. It acknowledges that the legal reform now encompasses a broader dimension than in prior years and insists on the importance of building institutional infrastructure and contextualizing the systems. Also outlined are the influences of external factors, ownership issues (technical and legal).

Chapter 4 – Capacity to Provide Justice Remedies

Abregu, M. 2001. 'Barricades or Obstacles: The Challenges of Access to Justice', in "Comprehensive Legal and Judicial Development: Towards an Agenda for a Just and Equitable Society in the 21st Century", R.V. Van Puymbroeck (ed.). World Bank, Washington, DC.

Available at http://www4.worldbank.org/legal/legop_judicial/ljr_conf_papers/Abregu.pdf

The paper explores obstacles to access to justice deriving from operational and structural factors, and points out a series of responses that the judiciary could offer to address such barriers.

Amnesty International Fair Trials Manual. 1998.

Available at <http://www.amnesty.org/ailib/intcam/fairtrial/fairtria.htm>

This manual provides a guide to individuals using relevant human rights standards to examine the fairness of a criminal trial or a justice system. The manual is divided into three sections focusing on 1) right to liberty and terms of detention, 2) rights to a fair trials, and 3) standards that are invoked in special cases involving the death penalty, children, and armed conflicts. It is designed for those who seek to evaluate whether a country's justice and trial systems conform to international standards.

Amnesty International (AI). 2001. "National Human Rights Institutions: Amnesty International Recommendations for Effective Protection and Promotion of Human Rights." AI Index IOR/40/007/2001, 1 October 2001.

Available at <http://www.nhri.net/pdf/IOR4000701.pdf>

The paper discusses all aspects of establishment and operation of NHRIs to ensure independence and effective action including membership, mandate and powers. It also includes general recommendations on investigations, methodologies for investigations, how to deal with individual complaints and addressing failed investigations effectively. Other issues discussed are human rights education, visits to places of detention, publicity, accessibility, and budgets for NHRIs.

Anderson, M. R. 2003. "Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in LDCs." IDS Working Paper 178, Institute of Development Studies.

Available at <http://www.ids.ac.uk/ids/bookshop/wp/wp178.pdf>

The paper examines some of the principal factors that deny poor people access to justice and suggests a number of legal reform strategies. The paper focuses on the judiciary and its accountability functions. It proceeds to examine the institutional obstacles to legal accountability by the poor and the anti-poor bias of many legal institutions. The paper's focus then turns to civil society and examines a number of economic and social factors that keep the poor from obtaining access to judicial systems. The next section explores how democratization and the incorporation of human rights concepts into national law have (or have not) enhanced access to justice. The conclusion suggests a number of policy reforms and strategies that state and civil society groups can deploy to increase the responsiveness of judicial systems to the poor.

Anaya, S. J. 2004. "International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State." Vol. 21, No. 1, p. 13-62. Arizona Journal of International & Comparative Law.

Available at <http://www.law.arizona.edu/Journals/AJICL/AJICL2004/Vol211/Anaya.pdf>

The article examines the rights of Indigenous Peoples in terms of the international human rights framework. Issues concerning Indigenous Peoples such as collective rights, non-discrimination and cultural integrity, land and natural resources, etc. are discussed. It finally proposes a model of a multicultural state which recognizes, respects and includes indigenous peoples.

The Bangalore Principles of Judicial Conduct. 2002.

Available at http://www4.worldbank.org/legal/publications/Bangalore_principles.pdf

The Principles establish a set of standards for ethical conduct of judges. They are designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct. The document covers: 1) judicial independence; 2) impartiality in judicial decision-making; 3) integrity; 4) propriety of judges; 5) equality of treatment to all; and 6) competence and diligence in due performance.

Basic Principles on the Independence of the Judiciary. 1985.

Available at http://www.unhchr.ch/html/menu3/b/h_comp50.htm

The Principles were formulated to assist states in securing and promoting the independence of the judiciary within the government framework. The Principles are categorized into 4 sections on the selection and functioning of the judiciary: 1) freedom of expression and association; 2) qualifications, selection and training; 3) conditions of service and tenure; and 4) discipline, suspension and removal.

Basic Principles for the Treatment of Prisoners. 1990.

Available at http://www.unhchr.ch/html/menu3/b/h_comp35.htm

Adopted in 1990 by the General Assembly, this set of principles spells out the standard for treating all prisoners. In line with basic human rights principles, prisoners should have access to opportunities and health services available in the country so that their inherent dignity and value as human beings can be protected.

Basic Principles on the Role of Lawyers. 1990.

Available at http://www.unhchr.ch/html/menu3/b/h_comp44.htm

A document formulated by the United Nations to promote and ensure the proper role of lawyers. It is divided into eight sections: 1) access to lawyers and legal services; 2) special safeguards in criminal justice matters; 3) qualifications and training; 4) duties and responsibilities; 5) guarantees for the functioning of lawyers; 6) freedom of expression and association; 7) professional associations of lawyers; and 8) disciplinary proceedings. The document helps to establish the standards for how lawyers should behave in the justice system.

Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. 1990.

Available at http://www.unhchr.ch/html/menu3/b/h_comp43.htm

The main objective of the Principles is to promote the proper role of law enforcement officials in administering justice. Aside from urging states to establish rules and regulations on the use of firearms, the Principles have prescribed circumstances under which non-violent means or firearms can be used.

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. 1990.

Available at http://www.unhchr.ch/html/menu3/b/h_comp36.htm

This resolution formulates important principles regarding the treatment of detained individuals. The resolution focuses on the application of human rights principles and ensures that all detained persons have the right to counsel, communications, explanation of their detention, and a prompt trial.

Buscaglia, E. 2001. "Justice and the Poor Formal vs. Informal Dispute Resolution Mechanisms: A Governance-based Approach."

Available at http://www4.worldbank.org/legal/ljr_01/doc/Buscaglia.pdf

This study has introduced a methodology where the links between access to justice, governance-related factors, and the impact on the poor can be identified and assessed. This same methodology can be applied in any other context or country through the use of objective and perceptual survey indicators. This paper has also identified the main governance-related advantages of the informal dispute resolution mechanisms used by the poorest segments of society within three rural jurisdictions in Colombia's Andean Region.

Code of Conduct for Law Enforcement Officials. 1979.

Available at http://www.unhchr.ch/html/menu3/b/h_comp42.htm

The Code defines the role of law enforcement officials in fulfilling the duty imposed upon them by law. It also delineates the extent to which law enforcement officials should employ force while performing their duties and protecting the health, privacy, human rights, and safety of persons they arrest.

Commonwealth Human Rights Initiative. 2004. "Policing – A Human Rights Perspective." India.

Available at <http://www.humanrightsinitiative.org/publications/police/mha-report.pdf>

This paper describes the results of a seminar organized by the Ministry of Home Affairs, the Government of India in association with Commonwealth Human Rights Initiative and Delhi Police. Discussions are centred on two thematic areas: 1) police-public interface and 2) good practices in policing. The paper is split up between a description of the ground realities, accountability mechanisms and recommendations.

Commonwealth Secretariat. 2001. "Best Practice for National Human Rights Institutions." London.

Available at http://www.asiapacificforum.net/about/paris_principles/nhri_bestpractice.pdf

A major resource on National Human Rights Institutions, their functions and best practices on establishing NHRIs, setting up the composition of NHRIs, ensuring that they have adequate authority, as well as other significant issues concerning NHRIs.

Coyle, A. 2002. "A Human Rights Approach to Prison Management: Handbook for Prison Staff." International Centre for Prison Studies.

Available at <http://www.prisonstudies.org/>

This handbook describes the principles of good prison management based on the international human rights standards. The handbook makes the link between these standards and practical prison management. It demonstrates that in addition to providing an appropriate framework for the management of prisons, this approach can be very effective in operational terms. The handbook is aimed at a wide readership, intergovernmental, governmental and non-governmental. Above all, it is intended for those who actually work in prisons and who deal with prisoners on a day-to-day basis.

Danish Institute of Human Rights and OHCHR. 2003. "National Human Rights Institutions and the Administration of Justice." Copenhagen: 13-14 November 2003.

Available at http://www.nhri.net/pdf/Conclusion_NHRI_AoJ.pdf

Topics discussed include the relationship between National Human Rights Institutions and the judiciary, judicial enforcement mechanisms and national institutions, direct powers of intervention and national institutions, the complaints handling powers of national institutions including civil cases and military and security force cases, and case handling systems.

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. 1985.

Available at http://www.unhchr.ch/html/menu3/b/h_comp49.htm

The Declaration defines the victims of crime and describes the facilitation of judicial and administrative mechanisms that enable victims to seek redress. The Declaration also focuses on prescribing the states' responsibilities in incorporating protective measures into national laws and providing assistance, financial compensation, and fair retribution to the victims.

Declaration on the Protection of All Persons from Enforced Disappearances. 1992.

Available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.RES.47.133.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.RES.47.133.En?OpenDocument)

The Declaration states the role and duties of states in preventing and punishing acts of enforced disappearance. Further, it prohibits acts of enforced disappearance under any circumstances and highlights the right of individuals who have been deprived of liberty to prompt appearance before judicial authority.

Golub, S. 2003. "Non-State Justice Systems in Bangladesh and the Philippines." Paper prepared for DFID.

Available at <http://www.grc-exchange.org/docs/DS34.pdf>

This paper aims to help DFID assess whether and how to work with non-state justice systems (NSJS) as part of its programme to advance safety, security and accessible justice (SSAJ) in the countries where it operates. Both Bangladesh and the Philippines also have numerous cultural minorities whose non-state justice systems coexist (sometimes uneasily) with those of the State. This paper accordingly aims to draw the insights and experience regarding both their non-state and state systems to ascertain what can be done to help make SSAJ a reality for cultural minorities from the Philippines and Bangladesh.

Guidelines on the Role of Prosecutors. 1990.

Available at http://www.unhchr.ch/html/menu3/b/h_comp45.htm

The Guidelines aim to secure and promote the effectiveness and fairness of prosecutors in criminal proceedings. The Guidelines are grouped into eight sections: 1) qualifications, selection and training; 2) status and conditions of service; 3) freedom of expression and association; 4) role in criminal proceedings; 5) discretionary functions; 6) alternatives to prosecution; 7) relations with other government agencies or institutions; and 8) disciplinary proceedings. The Guidelines establish a detailed code of conduct for prosecutors.

Human Rights Watch. 2004. "Prisons: Ending the Abusive Treatment of Prisoners."

Available at <http://www.hrw.org/prisons>

This site provides information on prison conditions, prison abuses, human rights protections for prisoners, and related issues. Research and information on prisons in specific countries can also be obtained.

International Centre for Criminal Law Reform and Criminal Justice Policy. 2001. "International Prison Policy Development Instrument." ICCLR.

Available at http://www.icclr.law.ubc.ca/Site%20Map/Programs/Prison_Policy.htm

This is the compilation of a comprehensive International Prison Policy Instrument developed by the International Centre for Criminal Law Reform and Criminal Justice Policy. This instrument is a compilation of standards and policies from many national and international sources and mostly includes UN Standards, such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Lawyers Committee for Human Rights. 2000. "What is a Fair Trial? A Basic Guide to Legal Standards and Practice."

Available at http://www.humanrightsfirst.org/pubs/descriptions/fair_trial.pdf

The Guide intends to provide criteria for individuals assessing the fairness of trial procedures and observing trials. Focusing mainly on the criminal trial proceedings, it ensures that the suspects' rights are protected during the pre-trial, hearing, and post-trial stages. Moreover, the manual seeks to encourage public awareness and monitoring of irregularities in trial procedures.

Morris, C. 2002. "Definitions in the Field of Dispute Resolution and Conflict Transformation." From What is Alternative Dispute Resolution (ADR)?

Available at <http://www.peacemakers.ca/publications/ADRdefinitions.html>

Includes ways of processing disputes: negotiation, mediation, conciliation, facilitation, adjudication (including courts and arbitration), case management in courts and tribunals, non-binding arbitration, facilitated policy dialogue or shared decision-making, ombudsman, non-violent direct action, peace building, reconciliation and restorative justice.

Mukerjee, Dr. D. 2003. "Police Reform Initiatives in India." Commonwealth Human Rights Initiative.

Available at <http://action.web.ca/home/sap/attach/mukerjee-police-humanrights.rtf>

Dr. Doel Mukerjee works in the Police, Prisons and Human Rights Programme at the CHRI. The paper mainly argues that any serious commitments on the part of the Commonwealth and its member states to ensure the realization of human rights and good governance must also address the issue of police accountability and reform. It discusses the issue of police accountability and reform in India, the judicial initiatives and the responses of different institutions like federal institutions, UNDP, National Human Rights Commission. The major recommendations from the disbanded National Police Commission are also presented.

Penal Reform International. 1999. "Recommendations for Penal Reform and Access to Justice." Penal Reform in South Asia.

Available at http://www.penalreform.org/english/models_kathreco.htm

The paper provides an overview of problems, concerns and experiences in the area of criminal justice and access to justice arising in their particular areas / countries shared by the representatives from four countries in the South Asian region who came together at the Conference on Penal Reform in South Asia at Kathmandu in November 1999. Shared problems and solutions emerged out of the discussions and several specific recommendations were made by the representatives which they promised to incorporate into policies for reform.

Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions. 1989.

Available at <http://www.unhchr.ch/html/menu3/b/54.htm>

The Principles articulate the circumstances under which no extra-legal, arbitrary and summary execution shall be carried out. Aside from preventing cases of extra-legal, arbitrary and summary executions, governments should cooperate fully in international investigations on this subject and establish proper investigative procedures to safeguard the basic freedoms of the accused.

Procedures for the Effective Implementation of UN Basic Principles on the Independence of the Judiciary. 1989.

Available at <http://www.hfhrpol.waw.pl/EN-RTF/en-5-6.htm>

This 1989 document has described and established the principles for ensuring independence in the judiciary. It has also clarified the role of the United Nations in providing training programmes and assisting member states in their implementation of these basic principles to create effective judicial systems.

Office of the High Commissioner for Human Rights. "Human Rights and Law Enforcement: A Manual on Human Rights Training for the Police." Professional Training Series No. 5/Add1. OHCHR.

Available at <http://www.unhchr.ch/html/menu6/2/training.htm>

This manual is one component of a three-part package of materials for human rights training for police (the Manual, the Trainer's Guide, the Pocket Book), and it provides information on international human rights standards relevant to the work of police and guides law enforcement agencies and individual officials to provide effective policing through compliance of human rights standards. This manual is designed for police trainers and training institutions, national police officials, whether civilian or military, civilian police (CIVPOL) components of United Nations peace-keeping operations.

Office of the High Commissioner for Human Rights. "Human Rights and Law Enforcement: A Trainer's Guide on Human Rights for the Police." Professional Training Series No. 5/Add2. OHCHR.

Available at <http://www.unhchr.ch/html/menu6/2/train5add2.pdf>

This trainer's guide (component two of the OHCHR package) provides session outlines on a full range of human rights topics, group exercises, instructions and tips for trainers, and a number of training tools, such as overhead transparencies, to be used in concert with the manual in conducting police training courses.

Office of the High Commissioner for Human Rights. "Human Rights Standards and Practice for the Police: Expanded Pocket Book on Human Rights for the Police." Professional Training Series No. 5/Add3. OHCHR.

Available at http://www.unhchr.ch/html/menu6/2/pts5add3_E.pdf

This pocket book (Component 3 of the OHCHR package) is designed to provide a readily accessible and portable reference for police committed to the lawful and humane performance of their vital functions in a democratic society. It contains hundreds of relevant standards, reduced to common language and point-form, and drawn from over 30 international sources. This manual is produced in a more "user friendly" format, with subjects arranged according to police duties, functions and topics.

O'Neill, William G. 2004. "Police Reform and Human Rights." HURIST.

Available at <http://www.undp.org/governance/docshurist/041103police%20reform%20and%20human%20rights.doc>

This paper reviews and analyzes selected initiatives, most implemented by the UN, to improve police performance concerning human rights.

Penal Reform International. 2001. "Making Standards Work: An International Handbook on Good Prison Practice." London, UK.

Available at <http://www.penalreform.org/english/MSW.pdf>

This publication presents an overview of the UN rules on prison conditions and treatment of prisoners and explains concretely their value and meaning for prison policies and daily practice. The Handbook is meant for use by all those working with prisoners or responsible for their care and treatment in any way.

Penal Reform International. 2002. "Access to Justice and Penal Reform: Review and Recommendations." Second South Asia Regional Conference on Access to Justice and Penal Reform, Special Focus: Under-Trials, Women and Juveniles. 12-14 December, 2002. Dhaka, Bangladesh.

Available at http://www.penalreform.org/download/SARO/dhaka_Conference.pdf

This paper includes recommendations that emerged from the second South Asia regional conference on access to justice and Penal Reform held in Dhaka, Bangladesh that brought together more than 80 participants from India, Bangladesh, Nepal, Sri Lanka and Iran. The special focus of the conference was on under-trial prisoners, women and juveniles in the prison system. The role and responsibilities of police, courts, prison and civil society were specifically addressed and the need for inter-agency collaboration and cooperation was recognized as essential for the delivery of justice.

Roy, R. D. 2004. "Challenges for Juridical Pluralism and Customary laws of Indigenous Peoples: The Case of the Chittagong Hill Tracts, Bangladesh." Vol. 21, No. 1, p 114-183. Arizona Journal of International & Comparative Law.

Available at <http://www.law.arizona.edu/Journals/AJICL/AJICL2004/Vol211/Royarticle.pdf>

This paper examines the customary law of the indigenous peoples in the Chittagong Hill Tracts (CHT) in Bangladesh. In particular it examines family law and the natural resource rights both of which are of particular concern to the indigenous peoples of the CHT. It also looks at the interaction of the formal legal system and customary law as well as the challenges and opportunities in applying international law. Finally, the paper outlines some of the major challenges facing the protection of customary law.

Standard Minimum Rules for the Treatment of Prisoners. 1955.

Available at http://www.unhcr.ch/html/menu3/b/h_comp34.htm

The Rules are formulated based on the general consensus of the international community on the treatment of prisoners. They establish basic standards on the management of penal institutions in providing accommodation, personal hygiene, medical services, instruments of restraint, food, education, etc. for different types of prisoners.

Statement of Principles of the Independence of the Judiciary (The Beijing Statement)

This 1995 statement calls for judges to uphold the independence and integrity of the judiciary. The judiciary must uphold the rule of law and promote the observance and attainment of human rights. Moreover, the statement includes the conditions, in terms of appointment, remuneration, and tenure, for choosing judges of proven competence, integrity, and independence (also see The Tokyo Principles and the Sri Lanka Principles).

Tanja, H. and N. Rod. 2003. "Reconciling Justice, 'Traditional' Law, and State Judiciary in East Timor." Final Report Prepared for the United States Institute of Peace.

Available at <http://www.ids.ac.uk/ids/law/pdfs/hohendixon.pdf>

The question of how the international community should administer justice in post-conflict scenarios has also become more urgent and apparent in the last decade, as justice has been revealed to be a crucial aspect of more complex interventions. The report combines these two diagnosed weaknesses of international operations in this research. The report focuses on the nature of the local legal systems, contrasting local concepts of justice from western-based ideas. It reviews the perspectives on local law that prevailed within UNTAET and examines the policy environment that prevailed throughout the mission and the guidance provided to staff in the field in relation to local law. A further section focuses on key areas of the UN's operation where local justice expectations and realities prevailed, and finally, the report examines Timorese perceptions on transitional justice and Timorese ways of dealing with the two different systems.

United Nations Development Programme. Primer on Parliaments and Human Rights.

Available at http://www.undp.org/governance/docshurist/030610PracticeNote_Poverty.doc

This primer was jointly commissioned under the GPPS and HURIST Programmes. It explores how UNDP can enhance the contribution that legislators, parliaments and parliamentary processes make towards the protection, promotion and realization of human rights. The primer suggests elements for assessing the human rights capacities of parliaments and examines how several ongoing approaches to parliamentary development can be used to enhance parliament's contribution to human rights. The primer concludes with some programming considerations pertinent to human rights-based parliamentary development programming.

United Nations High Commission for Human Rights. April 1993. "Fact Sheet No.19: National Institutions for the Promotion and Protection of Human Rights, including the Paris Principles." UNHCHR.

Available at <http://www.unhchr.ch/html/menu6/2/fs19.htm>

This Fact Sheet explains National Human Rights Institutions and their role in protecting and promoting human rights. It also includes the Paris Principles.

United States Agency for International Development (USAID). 1998. "Alternative Dispute Resolution Practitioners' Guide." USAID, Washington, DC.

Available at <http://www.usaid.gov/democracy/pdfs/pnacb895.pdf>

Drawing on the experiences of ADR programmes in both developing and developed countries and the lessons as to whether, when, and how to implement ADR projects, this guide provides an introduction to the broad range of systems that operate under the rubric of ADR. It is written to help project designers decide whether and when to implement ADR programmes in the context of rule of law assistance or other development initiatives. The guide explores and clarifies the potential uses and benefits of ADR and is also explicit about the limitations of ADR programmes, especially where they may be ineffective or even counterproductive in serving some development goals.

The Universal Charter of the Judge. 1999.

Available at <http://www.joasa.org.za/charter/charter.html>

This charter is drafted by judges from around the world as an instrument providing general minimal norms on the conduct of judges. It recognizes the importance of judicial independence in guaranteeing the impartiality of justice under the law. The Charter also affirms the right of every person to a fair trial and specifies the standards for appointing and disciplining judges.

United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules). 1990.

Available at http://www.unhchr.ch/html/menu3/b/h_comp46.htm

The Rules prescribe a set of minimum safeguards and non-custodial measures for persons subject to alternatives to imprisonment in accordance with the rule of law and human rights principles. Non-custodial measures, which can take place during the various stages of trial, help offenders to avoid institutionalization and to reintegrate into society.

Chapter 5 – Capacity to Seek Justice Remedies**Anderson, J. and G. Renouf. "Legal Services for the 'Public Good.'" National Pro Bono Resource Centre, Australia.**

Available at <http://www.nationalprobono.org.au/publications/forpublicgood.pdf>

This article considers how the commitment to providing and improving pro bono legal services can be channelled in the most effective way. It addresses questions such as 'what is the further potential for pro bono legal services to improve access to justice? What are the most effective types of relationships between pro bono legal services and publicly funded legal services? How can pro bono legal services be supported and promoted so that they most effectively improve access to justice?'

Asian Development Bank. 2001. "Legal Empowerment: Advancing Good Governance and Poverty Reduction." Overview Report. ADB.

Available at www.adb.org/Documents/Others/Law_ADB/lpr_2001_Part_2.pdf

This report examines how legal empowerment - or the use of law to increase the control that disadvantaged populations exercise over their lives - contributes to good governance, poverty reduction, and other development goals, and how it can enhance projects funded by the ADB and other development agencies. The report examines the concept and purpose of legal empowerment, constraints on access to justice and participation in governance by the disadvantaged, examples of legal empowerment activities, lessons learned from successful legal empowerment strategies, and relevant recommendations for success and impact.

Golub, S. 2000. "Non-Lawyers as Legal Resources for Their Communities," in Many Roads to Justice: The Law Related Work of Ford Foundation Grantees around the World. The Ford Foundation.

Accessible at: http://www.fordfound.org/publications/recent_articles/docs/manyroads.doc

This article explores the increasingly widespread use of non-lawyers in efforts to promote government accountability, implementation of laws and access to justice. It examines actual experiences in China, Bangladesh, the Philippines and other countries, and provides suggestions to strengthen paralegal work.

Golub, S. 2003. "Access to Human Rights: Obstacles and Issues." International Council on Human Rights Policy.

Available at <http://www.international-council.org/ac/excerpts/133.doc>

This overview paper explores the limited access people have to human rights in practice, by describing the diverse obstacles and constraints impeding practical implementation of human rights. It then outlines selected issues that pertain to a human rights approach (as a means) for advancing human rights (as a goal). It divides constraints into two broad categories: 1) institutions' characteristics and circumstances, and 2) individual characteristics and circumstances.

Golub, S. 2003. "Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative."

Available at <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=1367>

This working paper questions the dominant paradigm of 'rule of law' used by many international agencies. It proposes a focus on legal empowerment - the use of legal services and related development activities to increase disadvantaged populations' control over their lives - as an alternative.

Institute for Law and Justice. December 2000. "Compendium of Standards for Indigent Defence Systems: A Resource Guide for Practitioners and Policy Makers." United States.

Available at <http://www.ojp.usdoj.gov/indigentdefense/compendium/pdf.htm>

The Compendium of Standards for Indigent Defence Systems presents national, state, and local standards relating to five functions of indigent defence in the United States. Useful for seeking international experiences on systems and mechanisms for public defence institutions.

The International Centre for Criminal Law Reform and Criminal Justice Policy. 1999. "The Responsibility of States to Provide Legal Aid." ICCLR.

Available at <http://www.icclr.law.ubc.ca/publications/reports/beijing.pdf>

This paper focuses on the legal obligations of states to provide legal aid arising from international human rights law. It provides a historical account of the concept of legal aid, and of the transition from the traditional view of 'formal equality' before the law to the broader concept of 'access to justice'. The paper explains the right to legal aid as contained in international human rights law, and discusses how other rights impact on the duty of states to provide legal aid and ensure equal access to justice.

Malik, Shahdeen. 2001. "Access to Justice: A Truncated View from Bangladesh," in Comprehensive Legal and Judicial Development: Towards an Agenda for a Just and Equitable Society in the 21st Century, R.V. Van Puymbroeck (ed.), World Bank.

Available at http://www4.worldbank.org/legal/legop_judicial/ljr_conf_papers/Malik.pdf

This article examines the increasing marginalization of formal legal and judicial systems as a root problem of accessibility, and the need to adopt interventions that strengthen checks and balances and fairness in the justice system. The article examines the experience of Bangladesh as an illustrative example of difficulties in accessing justice that can also be found in many other developing countries.

McClymont, M. and S. Golub (eds.). 2000. "Many Roads to Justice: The Law Related Work of Ford Foundation Grantees around the World." The Ford Foundation.

Available at http://www.fordfound.org/publications/recent_articles/manyroads.cfm

This volume comprises papers produced under the Ford Foundation's Global Law Programs Learning Initiative (GLPLI), an effort to derive and disseminate insights flowing from the law-related work of the Foundation and its grantees around the world. Different articles in the book seek to convey some of the challenges that grantees have faced around the world and provide a sense of how they have used particular legal strategies in very different settings, of Legal Aid Services in South Africa and advantages of a hybrid system.

Narrain A. et. al. 2001. "Conference Report: Alternative Lawyering in India." Law, Social Justice & Global Development Journal (LGD).

Available at <http://elj.warwick.ac.uk/global/issue/2001-2/alf.html>

Proceedings of a conference where alternative lawyers shared and evaluated learning and experiences gathered from alternative lawyering in India in different domains: environment, civil liberties, women's rights, homosexual rights, labour rights and community-based lawyering.

Wilson R. J. and J. Rasmussen. 2000. "Promoting Justice: A Practical Guide for Human Rights Lawyering." International Human Rights Law Group.

Available at http://www.hrlawgroup.org/resources/content/PJ_covcont.pdf

This guide seeks to explore the ways in which lawyers can promote and protect human rights through legal advocacy and highlights the lessons learned by practicing human rights lawyers. Part I defines the term 'human rights lawyering', the main subject of the guide. In Part II, the guide examines the various structures that legal service providers have adopted and how these structures affect and intersect with the goals and strategies that these organizations pursue. In Part III, the strategies that lawyers have employed, both in traditional realms of legal advice and assistance, and the newer, less conventional delivery methods for promoting legal rights are discussed. Finally, in Part IV, the guide presents the overall conclusions, including the key strategies for addressing the central themes.

Chapter 6 – Disadvantaged Groups

Artz, L. and Black Sash, Knysa. 1998. "Access to Justice for Rural Women: Special Focus on Violence Against Women."

Available at <http://web.uct.ac.za/depts/sjrp/publicat/access.htm>

This report aims to identify the hardships women in rural areas go through, in particular domestic violence and how this increases their dependency on male members of the family. The research explains that due to the current prevailing societal structure, tradition tends to repress women and condone violence against them. It also discusses how this suppression negatively affects their ability to access justice in the face of violence and the secondary victimization these women face by their community and justice departments.

Asian Human Rights Commission. 2000. "Impact of Corruption on the Criminal Justice System on Women." AHRC

Available at <http://www.ahrchk.net/hrsolid/mainfile.php/2000vol10no02/191/>

An analysis of how corruption in the justice system affects women in Nepal. It is a compilation of results from surveys done in districts in Nepal that point to problems in the justice system that prevent many women from receiving fair trials.

Gargarella, R. "Too Far Removed From the People - Access to Justice for the Poor: The Case of Latin America." Universidad Torcuato Di Tella, Buenos Aires.

Available at <http://www.undp.org/governance/docsaccount/latin-america.pdf>

This paper aims to show how the poor in Latin America cannot obtain full access to justice, as a result of faults within the legal system itself. The main reason why the underprivileged have difficulties accessing justice, the paper says, is because since its formation, the judiciary have been too removed from the people. The author explains that although in technicality the laws and constitution of the various Latin American countries provide full social and economic rights, in actuality, the poor do not have the means to access them. The problems they face include: lack of information, high costs, corruption, excessive formalism, fear and mistrust, inordinate delays and geographical distance.

Ghosh, B. 2003. "A Road Strewn with Stones: Migrants' Access to Human Rights." International Council on Human Rights Policy.

Available at <http://www.ichrp.org/ac/excerpts/117.doc>

This paper examines the violation of migrant's human rights and the international and national legal frameworks that fail to protect migrants from abuse and their lack of access to any remedies for the grievances that they may have.

Human Rights Watch. 2003. "Ravaging the Vulnerable: Abuses Against Persons at High Risk of HIV Infection in Bangladesh."

Available at <http://www.hrw.org/reports/2003/bangladesh0803/>

This article explains that the persons most at risk of HIV transmission in Bangladesh - sex workers, men who have sex with men and injection drug users - are essential partners in the fight against HIV/AIDS. They are the group of people with the greatest need of HIV/AIDS information services and are also in the best position to deliver information and services to their peers. Further, the article mentions that these marginalized groups as well as HIV/AIDS outreach workers often face abuse and exploitation by the police when they approach them for help, which is a direct blow to Bangladesh's anti-AIDS efforts. The article offers recommendation to the Bangladeshi Government to reform the law enforcement system.

Joint United Nations Programme on HIV/AIDS. 1999. "Handbook for Legislators on HIV/AIDS Law and Human Rights." UNAIDS.

Available at http://www.unaids.org/html/pub/publications/irc-pub01/jc259-ipu_en_pdf.htm

A handbook, compiled by UNAIDS and the Inter Parliamentary Union, which aims to assist parliamentarians and other elected officials in disseminating and ratifying effective legislation and undertaking appropriate law reform in the fight against AIDS. It provides examples of legislative and regulatory practices from around the world.

Office of the High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS. 1998. "International Guidelines on HIV/AIDS and Human Rights." OHCHR and UNAIDS.

Available at <http://www.ohchr.org/english/issues/hiv/guidelines.htm>

A tool for states to assist in developing and implementing national HIV/AIDS policies and strategies with a rights-based framework. Also see the Revised Guidelines 6, on access to prevention, treatment, care and support.

Riddell, R. 2002. "Minorities, Minority Rights and Development." Minority Rights Group International, Issues Paper, November 2002.

Available at http://www.minorityrights.org/admin/Download/pdf/IP_Development_Riddell.pdf

This document looks at the links between the human rights of minorities and the process of development. International and national laws addressing minorities and protecting their human rights, the way development affects and is perceived by minorities including their inclusion or exclusion from the process, and how their needs and concerns are prioritized by government, etc.

Rosenthal, E. and C. J. Sundram. 2002. "International Human Rights in Mental Health Legislation."

Available at <http://www.mdri.org/pdf/NYLawSchoolJournal2002.pdf>

This paper analyzes and examines the application of international human rights law for people with mental disabilities. It begins by looking at the international legal framework, provisions for the highest attainable standard of physical and mental health, securing non-discrimination as well as liberty and freedom, preventing cruel and inhuman treatment, and finally establishing safeguards.

Sidoti, C. 2003. "Rural People's Access to Human Rights." International Council on Human Rights Policy.

Available at <http://www.ichrp.org/ac/excerpts/121.doc>

This paper describes how the rural poor do not have proper access to human rights. It says that human rights activists and institutions are predominantly urban in their base and orientation with the rural poor being increasingly ignored and marginalized. Needed services are not provided to those living in rural areas, unlike people living in urban areas. The paper not only identifies the problems facing the rural poor, but also provides legal and institutional ways to address the obstacles towards access to human rights.

United Nations Development Fund for Women. 2003. "Not a Minute More: Ending Violence Against Women." UNIFEM

Available at http://www.unifem.org/index.php?f_page_pid=207

This report highlights many of the successes achieved in the field of violence against women and details what must be done to build on them. It provides examples of good practices as well as efforts that did not meet the goals set out for them – and explores why not. It looks at the challenges ahead, and asks what the most fruitful next steps might be.

United Nations Development Programme. Civil Society Organization and Participation Programme: Indigenous Peoples

Available at <http://www.undp.org/cso/ip.html>

This site explains UNDP's position on Indigenous Peoples and includes policies, procedures and activities it has been involved in to protect and promote the concerns of Indigenous Peoples.

United Nations Economic and Social Commission for Asia and the Pacific. "Emerging Social Issues Division – Population and Social Integration Section: Disability Programme." UN ESCAP.

Available at <http://www.unescap.org/esid/psis/disability>

The Disability Programme is part of the Population and Social Integration Section of the Emerging Social Issues Division. The site includes publications and research on disability being undertaken by ESCAP including the latest: "Focus on Ability, Celebrate Diversity: Highlights of the Asian and Pacific Decade of Disabled Persons, 1993 - 2002."

United Nations Educational, Cultural and Scientific Organization. "Social Transformations: International Migration and Multicultural Policies." UNESCO.

Available at http://portal.unesco.org/shs/en/ev.php@URL_ID=1211&URL_DO=DO_TOPIC&URL_SECTION=201.html

This site provides some background on migration issues and includes publications, reports and links to other documents and resources on international migration.

Vene Klases, L. 1992. "Women's Legal Rights Organizing Political Participation in Africa, Legal Literacy: A Tool for Women's Empowerment."

Available at <http://www.justassociates.org/legalrtsafrica.pdf>

This paper discusses the challenge of discriminatory attitudes and deeply rooted cultural practices faced by women while seeking justice and states that legal programmes must combine information with consciousness-raising and community organization to encourage collective action at local level.

Chapter 7 – Justice in Post-Conflict Situations

International Crisis Group. 2003. "Afghanistan: Judicial Reform and Transitional Justice."

Available at http://www.icg.org/library/documents/report_archive/A400879_28012003.pdf

A report from ICG on the priority areas for reform to rebuild the justice system in Afghanistan. It focuses on the types of transitional justice mechanisms that need to be set up in order to ensure a transition that holds perpetrators accountable for past abuses while building up the justice system to deal with future issues.

UNDP and Chr. Michelsen Institute. 2004. "Governance in Post-Conflict Situations." Background Paper for Working Group Discussions. Bergen Seminar Series, Bergen, 5-7 May.

Available at <http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN016465.pdf>

This paper analyzes post-conflict governance issues and programming entry points in seven major thematic areas, as follows: access to information, democratic dialogue, electoral systems and processes, parliamentary development, decentralized governance, public administration reform and justice, security and human rights. (Also see Lessons Learned Research paper at www.cmi.no/news/undpsem2004/Research%20Paper.pdf).

Farid, H. and R. Simarmatra. 2004. "The Struggle for Truth and Justice: A Survey of Transitional Justice Initiatives throughout Indonesia." Muddell, M.K (ed). Occasional Paper Series. International Center for Transitional Justice. New York, NY.

Available at <http://www.ictj.org/downloads/Indonesiafinal2MB.pdf>

This paper presents the key findings emerging from a mapping exercise of transitional justice activities taking place in Indonesia. It presents the different means through which people have sought to address violence they've faced and lists some recommendations.

Additional Resources

Asia Pacific Forum on Women, Law and Development (APWLD)

Available at <http://www.apwld.org/>

An NGO dedicated to using the law to promote social change for equality, justice and development. Its activities centre on promoting basic human rights for women through policy advocacy, education, and training.

Commonwealth Human Rights Initiative (CHRI)

Available at <http://www.humanrightsinitiative.org>

The website offers links to a variety of education materials on Commonwealth Human Rights Initiative's (CHRI) principles. Its access to information campaigns which includes links to its no restriction to information (RTI) site, on the necessity for constitutional principals, as well as links to election monitoring in the Commonwealth. Its access to justice campaign links to pages on police reforms, prison reforms, and CHRI's fact finding missions.

ELDIS Participation Resource Guide.

Available at <http://www.eldis.org/participation>

A comprehensive listing of major participation resources online with descriptions of organizations, site content, contact details, practical manuals, major web sites, bibliographic sources, organizations and networks, and discussion lists. Themes include conflict, gender, capacity building, governance and monitoring and evaluation (M&E).

Governance Resource Center (GRC) Exchange. Safety, Security and Access to Justice.

Available at: http://www.grc-exchange.org/g_themes/ssaj_access.html

Links and resources on access to justice including overview of the topic and references to relevant articles and publications.

International Bar Association.

Available at <http://www.ibanet.org>

Promotes the exchange of information between lawyers and legal associations worldwide.

International Center for Transitional Justice (ICTJ)

Available at <http://www.ictj.org/>

An international NGO working to support transitional justice in post-conflict situations by building local capacity to prosecute perpetrators of human rights violations, documenting violations through non-judicial means such as truth commissions, reforming abusive institutions, providing reparations to victims, and advancing reconciliation.

International Council on Human Rights Policy (ICHRP).

Available at <http://www.ichrp.org/>

The ICHRP is a research institution that focuses on human rights issues. It works to issue tools and studies on human rights policy.

International Crisis Group.

Available at <http://www.icg.org>

The International Crisis Group is an multinational NGO that focuses on field research and analysis of conflict around the world. It produces briefing papers and reports which are available on the website.

Institute of Development Studies(IDS) Participation Resource Centre, UK.

Available at <http://www.ids.ac.uk/ids/particip/index.html>

Through the work of the Participation Group, the Institute of Development Studies serves as a global centre for research, innovation and learning in citizen participation and participatory approaches to development. The Research Pages provide overviews, articles and reports from their programme; including unpublished practical information as well as research reports, training manuals, workshop reports, critical reflections and newsletters.

Joint United Nations Programme on HIV/AIDS (UNAIDS)

Available at <http://www.unaids.org>

The site of the United Nations agency UNAIDS which is the main advocate for global action on the HIV/AIDS epidemic. Includes UNAIDS reports and publications.

National Human Rights Institution Forum

Available at <http://www.nhri.net/>

An international forum for researchers and practitioners in the field of national human rights institutions. The site includes key global and regional documents, documentation on the work of global and regional fora, information on and from National Human Rights Institutions, bibliography and research materials, capacity building and training resources.

Mental Disability Rights International

Available at <http://www.mdri.org>

MDRI documents conditions, publishes reports on human rights enforcement, and promotes international oversight of the rights of people with mental disabilities. MDRI trains and supports advocates seeking legal and service system reform and assists governments to develop laws and policies to promote community integration and human rights enforcement for people with mental disabilities.

Minority Rights Group (MRG)

Available at <http://www.minorityrights.org/>

MRG is an organization dedicated to protect the rights of religious, ethnic, and linguistic minorities and indigenous groups worldwide. It works to promote participation of minorities and indigenous peoples, advocate for their needs and include their concerns in development policies. It produces reports, briefing papers and training manual on various issues facing indigenous people and minority groups.

Penal Reform International

Available at <http://www.penalreform.org>

Penal Reform International (PRI) is an international non-governmental organization that works on reforming the prison system worldwide. The site includes information on their activities as well as publications and reports they have produced.

UN Enable (United Nations Internet Sites on Disabilities).

Available at <http://www.un.org/esa/socdev/enable/unpwdwebsites.htm>

Links to disability related sites including sites on: disability and development, disability and human rights, disability and health, disability and education, etc.

United Nations Development Fund for Women (UNIFEM)

Available at www.unifem.org

UNIFEM is the women's fund at the United Nations. The site includes information on UNIFEM activities as well as publications and relevant documents on women's issues and gender equality.

United Nations Development Programme, "Promoting Democracy Through Justice Sector Reform – Access to Justice"

Available at <http://www.undp.org/governance/justice.htm>

UNDP's site for its work on access to justice. It includes presentations, papers and reports on UNDP's work on access to justice.

United Nations High Commission for Refugees (UNHCR)

Available at <http://www.unhcr.ch/cgi-bin/texis/vtx/home>

UNHCR focuses on protecting refugees and guaranteeing them their rights and resolving refugee problems around the world. It strives to ensure that everyone can exercise the right to seek asylum and find safe refuge in another country, with the option to return home voluntarily, integrate locally or to resettle in a third country.

UNDP Oslo Governance Centre: Access to Justice Resources

Available at <http://www.undp.org/oslocentre/access.htm>

A list of resources, mainly UNDP, on the Democratic Governance sub-practice area of Access to Justice. The site includes links to more resources in other areas of Democratic Governance as well.

“In the 21st Century, in addition to social justice at the national levels, we have to give more attention to justice at the international level.”

Shirin Ebadi, 2003 Nobel Peace Prize Laureate

“The principle of ‘equal justice under law’, carved into stone over many a courthouse, needs to be translated into action in our world.”

Justice Michael Kirby, Justice of the High Court of Australia

The ***Practitioner’s Guide*** is only one of several tools produced by UNDP’s Asia-Pacific Rights and Justice Initiative. Consider <http://regionalcentrebangkok.undp.or.th/practices/governance/a2j> the dynamic home base of this Guide and the reference point of your work in access to justice.



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