



Case Study

Access to Justice for Indigenous Peoples in Bangladesh

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Towards Inclusive Governance

Promoting participation of disadvantaged groups in Asia-Pacific

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Acronyms

ASU	Army Security Unit
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CERD	Convention on the Elimination of Racial Discrimination
CHT	Chittagong Hill Tracts
CHTRC	CHT Regional Council
CHTDF	UNDP Chittagong Hill Tracts Development Facility
CRC	Convention on the Rights of the Child
DC	Deputy Commissioner
DGFI	Directorate General of Forces Intelligence
EBSATA	East Bengal State Acquisition and Tenancy Act
FIDC	Forest Industries Development Corporation
FIU	Field Intelligence Unit
GoB	Government of Bangladesh
HDCs	Hill District Councils
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	The International Covenant on Civil and Political Rights
UPDF	United People's Democratic Forum
MoCHT	Ministry of CHT Affairs
NSI	National Security Intelligence
PCP	Pahari Chattro Porishod (Hill Students Council or PCP)
PCJSS or JSS	The Parbattyo Chattagram Jana Sanghhati Samiti)

Towards Inclusive Governance

RC Regional Council

SAD Special Affairs Division of the Prime Minister's Office

1 Introduction

The overall justice system in Bangladesh has long been seen to provide a deteriorating service to the population in general and for indigenous people in particular. Most of the approaches which have been adopted to date to enhance access to justice, whether systemic, institutional, social or pedagogic, have marginalized the rights of indigenous peoples, been inadequate in their outreach and largely insensitive to questions of cultural distinctiveness.

The number of indigenous or “tribal” peoples in Bangladesh reportedly stands at 1,772,788 (Bangladesh Census 2001 [Provisional]); although indigenous people groups claim that the figure is in fact higher). About 1,036,060 Adivasis live in the plains, in the north-west, north-east and north-central border areas, south-central and south-eastern coastal areas (mainly in Dinajpur, Rajshahi, greater Mymensingh, Patuakhali-Barguna-Cox’s Bazar, Sylhet and Moulvibazar Districts, as well as Jessore and Khulna Districts), while some 736,682 Hill people inhabit the Chittagong Hill Tracts (CHT) in the south-east (comprising the three districts of Bandarban, Khagrachari and Rangamati).

1.1 Objectives

This case study aims to identify the main problems faced by indigenous peoples as they seek access to formal and traditional justice systems. It also focuses on their right to access to land and forests, their right to life and liberty and personal security, their right to gender justice and finally their right to participation and representation.

1.2 Methodology

The design and conduct of the study followed an inclusive and participatory approach. A team composed of an advisor and two national consultants, combined deskwork, consultation processes and action research in order to seek insights and in-depth information on key issues related access to justice, including access to both the formal and the informal justice systems. In addition to gathering information, the study sought to raise awareness and engage in a dialogue with those consulted about their rights and entitlements, the relevant governance frameworks and the legal and judicial mechanisms available for redress of grievances in the sectors under discussion.

While this study did involve representative voices of Adivasis from different communities in both the plains and the CHT, field work and in-depth focus group discussions also took place with the Santal community in Rajshahi and Dinajpur, and the Hill peoples (mainly Chakma, Marma and Tripura, as well as smaller groups) in the CHT.

This case study discusses various approaches to access to justice, presents the methodology adopted for this study, and then reviews its objectives. It discusses the relevant political and historical context, economic and cultural background, and the

struggle to establish indigenous peoples' rights. It outlines the legal framework, including both formal and non-formal justice systems, as applicable to indigenous peoples. It sets out the relevant institutional framework, and then analyses the key obstacles indigenous peoples face in obtaining access to both the formal and non-formal justice systems against the background of the overall situation regarding access to justice for the majority populations of Bangladesh. The paper then sets out existing interventions by state and non-state actors to ensure access to justice for indigenous peoples. Finally, it proposes recommendations and strategies to facilitate and enhance such access, both in the plains and in the CHT.

2 Political and Historical Context

2.1 Political context

The political histories of the Adivasis in the plains and hills in the colonial period vary sharply.

In the British colonial period, the CHT was administered under a separate legal regime, namely the CHT Regulation (1900), which placed the region under the administration of a Superintendent, and later, a Deputy Commissioner (DC), who presided over all civil and criminal matters. It also recognized traditional institutions such as the Circle Chiefs, Headmen and *Karbaris*. The Circle Chiefs retained power over customary and traditional matters relating to land, family and some petty criminal matters. Circle Chiefs were at first directly in charge of administration but their administrative powers were curtailed and replaced with a prerogative to participate in an Advisory Council headed by the Deputy Commissioner. Ultimate legislative authority and rights of eminent domain, however, were reserved solely for the British crown.

In the plains, the British, bent on maximizing revenue collection and facilitating commodity production for global markets, pursued ruthless policies to uproot Adivasis from some of their ancestral forested territories and employed them in new grand settlement schemes. To this end Adivasis were relocated to less colonized parts of Greater Bengal and to north-eastern regions where cheap labour was urgently needed for indigo and tea plantations. Some were resettled and turned into peasant cultivators, while others became day labourers.

In contemporary Bangladesh too, the political history of the CHT has diverged dramatically from that of the plains. The rejection by the Government of Bangladesh (GoB) in 1974 of demands for explicit constitutional recognition and protection of the rights of the indigenous peoples of the CHT led to a struggle for autonomy. After attempts to resolve the conflict in 1985 and 1989, the Parbattyo Chattagram Jana Sangghati Samiti PCJSS or JSS), the largest party of the Hill people and the GoB signed the CHT 'Peace' Accord in 1997. Though criticized by many, on both the left and right, the Accord recognized the special status of the CHT as a 'tribal inhabited area'; provided for demilitarization of the area; rehabilitated JSS fighters; allowed returnee refugees and displaced people to return home; established a Land Disputes Resolution Commission; devolved further powers to the Hill District Councils (including on land administration and law and order); and formed a CHT Regional Council (RC) and a Ministry of CHT Affairs (MoCHTA). However, the substantial non-implementation of the Accord to this day remains a major bone of contention between the PCJSS and the GoB.

2.2 Economic background

Most indigenous people are agriculturists, while others are employed in public or private service, as artisans or in trade. Communities in north-western and north-eastern districts largely practice wet-rice agriculture. *Jum* (swidden) cultivation has traditionally been the

mainstay of agricultural communities in the CHT but the continuing acquisition of land and forests in the area by government agencies and government-sponsored Bengali settlers has led to falls in productivity. Wet-rice cultivation is common in the narrow valleys of the CHT, whereas *jum* cultivation is limited to ridge-tops and sloping lands, where wet-rice or other forms of irrigated agriculture is practically impossible and market-oriented agriculture is restricted to a few species of spices that may be dried and marketed on account of their durability and light weight. The traditional subsistence economy of most Adivasi communities has gradually been integrated into the market economy, even among *jum* communities, given the creeping intrusion of the 'state'.

Poor economic infrastructure predominates in Adivasi-populated areas, including the CHT, and government services (such as health, sanitation and education) are not properly distributed. There is disparity among and within Adivasis, particularly within the CHT.

2.2.1 Land

Given the country's overwhelming dependence on land and agriculture, access to and enjoyment of land are among the most common problems in Bangladesh, irrespective of ethnicity. However, Adivasis face specific problems as in many cases they have been systematically dispossessed of their lands, either through the operation of law and by force. Shifting demographics and the expansion of the Bengali cultural majority into areas traditionally inhabited by Adivasis, including in some areas formally categorized as 'forests', has perpetuated the practice of forcible and violent dispossession of Adivasi land — land which understandably holds particular social and cultural significance to most Adivasis.

As noted by a prominent Hill person, 'land is the main problem'. Adivasis across the country allege that they have been dispossessed of their lands through the state's non-recognition of their customary rights over land.

The law governing the land rights of Adivasis in the plains is contained in the East Bengal State Acquisition and Tenancy Act (1950). The land problem of the indigenous people of the plains differs from those living in the Hills due to different agricultural practices; their concentration either in the midst or vicinity of the Bengalis; the nature of external political control and different legal frameworks; and more importantly (in the context of the Garos and Khasis) the matrilineal nature of their society.

The law governing land rights of Adivasis in the CHT is contained in, among others, the CHT Regulation (1900), as well as a number of laws passed in the period following the Peace Accord (see below). In the CHT, the most acute land-related problems include land scarcity following the construction of the Kaptai Dam in 1960 and the displacement of some 100,000 inhabitants; land dispossession at the hands of government-sponsored Bengali settlers; acquisition of land for new 'reserved forests'; allotment of customarily-owned lands to non-resident entrepreneurs for rubber and other commercial plantations; and 'privatization' of former commonly-held areas. In the post-Accord period, continuing dispossession and displacement of Adivasis has occurred through compulsory acquisition of lands.

2.2.2 Forests

Forests constitute an integral part of the lives and belief system of indigenous peoples. The main law in Bangladesh governing forests and forest resources is the Forest Act (1927).

In the colonial period, the state took over the direct management of many forested areas by declaring them 'reserved forest', which prohibits access or use of the forest or forest produce, without the government's express consent, thereby criminalizing and outlawing countless Adivasis whose lives and livelihoods were closely interconnected with the forests. In the CHT, the state also declared areas of swidden and other commons used by Adivasis as 'protected forests' or 'unclassified state forests' (in addition to reserved forests), again resulting in Adivasi rights being treated as mere usufructs rather than as rights of ownership.

These practices continue in independent Bangladesh. Thus, many forest-dwellers and forest-adjacent communities face trumped-up criminal cases and harassment (for example, for 'theft' of forest produce) merely for continuing their traditional existence and livelihood patterns, including swidden (*jum*) cultivation and gathering of forest produce. Women bear a disproportionate burden, as prohibitions by the Forestry Department on access to forests to collect dead branches or leaves, forces them to travel long distances to gather fuel wood.

The 20-year Forestry Master Plan adopted by the GoB in 1994 sets out government policies and actions until 2013. Pursuant to this Plan, the Forest Department has undertaken schemes to cover 20 percent of the country's land surface with forests, this includes logging in the natural hill (reserved) forests in the northern and southern CHT. In addition, the government-owned Forest Industries Development Corporation (FIDC) and private companies have engaged in logging projects in reserved forest areas in the CHT and have established eco-parks under the auspices of the Forest Department without any effective consultation with Adivasi inhabitants or users. These programmes have been disruptive and have violated the rights of local people and have had a negative impact on the local environment.

2.3 Cultural context

Indigenous peoples are marginalized by the state's non-recognition of their cultural distinctiveness. The present Constitution's mono-cultural, monolingual and mono-religious orientation has prevented it from being inclusive with regard to Adivasi identities. Until the declaration of Islam as the state religion, the Constitution was secular. Although religious freedom was, and is still, recognized as a fundamental right – despite the provision of a single state religion – the emphasis on fostering the national language and culture in the absence of any comparable provisions for the languages, cultures and religious beliefs of the Adivasis has perpetuated their feelings of exclusion, insecurity and marginalization. For example, the Bangla Academy facilitates the development of the Bengali language, literature and culture but there are no similar institutes to foster development of the languages and cultures of the indigenous peoples, and there is only limited state support for mother language education of such communities. Given the overall disadvantaged situation of Adivasis, the gap between the cultural development of the Adivasis and the majority community has widened.

2.4 The struggle for rights of the indigenous people

Indigenous peoples in the CHT have adopted their own modes of protests and resistance against their marginalization and state violations of their rights. These protests take place at various levels and acquire different forms ranging from forming indigenous organizations to resistance politics. For example, in the plains, various Adivasi organizations pursue advocacy, mobilization and networking activities, these organizations include the Jatiyo Adivasi Parishad of the north-west, the Tribal Welfare Association in the central north, the Greater Sylhet Adivasi Forum and Khasi Welfare Society in the north-east, the Rakhaing Buddhist Welfare Association and the Rakhaing Development Foundation in the coastal south. Organizations active at the national level include the Bangladesh Adivasi Forum and the now dormant National Adivasi Coordination Committee.

Resistance in the CHT took the form of an armed struggle in the 1970s but was abandoned after the CHT 'Peace' Accord of 1997. The movement led to the formation of the PCJSS/JSS, the largest political party of the hill people, and a new CHT party that was opposed to the Accord, the United People's Democratic Forum (UPDF). Both of these parties are aligned to the Hill Women's Federation and Pahari Chattro Porishod (Hill Students Council or PCP). In addition, almost all indigenous peoples in the CHT have their own autonomous organizations (e.g. Bawm Social Council, Marma Sangskriti Sangstha, Marma Buddhist Association, Marma Welfare Association, Marma Unnoyon Songshod, Tripura Kalyan Foundation, Tripura Unnoyon Sangshod, Bangladesh Tanchangya Kalyan Sangstha, Mro Social Council, Khyang Welfare Association, and organizations of the Chak, Khumi, Lushai and Pangkhua). There are also civil society organizations composed of UP chairpersons and members, headmen, Adivasi traders, *mauza* forest-dwellers, etc. The most influential NGOs and land rights activist forums include the Hill Tracts NGO Forum (many of whom have now rallied under the banner of the Hill Tracts NGO Network) and the Movement for the Protection of Forest and Land Rights in the CHT.

Organized Adivasi groups in the CHT and plains have voiced their concerns and liaised and networked with progressive mainstream civil society groups to uphold and negotiate their rights with the government – both individually and collectively – through forums such as Bangladesh Indigenous Peoples Forum. Their demands have centred around major issues of land and forest rights and the violation of fundamental human rights, such as the right to life and property and, in the case of the CHT, has involved the demand for implementation of the Accord.

3 The Constitutional and Legal Framework

3.1 International human rights framework

Bangladesh is bound under international human rights law to respect fundamental human rights, including those of indigenous peoples.¹ It has specific treaty obligations to protect, promote and fulfill human rights pursuant to its ratification of the major human rights treaties, including the ICCPR, ICESCR, CERD, CEDAW, CAT and the CRC. However, it should be noted that there are a number of significant declarations/reservations made with regard to several of these, the most pertinent is the rights of indigenous peoples as reservations to the ICCPR and ICESCR regarding equality, and to CEDAW (particularly, Article 2 - obligation to implement and Article 16 - rights within the family). The concluding comments and observations of the respective Treaty Bodies on Bangladesh's state reports provide valuable guidance on the steps required to ensure effective implementation by Bangladesh of its treaty obligations.²

In addition, it also has binding obligations under specific treaties addressing indigenous peoples' rights, such as the ILO Convention on Indigenous and Tribal Populations (Convention No. 107) and the Convention on Biological Diversity. A range of other international instruments further provide a framework for recognition of such rights, including the Draft Declaration on the Rights of Indigenous Peoples (approved by the UN Human Rights Council in June 2006 and expected to be adopted by the UN General Assembly possibly within months).

Apart from the binding provisions of international treaty law, Bangladesh, like other members of the international community, has obligations under customary international law, drawn from international instruments such as the Universal Declaration of Human Rights, and the progressive development of human rights law through the decisions of international courts and tribunals and norms of a universal or near-universal character. Free, Prior and Informed Consent (FPIC) is one of the norms which is of particular relevance for indigenous peoples, particularly in the context of development and resource use programmes; the importance of this norm is such that it has been included in the Draft Declaration on the Rights of Indigenous Peoples, and was accepted by the World Commission of Dams, and partially in the World Bank's OP 4.10. This concept is closely related to the right of indigenous peoples to self-determination and to the related rights of self-development and self-governance. At the practical level, the progressive development of international human rights law has led to more frequent consultations with indigenous peoples in programmes and projects affecting them. Some of these principles and norms have been incorporated into national laws, e.g. in the Philippines, or are in the process of being incorporated as in Nepal.

¹ The discussion in this section is drawn largely from Raja Devasish Roy, "Challenges for Juridical Pluralism and Customary Laws of Indigenous Peoples: The Case of Chittagong Hill Tracts, Bangladesh", *Arizona Journal of International and Comparative Law*; Vol. 21:1, 2004, p. 113, at 160 ff.

² See for example the CERD Committee's concluding observations of 2001 A/56/18 (2001) 21 at paragraphs 66 and 71 (regarding affirmative action provisions for the socially and economically disadvantaged, including 'tribal' populations of the CHT, and for ensuring security of person in the CHT, in the context of reports of detention and ill-treatment by the security forces.

3.2 Constitutional framework

The Constitution of Bangladesh, adopted on 4 November 1972, guarantees fundamental rights to equality before the law, and for citizens to be treated in accordance with law, and to enjoy equal opportunities with regard to public employment or education, to life, liberty, personal security, and freedom of movement, assembly and association, expression, religion, profession and occupation and property, and to the protection of home and correspondence (Articles 27-43). The Constitution further guarantees the right to seek judicial remedies for violations of human rights (Article 44).

Importantly, the Constitution specifically provides that the state shall not discriminate on grounds of, *inter alia*, caste or race (Article 27), and that it shall take 'special measures' to secure the rights of 'women, children and backward sections' of society (Article 28(4)). Many of the measures taken to secure the rights of Adivasis with regard to quotas in state educational institutions and public sector employment, as well as representation in elected office and separate treatment of areas such as the CHT may be seen to have been taken pursuant to this constitutional mandate.

However, as noted above, the fundamental principles of state policy (which are non-justiciable), as embodied in the Constitution, reflect a vision of Bangladesh as being monocultural and monolingual, with Bengali being identified as 'the national culture' and 'the national language' (Article 23). Despite a clear recognition of secularism in the original Constitution, subsequent amendments resulted in the recognition of Islam as the state religion; importantly however, the right of others to practice their religion is recognized (Article 2A) and the fundamental right to freedom of religion is guaranteed (Article 41). Additionally, the Constitution sees the emancipation of 'backward sections' (along with peasants and workers) from all forms of exploitation as a "fundamental responsibility of the state" (Article 14).

3.3 Legal framework

The country's Constitution and criminal law applies to all persons across the country, although the Code of Criminal Procedure (1898) is sometimes applied in a modified form in the CHT.

In the plains, civil laws applies uniformly to all persons (with some particular provisions operating in relation to property rights of Adivasis). A significant exception, and recognition of pluralism, is with regard to faith-based personal laws which vary depending on the religious identity of the person(s) concerned.

In the CHT, however, a distinct legal regime is in vigour because of the CHT Regulation (1900) which means that some laws which are valid in other parts of the country are not applicable in the CHT, whereas some laws valid in other parts of the country are not observed in the CHT. So, for example, the Code of Civil Procedure (1872) and certain

other civil laws, including many family and land-related laws, as well as laws establishing special courts and tribunals, do not operate in the CHT.

In the plains, ordinary civil and criminal laws apply to all persons, including Adivasis. There is no formal state recognition of custom-based family laws of the Adivasis but their customary rules of inheritance and marriage and divorce customs are nevertheless observed. Many disputes are resolved on the basis of these laws by (unrecognized) traditional justice institutions within each community. However, the East Bengal State Acquisition and Tenancy Act (1950) which is immune to any constitutional challenge on the ground of violation of fundamental rights, specifically prohibits the transfer of 'aboriginal' lands to 'non-aboriginals'.

As recognized by the CHT Regulation (1900), the laws governing the family rights of hill people and their rights over natural resources are based on their customs, usages and traditions. While custom-based family laws are primarily administered by traditional institutions, whose offices are recognized by the formal legal system, custom-based rights over natural resources are only recognized to a limited degree. Civil administration also has jurisdiction over customary law matters on appeal or revision, as does the Supreme Court.

Some significant changes regarding land matters were made to the CHT Regulation in 1971 and again in 1979 which removed the requirement of prior approval of the National Board of Revenue concerning land grants to non-residents, thus giving the Divisional Commissioner more leeway in granting leases and discretionary power over land settlements.

Among the laws passed in accordance with the CHT 'Peace' Accord of 1997 are the CHT Regional Council Act (1998) and the Hill District Council (Amendment) Acts (1998) in respect of Bandarban, Khagrachari and Rangamati, respectively. Two further acts which specifically recognize the laws, customs and practices/usages of the CHT are the CHT Land Disputes Resolution Commission Act (2001) and the CHT Regulation (Amendment) Act (2003). In a landmark judgment regarding succession to the position of Circle Chief, the Appellate Division of the Supreme Court declared that both the GoB and the Supreme Court should refrain from interfering with tribal customary law and respect the 'susceptibilities' of the tribal people (Mustafa J. in *Aung Shwe Prue Chowdhury vs. Kyaw Sain Prue Chowdhury and Others (Civil Appeal No. 8 of 1997)*, Supreme Court of Bangladesh (Appellate Division), 50 DLR (AD) 1998, pp. 73-80 at p. 80 (see also, BLD, 1998 (Vol. XVIII), p. 41.).

4 Institutional Framework

4.1 Law-making bodies

The President of Bangladesh may legislate by promulgating ordinances; the *Jatiyo Sangsad*, or National Parliament, is the country's principal law-making body. In addition, the parliament may delegate, by Act of Parliament, powers to issue orders, rules, regulations, bye-laws or other instruments with legislative effect, to any person or authority.

In the CHT, the Regional Council (RC) must be consulted by the GoB regarding legislation for the CHT. In addition, the RC advises the GoB in matters related to removing any inconsistencies between the CHT Regulation and other laws. Furthermore, the RC and Hill District Councils (HDCs) may advise the GOB to refrain from passing any law that may be detrimental to the rights of indigenous peoples.

No provision exist for reserving seats for indigenous peoples in Parliament; there are currently three Adivasi MPs represented — one from the plains (Haluaghat/Mymensingh) and two from the CHT (Rangamati and Bandarban Districts — out of 345 MPs (45 of whom are women in reserved seats).

4.2 Executive

Bangladesh has a unitary system of government, but with radically different institutional frameworks governing the rights of Adivasis in the plains and Hill people. The former are governed by the same administrative and judicial bodies as in other parts of Bangladesh, while a special system comprising of statutory bodies with regional and local powers, working in tandem with traditional institutions is applicable for Hill people and other residents of the CHT.

In the plains, central authorities include the various line ministries, as well as the Special Affairs Division of the Prime Minister's Office (SAD), which has been responsible for the development of Adivasi-inhabited areas in the plains since 1990. Under this arrangement, SAD has targeted 62 *Upazilas* in 36 districts in the plains as special development areas since 2004-2005. The overarching goal of the SAD's funding arrangement for the plains Adivasis is to engage them in the country's development efforts and improve their quality of life. It places special emphasis on income-generating activities, sanitation and drinking water programmes, building of religious institutions and community centres, support to educational facilities, sports and cultural activities, and tree plantation. Many Adivasis consider that such programmes are largely bureaucratized and have not been planned or implemented through participatory processes with Adivasi communities; they also question the transparency and accountability of fund management, as well as the effectiveness of such projects.

At the district level, the central government is represented through the Deputy Commissioner, who also serves as the District Magistrate. Local government institutions include the *Paurashavas* (Municipal Authorities), *Upazila Parishads*, *Upazila Development Coordination Committees*, *Union Parishads*, and at the village level, *Gram Sarkars*.³

In the CHT, in addition to the line ministries, the MoCHTA is specifically responsible for the region, and is headed by an Adivasi (though is currently headed by the PM, with an Adivasi as Deputy Minister). Its Advisory Body, which includes high-level Adivasi representatives, has not met at all since the current Government took office in 2001. The Regional Council is a unique regional, rather than district level, institution, as it is responsible for the supervision and coordination of all local government bodies within the three Hill Districts. It is made up of 25 persons, two thirds of whom must be tribal members, including the Chairperson (and two female members). Other regional level institutions include the CHT Land Disputes Settlement Commission, which has a significant representation of Adivasis and the CHT Development Board with an Adivasi as Chairperson.

The DC holds a uniquely important position at the district level, exercising both civil and criminal powers. In addition to the various local government institutions operating in the plains, the CHT also includes Hill District Councils (HDCs), which was established in 1989 and strengthened in 1998. The functions and responsibilities of HDCs with regard to access to justice include authority over the local police, tribal law, social justice and youth welfare; land administration (including the Bazar Fund or market centre areas) they are also entitled to collect fees from social justice activities. Adivasi hold the majority of seats in HDCs as part of a reserved seats programme for Adivasis and women.

4.3 Law enforcement bodies

The police department (under the control of the Ministry of Home Affairs) is the main law enforcement body in both the plains and the CHT. Despite the existence of quotas for recruiting Adivasis into public sector positions and specific provisions in CHT-specific laws for recruiting police personnel (below the rank of Sub-Inspector) by HDCs, in reality there are very few indigenous people working in the Bangladesh police force. A singular exception is the induction into the police force of some of the former *Shanti Bahini* guerillas, who have been stationed in the plains districts. In addition, national security agencies such as the Police Special Branch, the National Security Intelligence and the Directorate General of Forces Intelligence (DGFI) reportedly play a significant role in monitoring and surveillance of Adivasi organizations and activists. In the CHT, in addition, the Army retains a significant presence (despite provisions in the Accord for demilitarization of the region (with some specific exceptions) including its local intelligence units known as the Field Intelligence Unit (FIU) and the Army Security Unit (ASU).

³ The laws governing the establishment of the local government institutions established across Bangladesh are respectively the Paurashava Ordinance (1977), the Zila Parishad Act (2000), the Upazilla Parishad Act (1998), the Local Government (Union Parishad) Act (1983) and most recently the Gram Sarkar Act (2003). However, the Gram Sarkar bodies are yet to be seen to be functional in the CHT. Some peoples living in the CHT feel that the Gram Sarkar Act should not apply to the CHT since the government did not consult the CHT Regional Council about extending this law to the CHT in its existing form.

4.4 Formal and non-formal institutions of justice

4.4.1 Formal justice institutions

The judicial system, headed by the Chief Justice, consists of the Supreme Court and the Subordinate Courts. The Supreme Court has jurisdiction over the whole country; the Subordinate Courts operate across the country, except for the CHT.

The Supreme Court has two divisions, the Appellate Division (composed of seven judges) and the High Court Division (comprising 72 judges) (see Article 94 of the Constitution). There is only one Adivasi (Monipuri) judge and about five Adivasi lawyers practicing in the Supreme Court.

The Subordinate Courts include both civil courts (established by the Civil Courts Act of 1887) and the criminal courts (established by the Code of Criminal Procedure of 1898). There are currently about 780 sanctioned judicial posts (BCS Judiciary) and another 600 or so Magistrates who function as ‘judges’ in criminal courts; other Magistrates perform purely executive functions. The Subordinate Courts also include other courts and tribunals, as established by Parliament, which are subordinate to the High Court (Article 114, Constitution and specific laws). The Civil Courts, in descending order of hierarchy, include the Courts of the District Judge, the Additional Judge, the Joint District Judge, and the Assistant Judge (Section 3, Civil Courts Act 1887).

The Criminal Courts, again in descending order, include the Courts of Sessions, Additional Sessions Judge, Assistant Sessions Judge, Metropolitan Magistrate, Magistrate of the First Class, Magistrate of the Second Class and Magistrate of the Third Class (section 6, CrPC 1898).⁴ The Special Courts and Tribunals include – in relation to civil matters – the Administrative Tribunal, the Environment Court, the Family Court, the Juvenile Court, the Labour Court and the Labour Appellate Tribunal, the Money Loans Court, the Court of Settlement and the Taxes Appellate Tribunal, and – in relation to criminal cases – the Special Tribunal on Violence against Women and Children and the Special Tribunal for Speedy Trials.⁵

In practice, in almost all districts other than Dhaka, the same judge often hears both civil and criminal matters, given the lack of court space and also the lack of judicial offices. In addition, judicial officers also serve as the presiding officers of the special courts and tribunals. Judicial Officers may also play non-judicial functions as the law officers of various Ministries, including the Ministry of Law, where they are required to carry out

⁴ Under various amendments to the Criminal Procedures Code, the powers of Magistrates (First, Second and Third Class) have been progressively increased. Earlier, roughly only one fourth of the 400 or so sections of the Penal Code provided for punishment of less than two years and these were tried by the Courts of Magistrates and the rest were tried by Courts of District, Additional District, Joint District and other Judges. Now with the enhanced powers of punishment, (allowing for trial by Magistrates of the First Class of offences punishable by up to five years imprisonment) the number of offences which are tried in the Courts of Magistrates have doubled, with the resultant reduction in the cases tried in Courts of Sessions, Additional Sessions, Joint Session and other Judges. Thus, Magistrates who belong to the Executive, are exercising increasing judicial functions and in a sense encroaching upon the jurisdiction of the judiciary.

⁵ Many such tribunals may be headed by Magistrates. So for example, the Children Act (1974) provides that a Magistrate may be appointed to preside over a Juvenile Court, while the Law and Order Disruptive Crimes (Speedy Trial) Act (2002), which establishes the Special Tribunal for Speedy Trials, provides that a Magistrate may be appointed as a Judge of this Tribunal in respect of certain offences punishable by up to five years imprisonment.

purely administrative functions. Furthermore, the Magistrates, in addition to their criminal judicial functions, are also engaged, simultaneously, in administrative functions (Metropolitan Magistrates are the exceptions as they perform only judicial functions and do not act as “administrators”).

The CHT Regulation establishes a wholly separate system of administration of civil and criminal justice in the CHT. There are no subordinate courts, and in each district, the respective DC, who also holds the post of District Magistrate, is responsible for both civil and criminal justice. In civil matters, disputes may be taken at the first instance to *Karbaris*, and then to Headmen, and then to the Circle Chiefs. Revisions may lie from decisions of the Chiefs to the DC. A writ petition against any decision of the DC is referred to the High Court (and then a further appeal may be made to the Appellate Division). In practice, and contrary to the situation during the colonial period, the Chief/Headman lacks any enforcement powers, and petitions are on occasions filed directly before the DC, who generally consult the Circle Chiefs if the matter concerns a “tribal” matter.

In criminal matters, jurisdiction lies in the first instance with the 2nd and 3rd Class Magistrates and the Additional District Magistrate (ADM). Appeals from the ADM are referred to the Divisional Commissioner of Chittagong, in the absence of a Sessions Court in the CHT. Appeals from the Commissioner are in turn referred to the High Court Division of the Supreme Court, and a further appeal may be lodged with the Appellate Division of the Supreme Court.

The Land Disputes Resolution Commission, established in 2001, is headed by a retired judge of the Supreme Court, and includes concerned Circle Chiefs, the the RC Chairperson (or his/her representative), the Deputy Commissioner or Additional Divisional Commissioner and the three HDC Chairpersons as members .⁶ It is responsible for providing expeditious remedies to land disputes, including those involving returnee hill refugees. The Land Disputes Resolution Commission is obliged to take account of ‘local laws, customs and usages’.

4.4. 2. Non-formal (traditional) justice institutions

In the plains, the traditional system of justice of many Adivasi communities is still operational and used in dispute resolution of both civil and petty criminal matters, despite the fact that it is not recognized by any state law or institution. In the CHT, the traditional justice institutions, namely of the three *Circle Chiefs*, the *Mouza* Headmen and the village *Karbaris* complement the formal justice institutions and their jurisdiction over matters involving custom-based family laws and some land and natural resource related rights is recognized by the latter. Appeals from the decisions of the *Karbari* lie to the Headman and from the Headman to the respective Circle Chief. Revisions, and now

⁶ See Section 3, CHT Land Disputes Resolution Commission Act 2001 (Act 53 of 2001). Earlier, in 1999, the Land Commission a nine-member body headed by former Justice Anwarul Huq Choudhury, was set up by administrative order for the CHT pursuant to the CHT Peace Accord, with a three year tenure and with responsibility for settling land disputes of rehabilitated persons in the CHT, cancelling ownership of land due to illegal leases or occupation, and settling all disputes according to prevailing laws and customs in the CHT. However this Commission never became functional.

also appeals, may lie against the decision of the Chief to the Deputy Commissioner and Divisional Commissioner, respectively.⁷

4.5 NGOs

While Bangladesh has the highest density of NGOs in the world, there are still few NGOs or legal services organizations with an explicit focus on Adivasis. There are significant exceptions, including organizations involved in managing legal awareness and legal literacy programmes, as well as Adivasi land rights (ALRD, BELA, BLAST, Samata), human rights education (ASK, BLAST, Odhikar), women's rights (Bangladesh Mohila Porishod, BNWLA, Naripokkho, BNKS), and legal services, including legal aid and assistance (ASK, BLAST, Samata).

Many of the former Adivasi-focused programmes (e.g. the CARITAS Legal Aid Programme in the 1980s) have been the victims of their own success, as the government clamped down and refused to approve programme activities which had resulted in effective recovery of lands of which Adivasis had been dispossessed in the northern areas.

All NGOs who receive foreign funding to undertake welfare activities are required by law to obtain prior registration and approval of their activities from the NGO Affairs Bureau. Prior enquiries are conducted into the affairs of each NGO seeking such registration/approval by the Ministry of Home Affairs, as well as various security agencies, such as the National Security Intelligence (NSI), the Special Branch of the Police (SB) and the Directorate General of Forces Intelligence (DGFI), which is under the control of the Army. This is a tortuous process for all NGOs, and all the more so for Adivasi-run or focused NGOs, or minority rights organizations.

4.6 Overlap or interface of formal and informal justice institutions

There are separate recognized traditional justice institutions in the CHT but not in the plains. However, there is considerable existing overlap between their roles and functions and those of central, regional and local institutions with regard to justice delivery, as well as land management.

With a few notable exceptions, there is generally little institutionalized understanding of Adivasi rights or concerns, and even less so with regard to the rights of Adivasis from vulnerable groups, who experience intersecting discriminations, e.g. women, children or persons with disabilities or the elderly, within formal and informal justice institutions.

⁷ In fact, no appeals have apparently been filed against the Chief's decision before the Divisional Commissioner to date, which has been seen by one commentator as reflecting reluctance on the part of indigenous peoples to expose their conflict resolution process to non-indigenous authorities. See Raja Devasish Roy (2005), *ibid.* at p. 130.

Appendix 1

Inclusion of marginalized groups survey questionnaire

Introduction: UNDP Afghanistan and its partner agencies are investigating the propensity, prevalence and cause of the various difficulties faced by ‘persons with disabilities’ in voting and political participation. In order to complete this investigation, the following questions need to be answered. The questions are few, loosely structured and broadly conceived to capture the maximum amount of relevant information with minimal fuss and in the spirit of a casual and friendly dialogue. The questions are intended to capture any area-based variation of the lived experiences of persons with disabilities and also situate their difficulties, if any, of voting and political participation within the broader context of daily living. We encourage you to enthusiastically and answer all questions fully. Please take your time and remember that there is no ‘right’ or ‘wrong’ answers – whatever you wish to say will all be equally valid for us. Your answers will be kept strictly anonymous and confidential and used for scientific research purposes only. There is no political or ideological preference in this research. Respondents need to be old enough to vote, over 18 years of age. We thank you for your cooperation and would be happy, if you so wish, to share a copy of the results of this research with you after it is completed.

Questions

- | | |
|---|--------------|
| 1.1. Do you vote/ did you vote in the last election or any election? | Yes/No |
| 1.2. How many times have you voted so far? | Exact/Approx |
| 1.3. What is your age? | Exact/Approx |
| 2.1. What are the six biggest difficulties you face in daily life? | Probe |
| 2.2. Which three are the worst among those difficulties? Why? | Probe |
| 3.1. What, if any, are some of the difficulties in <i>your</i> area that trouble your right to vote and/or participate in politics? | Probe |
| 3.2. What do you think are some of the specific causes behind those difficulties in your area? | Probe |
| 4.1. Anything further you wish to add? | |

Demographics/miscellaneous information

Interviewee: _____

Sex (don't ask!):

M/F

Disability status:

Disabled:

Y/N

Family member of Disabled:

Y/N

(If family) Dependent on/independent of disabled person:

Close friend/relative/neighbour of disabled person:

What disability:

Mayub or *Malul* (accidental or congenital/from birth?):

Interviewer:

Your credentials; how long was the interview?

Thank You!

(N.B.: For any clarifications/ questions, contact Shabnam Mallick at UNDP, shabnam.mallick@undp.org)

Appendix 2

Inclusion of marginalized groups survey database

Figure 1: Double click on the icon below to open database.



Microsoft Excel Chart

Appendix 3

Action-oriented case studies for inclusive governance for disadvantaged groups

(UNDP, Regional Centre in Bangkok): *inclusive governance and disability, UNDP Afghanistan*

Statement of the problem

Disability and extreme poverty are thought to be interdependent in Afghanistan, resulting from ignorance, low expectations and prejudice. *Capacity-building* of Disabled People's Organizations in Kabul and surrounding districts is an important priority in a country such as Afghanistan where it is estimated that there are more than one million disabled persons living in abysmal conditions.⁸ However, the question of what form this capacity-building should take, especially with regard to encouraging participation in elections. This is a germane question as poverty, ignorance, low expectations and prejudice may be the lowest common denominators uniting victims of discriminations but their overall experience is rarely uniform. Vulnerabilities and coping mechanisms obviously differ in different places and between different people. So do the varied discriminatory practices. The problem is compounded as the government, donors and NGOs, although perhaps in tentative agreement on the aggregate, often differ on the definitions of equality, equity and mainstreaming.⁹ Hence, while broad rights-based approaches are fine in principle and in rhetoric, in their actual implementation these approaches become heavily contingent on the local context. Here, then, we have a problem on which there is little agreement on the causes or solutions and where, as usual, the devil is in the details.

Background

This study comes at an opportune moment as the Government of Afghanistan and the international community are embarking on a human rights based approach (HRBA) to disability issues in a systematic and concerted manner. The goal of this HRBA is to promote an inclusive, dignified, barrier-free and rights-based society for persons with disabling impairment in Afghanistan. Accordingly, disabled Afghans are entitled to benefit from the full range of civil and political, and socio-economic and cultural rights embodied in the Afghan Constitution and international human rights instruments.

National policy strives to create a barrier-free society for all based on the principles of participation, integration and the equalization of opportunities, as defined by the United Nations in their World Programme of Action concerning Disabled Persons; the Standard Rules for the Equalization of Opportunities for Disabled Persons; The Biwako Millennium Framework for Action towards an Inclusive, Barrier-free and Rights-based Society for Persons with Disabilities in the Asia and Pacific region and the on going elaboration for

⁸ Action on Disability and Development (2005). "Comprehensive Disabled Afghans' Programme: Report on Assessment and Definition of Capability Development Strategies," UNDP March/April 2005.

⁹ Wakefield, S. and B. Bauer (2005). "A Place at the Table: Afghan Women, Men and Decision-Making Authority," *AREU Briefing Paper*, August 2005.

the International Convention to Protect and Promote the Rights of Disabled Persons. In doing so, the government of Afghanistan gives priority to enable disabled people to take charge of their lives by removing barriers which deter them from full participation in society.

The disabled person is recognized in national policy, as well as a member of society and therefore deals with all aspects of his or her life (MMD 2003). Some key areas have been identified which need special attention based on the perceived needs and priorities of disabled Afghans. These include supporting disabled persons' organizations, especially disabled women's groups; raising awareness to educate and change public attitudes towards disabled persons; prevention, early intervention and rehabilitation, including health care and therapeutic aids; the development of guidelines for accessible environment and facilities, including access to information; education for all; accessible vocational training programmes and facilities; and an affirmative action plan to ensure that disabled persons have equal employment opportunities, including sheltered employment. Furthermore, the inclusion of disabled persons into society requires physical and programmatic access to cultural and recreational activities, including sports, as well as access to social welfare, accessible housing and public transport. Training will be given to personnel involved in the planning and provision of services for disabled persons. The Afghan government, in coordination with the National Disability Commission (NDC), will take the lead role in collecting and disseminating information, as well as conducting research into the needs of disabled persons.

The MMD¹⁰ will take the lead role for the coordination of implementing national programmes as part of the Comprehensive National Policy on Disability. Designated ministries have been assigned special roles and responsibilities to implement the national policy. The MMD and related government agencies will work closely with national and international organizations, including disability organizations, to realize this policy. The MMD and NDC will collaborate with other agencies, particularly disabled person's organizations, in order to monitor its implementation.

It is clear that little explicit and concerted attention has been paid to the question of participation and representation of disabled persons in the country's governance, and that their empowerment has been inadequately researched and operationalized.

Objectives

- Demographic focus: disabled women
- Thematic focus: participation and representation

Premised on the aphorism that, after all, "all politics is local," we wish to study gender-based and disability-based discrimination as locally mediated socio-political phenomena. Here, geography matters as much as individual experience. This is because abstract social processes such as social stratification, local governance and ideological hegemony are revealed to us 'on the ground'. Hence, a spatially-oriented approach is of

¹⁰ The Ministry of Martyrs and Disabled (MMD) has now been merged with the Ministry of Labour and Social Affairs (MoLSA) and is now known as the Ministry of Labour, Social Affairs, Martyrs and Disabled (MoLSAMD). As the survey straddles the period before and after the merger of these two ministries, both the old and new entities are cited in this case study.

ontological utility to help understand the real geographical ground upon which the process of development meets with contrary forces of discrimination and exclusion.¹¹

Sure enough, it is often claimed that the status of disadvantages and forms of discrimination is different in Kabul than what it is in Kandahar or Herat, and different in the north-west from what it is in the south-east. There are also, supposedly, rural-urban variations, urban-urban variations, and rural-rural variations, etc. It is also generally acknowledged that society's treatment of disabled people is not uniform (e.g. *mayub* or congenital impairments by and large receive less sympathy than accidental or *malul* ones). Likewise, there is no consistent expectation of society among disabled persons (e.g. some disabled people have very low expectations with regard to assistance while others have unrealistically high notions).¹²

But the exact dynamics of this variation, the micro-macro links, have not been systematically studied. We hypothesize that unpacking the strands of gender and disability-based discrimination, in terms of a regional and experiential variation, will lead to important clues of culturally-embedded, spatially-mediated elements of permissiveness and denial, inclusion and exclusion systems, etc. This might lead to further clues for social change and other analytical insights useful for the implementation of an inclusive governance programme.

- *We propose a comparative analysis of the experiential and regional variations in discriminatory practices in Afghanistan.* The study will be situated at the intersection of gender and disability. The rationale for the choice of the disadvantaged group – disabled women – is informed by the fact that they are a subset of the disadvantaged population who are doubly victimized, first because of their gender and then because of their impairment. But since gender is not *only* about women, the study will consider gender and disability-based discrimination and focus on disabled women, but will also include men as well. Therefore, through case studies including but not limited to disabled women's experiences in the electoral processes in the recent past in Afghanistan, we propose to tease out analytically significant pointers to participatory and representational obstacles, and thus deduce how to prevent social exclusion and encourage inclusive democratic development.
- Moreover, we propose to explore the overlaps between representation/participation and justice issues. Because representation and participation of disadvantaged populations in the electoral processes is also a function of their standing in local public/political spaces and forums. Hence, we propose to focus on variable obstacles to participation and access to customary and informal justice systems for the disabled and otherwise especially marginalized and disadvantaged women in local forums like *jirgas* and *shuras*.

¹¹ For a spatial framework of analysing social action, see: Routledge, P. (1993). *Terrains of Resistance: Non-violent Social Movements and the Contestation of Place in India*, Praeger.

¹² Action on Disability and Development (2005), op.cit.

Relevance and linkages

- Linkages are envisaged to the new 3-year policy framework and action plan due to be approved by the Cabinet by Jan 2006 and also the Justice programme 'Justice in the Community'.
- Lessons learnt from this study will reinforce nationally obtained lessons already embedded in the National Programme for Action on Disability (NPAD) to ensure it feeds into policy and programming.
- The findings of this study will try to further the advisory capacity of the Afghanistan Independent Human Rights Commission (AIHRC), the nodal body mandated with providing suggestions and corrective measures at every level of governance to enhance human rights, on the basis of existing international human rights principles and standards.
- It is hoped that this study will be timely and relevant to the ongoing democratic transition and associated general elections in Afghanistan, and that it will be in keeping with the Millennium Development Goals review currently under way in Afghanistan.
- The study will also be timely as it coincides with the Joint Electoral Management Body (JEMB) review.

Methodology

We hope to draw from ethics and justice theories, exchange and incentives, social anthropology and identities, and securitization/desecuritization, utilizing a participatory, mixed-methods¹³ (e.g. qualitative/quantitative; desk review; surveys; semi-structured and focus group interviews; and workshops) human rights based approach.

The study will be based on the methodological and procedural approaches formulated in *UNDP Guidelines for Participatory Consultations on Access to Justice* (June 2003) and *UNDP Programming for Justice: Access for All: A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice* (2005), in addition to substantive areas.

We propose to partner with disability and women-specific NGOs active in existing areas of UNDP programmatic work and good contacts with disabled people's organisations and regional personnel – in areas such as Mazar-i-Sharif, Jalalabad, Kandahar and Kabul. This study proposes to involve stakeholders from the research partners identified below, comprising government, non-governmental and donor agency personnel and disabled persons from the captive sample of programmatic target population and beneficiaries.

Following an exhaustive, participatory situation analysis of the geographic regions involving social profiling, community mapping and interviewing, it is expected that we will be able to arrange four focus group interviews, four in-depth consultations, (one for each region) and a consolidated survey. The sample size and composition of the survey sample will be determined and a survey questionnaire prepared and pilot tested as the research progresses.

¹³ For an overview of the mixed methods approach, see Barron, P. *et al* (2003). "Do Participatory Development Projects Help Villagers Manage Local Conflicts? A Mixed Methods Approach to Assessing the Kecamatan Development Project, Indonesia," World Bank.

Risks, constraints and limitations

- It would be prudent to mention at the outset that scarcity of reliable data and all information on the disabled in Afghanistan is to be a major hurdle. National statistical and survey capacities have been seriously eroded through decades of war. Many areas of the country are still inaccessible to any kind of basic or applied research and security outside Kabul remains a major concern as the elections approach. But the absence of evidence is not the evidence of absence. Disabled people in Afghanistan are indeed both numerous and desperate.
- There are significant challenges in access to community groups including security issues, lack of trust, pitfalls of elite capture, capacity and willingness of respondents to participate, etc. It is therefore proposed that we partner with disability and women-specific NGOs to the maximum extent possible and link the study to existing areas of programmatic work and good contacts with disabled people's organizations and regional personnel in areas like Mazar-i-Sharif, Jalalabad, Kandahar and Kabul.

In that light, this research will make no presumptions on the representativeness of its findings. While this research will attempt to collect qualitative and quantitative information from all available sources, it is important to bear in mind that the project is designed as an *exploratory* study and that it will compensate the lack of statistical data and information with 'thick' descriptions, richness of observations, depth of analyses and the rigors of peer review. To that extent, it is hoped the findings of this study will be formative, exhaustive, reliable and valid, and provide points of departure, or "springboard", for more extensive studies in future.

Research partners

- The Joint Electoral Management Body (JEMB)

The JEMB was created to enhance the effectiveness of the activities of United Nations' Assistance Mission to Afghanistan (UNAMA) and the Interim Afghan Electoral Commission (IAEC), as well as strengthen the mechanism for overseeing the conduct of voter registration for the 2004 general elections. The JEMB is an independent legal/administrative body tasked with the issuing and publishing regulations, procedures, instructions, notifications and guidelines for the registration process, and has full responsibility for preparing, managing, convening and overseeing the elections.

- The Ministry of Martyrs and Disabled (MMD)

The Ministry of Martyrs and Disabled (MMD) is currently the principal government agency responsible for disability coordination, advocacy and information dissemination in Afghanistan. It is structured to develop and deliver a comprehensive package of services to disabled persons to enhance their participation in economic life. MMD is heavily involved in the development of a national disability policy and strategy so that the needs of disabled people are better served and their rights are ensured.

- The National Programme for Action on Disability (NPAD)

- The Ministry of Rural Rehabilitation and Development (MRRD)
- The National Solidarity Programme (NSP)
- The Afghanistan Independent Human Rights Commission (AIHRC)

The National Programme for Action on Disability works in formal agreement with two line ministries, namely the Ministry of Martyrs and Disabled (MMD) and the Ministry of Labour and Social Affairs (MOLSA). The primary objective of NPAD is to raise awareness and capacity and to develop government structures for policy development, implementation and coordination of disability-focused efforts in Afghanistan. The emphasis of the Programme is to ensure the rightful inclusion of disabled people by addressing and breaking down the social, political and economic barriers faced by disabled people in Afghanistan. NPAD will be a key research partner for this study. The hope is not only to utilize NPAD's comparative strengths and expertise in the disability sector to inform this study but also to appropriately leverage the Programme's close working relationships with the Ministry of Rural Rehabilitation and Development (MRRD), the National Solidarity Programme (NSP) of Afghanistan, the Afghanistan Independent Human Rights Commission (AIHRC) and a resource network of NGOs, CBOs, PVOs and independent experts.

MRRD: MRRD is the key ministry responsible for rural poverty reduction through developing, financing and executing an equitable and effective social policy in Afghanistan

NSP: The NSP was established by the (Transitional) Government of Afghanistan to assist communities throughout the country in their efforts to strengthen local structures in order to improve access to social and productive infrastructures. The work of the NSP is based on the core values of participatory planning, community contributions and transparency,

AIHRC: The Independent Human Rights Commission was established to promote and protect human rights in Afghanistan and investigate human rights violations and abuses, as well as to develop a national curriculum on human rights, and provide suggestions and corrective measures for the betterment of human rights in the country based on the international human rights principles and standards.

- Non-governmental organizations

Non-governmental, community-based disabled peoples' organizations, or DPOs, are in the frontline of all activities related to persons with disabilities. Work will be conducted in partnership with organizations such as the National Association of Disabled Women in Afghanistan (NADWA), one of a number of organizations that have high representation of women and which is particularly active in issues in the intersection of women and disabilities and the Disabled Shura of Afghanistan (DSA).

Appendix 4

Afghanistan Subnational Governance Programme (ASGP) programming document extract

Background and programme strategy

The Constitution of Afghanistan established a firm basis for subnational governance and the government has embarked on the crucial process of developing the policy, legal and regulatory framework, reforming institutions and ensuring that post-conflict local governance can work in the field. Afghanistan has opted for a prudent approach towards further empowerment of the local communities, building on stronger central government and enhanced performance of the local administration with some degree of deconcentration to the administrations at the provincial and, to a lesser extent, district level. In addition, municipalities have been provided some (limited) fiscal autonomy.

Within this framework and acknowledging that 'while the process of political defragmentation proceeds and the government moves towards a state of normalcy, threats to the legal hegemony of the state persist', the Afghanistan National Development Strategy emphasizes that:

'The legacy of weak public service delivery makes it essential... to strengthen institutions responsible for delivery of key public services; without this, we will fail to achieve our national development goals' (ANDS; p. 82)

Success in the reform of the entire public sector, at the national and subnational is considered by the Government of Afghanistan as essential to all other national programmes. It is also stressed that 'lasting peace and prosperity in Afghanistan require structures of governance that are accountable, transparent, effective and Islamic (ibid; p. 83). The Government of Afghanistan 'will give priority to the coordinated establishment in each province of functional institutions, including civil administration, police, prisons and judiciary. These institutions will have appropriate legal frameworks and appointment procedures, trained staff, and adequate remuneration, infrastructure and auditing capacity (the Afghanistan Compact, p.3).

As stressed in the UNDP Country Programme Action Plan 2006-2008, the capacity to plan, manage and implement activities, both at national and subnational levels is essential for the achievement of Afghanistan's development objectives. The UN Development Assistance Framework (UNDAF) also reiterates the need to foster better governance as a prerequisite for sustainable human development and fight against poverty.

The Afghanistan Subnational Governance Programme (ASGP) will play a key role in developing capacity and systems to ensure effective implementation of the governance strategies outlined in the Afghan National Development Strategy and donor compact addressing the challenges identified for subnational governance. To address the

challenges outlined in the previous section, the programme has the following major (interrelated) components:

- i. Support will be provided to central government agencies responsible for formulating and implementing local governance policy and developing legal and regulatory framework. This support will consist of assistance to develop the institutional framework and organizational capacity as well as technical support for the development and fine-tuning of the policy, legal and regulatory framework for local governance.
- ii. Support capacity development for subnational governance change processes in line with the policy and legal framework. This involves a concerted effort aimed at 'making local governance work' through continuous coaching/mentoring of local administrators and elected representatives, as well as facilitating participatory local governance processes. As part of this component, UNDP will continue to support strategic elements related to the training of civil servants in local administrations. It also includes a large-scale civic education campaign to enhance participation of Afghan citizens in governance projects.
- iii. A pilot programme for selected provincial and municipal governments in which the nationwide capacity development effort will be complemented by a funding modality for local governments allowing hands-on experiences in the planning, financing and management of select local development processes.
- iv. Support for the development of a network/association of provincial councils to strengthen knowledge-sharing and the avenues for interaction with legislators and to contribute to nation-building by bringing the centre and provinces closer together.

The ASGP will be the core pillar of the UNDP integrated approach for support to local governance. Some of the key principles underpinning the ASGP are:

- A number of other programmes will contribute towards the same outcome and the ASGP has important linkages to a number of other programmes.
- The ASGP will assist in the development of a national framework to support local governance and the implementation in 20 provinces at the beginning of the programme and expand it to cover the entire country within three years, as conditions in the individual provinces allows. In addition, the programme will provide more intensive support to a limited number of pilot provinces (2-3 provinces) to be covered by component iii).
- The support for the functioning of local governance at the provincial level and below (component ii and iii) is geared towards pilot-testing the policy/legal/regulatory framework in the development phase and as lessons are learned; this will provide inputs to further refine the national framework for local governance. Regular evaluations will need to be carried out and the lessons learned should provide grounds for the fine-tuning of policies and implementation strategies.

Towards Inclusive Governance

- The overall selection of provinces to be covered by the programme (and local governments covered within them) will be guided by criteria related to poverty and capacity development needs. The selection of provinces and local governments for the intensive piloting will be based on commitment to improve governance, in particular participation and transparency.

Appendix 5

Afghan Civil Society Empowerment Programme (CISEP) programming document extract

Background and programme strategy

This strategy recognizes that a vibrant and vigorous democracy will only take root in Afghanistan if it is sustained by an empowered citizenry, as well as strong and responsive governance institutions. The civil society sector in Afghanistan is young and relatively inexperienced. Many CSOs are still trying to understand/find their role in the new political landscape. The overall goal of the programme is a strong and vibrant civil society sector which can actively participate in national policy formulation and oversight processes. Specifically, it aims at supporting the active engagement of civil society in the further development and implementation of the ANDS and local governance processes. This will be achieved through a series of activities designed to build the capacity and promote an enabling environment for a wide range of civil society organizations at the national, regional and local level in a broad spectrum of development and governance processes. A key initial step will be to convene meeting(s) with donors to get an up-to-date overview of key bilateral donors and development NGOs present and planned support priorities to the Afghan civil society sector. These meetings will allow UNDP to exchange information on planned activities and confirm opportunities for collaboration on common areas of interest and avoid duplication of effort. Several of the components of the strategy envisage working with and through Afghan CSO umbrella organizations, e.g. ACSF, ACBAR, Afghan Women's Network (AWN) Action for Civil Society in Afghanistan (ACA) and Civil Society ANDS (CSANDS). An assessment of the absorptive capacity of umbrella organizations will be an integral part of the process of identifying the capacity of relevant Afghan partners to implement this programme. Another important criterion in identifying partners will be the extent to which umbrella organizations can identify/reach CSOs at the subnational level with the potential of making a contribution to development at local level. As most elements of these programme activities will cut across and reinforce other UNDP Afghanistan governance programmes, the civil society empowerment programme will liaise closely with the ACT Programme (Accountability, Integrity and Transparency in Afghanistan), the Afghan Subnational Governance Programme (ASGP), the Access to Information and ICT for Development programme, the Justice and Human rights Programme and the Capacity Development Facility.

At the national level

The strategy has two interrelated and mutually reinforcing components.

The first focuses on enhancing the capacity and increasing the transparency of CSOs whilst promoting greater collaboration across the sector. The aim is to:

- Promote improved internal governance processes/structures within the CSO sector. Lack of CSO accountability in Afghanistan places a large barrier between them and the government. There is a need for greater self-regulation across the

sector. A study undertaken by the Institute of Development Studies (United Kingdom) concluded that an organization's internal governance and its specific relation to the state are the most important factors in achieving policy influence. The NGO's code of conduct goes some way to addressing governance concerns among the relatively small groups of CSOs registered with the Ministry of Economy. There is now an urgent need for the rest of the sector to adopt these principles and put in place basic governance structures within their organizations. Such structures would include, among others, elected boards, the production of annual accounts/reports, and identification of 'conflict of interest' areas.

- Promote greater cooperation/collaboration across the sector. Up-to-date information on CSO activities and the geographic focus of their work will facilitate this process. This information will also be an important resource for government and donors. Seminars and workshops will be arranged to raise awareness of issues of common concern such as access to information/right to information/improved CSO governance.

The second strand of the strategy is directed towards supporting effective participation by CSOs in policy formulation. The aim is to strengthen the capacity of selected civil society umbrella organisations/CSOs to engage actively with government and other development actors in policy formulation processes and to exercise an oversight function. Particular emphasis will be placed on improving CSOs capacity for evidence – based action research to inform effective advocacy, relating to/working with the media, budget tracking, outcome mapping and impact assessment. Priority will also be given to improving presentational skills. Close links are envisaged with UNDP's PACTA programme. Hence part of the strategy is to support an enabling political environment for civil society at the national level through interaction and support to the respective ministries (MOE/MOJ/MRRD) responsible for CSO registration and oversight of their activities. The strategy will also facilitate systematic engagement on ANDS policies between CSOs, government as well as other key stakeholders.

At the sub-national level

The strategy has the following five core elements.

- Strengthening the capacity of civil society organizations working at local levels.

In close liaison with UNDP's Capacity Development Support Facility and working with civil society regional resource centres and umbrella organisations, the focus will be on developing the skills and ability of a wide range of CSOs to play an informed role and to interact effectively with provincial and district and village governance bodies on a range of development issues. Particular attention will be given to new CSOs that would like to contribute to development in Afghanistan. Emphasis will be placed on three main areas:

- (i) Developing CSOs' understanding of development in general and the ANDS in particular. It is envisaged that this will be done through a combination of focused thematic workshops, joint stakeholder meetings and a small grants facility to implement development projects in line with the ANDS priorities. Emphasis will be placed on understanding the different impact of activities on women and men, and in making provision for special budget allocations, measurable steps, accountability systems and the identification of focal points for implementation support to ensure that women's participation is equitable.

- (ii) Supporting the development of a range of skills within CSOs to enable their staff to engage more effectively with government bodies and have better outreach to poorer groups in local communities. It is important to note that there is relatively limited understanding within the civil society sector of their capacity development needs. A notable exception is the need to improve their ability to raise funds. Particular attention will be given to improving CSOs' understanding of the need for legitimate constituencies as well as participatory approaches to development.
 - (iii) Strengthening CSOs internal governance structures. Activities will include regional consultations to discuss self-regulation of the sector and the adoption of voluntary code of conduct. Workshops/ training will be held on a range of issues including registration, elected boards, maintaining financial records/ staff recruitment procedures etc., specific development themes, training needs assessments, training programmes, support in developing codes of conduct, creation of civil society workspace on UNDP Afghanistan website.
- Enhancing opportunities for poorer groups in local communities to participate in local decision making processes.

Ensuring that the interests and views of poorer and more marginalised groups are not overlooked is an integral part of democratic governance processes. In order to be able to communicate and negotiate with other citizens and influence decisions that directly affect them, poor people need to have the confidence that comes from improved understanding and increased knowledge. The Civil Society Empowerment programme will aim to support civic education initiatives which provide opportunities for poorer people to form opinions, express themselves, revise their opinions on the basis of new information and work together with like-minded people to have their voices heard in governance and development processes. It will draw on the expertise/explore possible collaboration with other actors working on-going national and regional civic education initiatives, e.g., ACSF, the Afghanistan Electoral Commission. It will be important to assess the extent to which poor peoples are currently participating in civic education initiatives and also the extent to which the shuras and CDCs can play a greater role in this area. CDC experiences with the empowerment of women in sectors such as health, education will be further assessed with a view to taking account of lessons throughout the subnational governance and civil society empowerment program. Shuras are highly respected within communities and have the potential to be a strong 'force' for civil society development with Afghanistan. Close cooperation is envisaged with UNDP's Sub National governance programme.

- Developing the enabling environment for civil society at local level

The strategy will foster improved understanding of the role of, and interaction with, civil society by provincial, district and village authorities. It will identify officials in each of the key government agencies, including the provincial councils, who have the potential to be 'drivers of change' within their organizations and who are prepared to advocate for increased interaction with civil society on development issues. Special attention will be paid to identifying female "drivers of change" and develop their leadership skills. Activities will include (i) working with the sub-national governance programme (ASGP) to carry out an analysis of institutional and structural factors influencing change within governance bodies. (ii) Convening roundtables with government representatives to

strengthen their understanding of the role of civil society organizations and how local government can work with civil society to enhance the impact and outreach of the ANDS at local level (ii) convening regular meetings/seminars between government and other stakeholders, including CSOs, on specific aspects of the ANDS.

- Improving access to information

Improving access to credible and relevant information for civil society and government officials at national, regional and local levels will be a crucial underpinning of UNDP Afghanistan's governance work. For this reason, a separate Access to Information and E governance programme has been developed which has a number of core components including: strengthening the enabling, policy, regulatory and institutional environment for Access to Information, media and ICT; developing regional information and communication strategies to support the implementation of the ANDS and the achievement of the MDGs; enhancing the professional standards of national and provincial media, building their skills to develop programmes on development matters and to exercise a watchdog function in relations to the ANDS; extending community radio and promoting awareness of peoples' right to information, enhancing their ability to make requests to government and government's ability to make information available. Specific outputs related to these components are set out in the Access to Information and E Governance programme.

- Promoting greater cooperation and increased networking across the civic sector at provincial and district levels.

In many provinces there is a very limited relationship between organizations registered as CSOs and those as NGOs. The former comprises a range of social and cultural organizations, including political parties which to date has relatively little support from the international community. The latter is made up of organizations working mostly on humanitarian and reconstruction projects, often in partnership with international NGOs, bilateral and multilateral donors. A number of the NGO umbrella organizations have active members that cooperate with them at provincial levels but these are reported as weak and under-resourced. Their outreach to and interaction with CSOs, in the provinces is also mixed. The strategy aims to promote greater interaction and increased networking between the two CS groups so that they can have a more collaborative approach in their engagement with government officials and donors on key issues related to the implementation of the ANDS. Activities will include strengthening civil society forums at sub national levels and supporting workshops/seminars which bring together representatives from CSOs and NGOs on key development and governance issues.

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