

# INTRODUCTION TO ACCESS TO JUSTICE

CHAPTER



Overview of the Chapter

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## OVERVIEW OF THE CHAPTER

All human beings are born free and equal in dignity and rights.<sup>1</sup> 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.

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<sup>1</sup> 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).<sup>2</sup>

### 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.<sup>3</sup> 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.

<sup>2</sup> 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/>].

<sup>3</sup> 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

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

<sup>5</sup> 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”<sup>4</sup>. 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 disadvantaged<sup>5</sup>. 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.

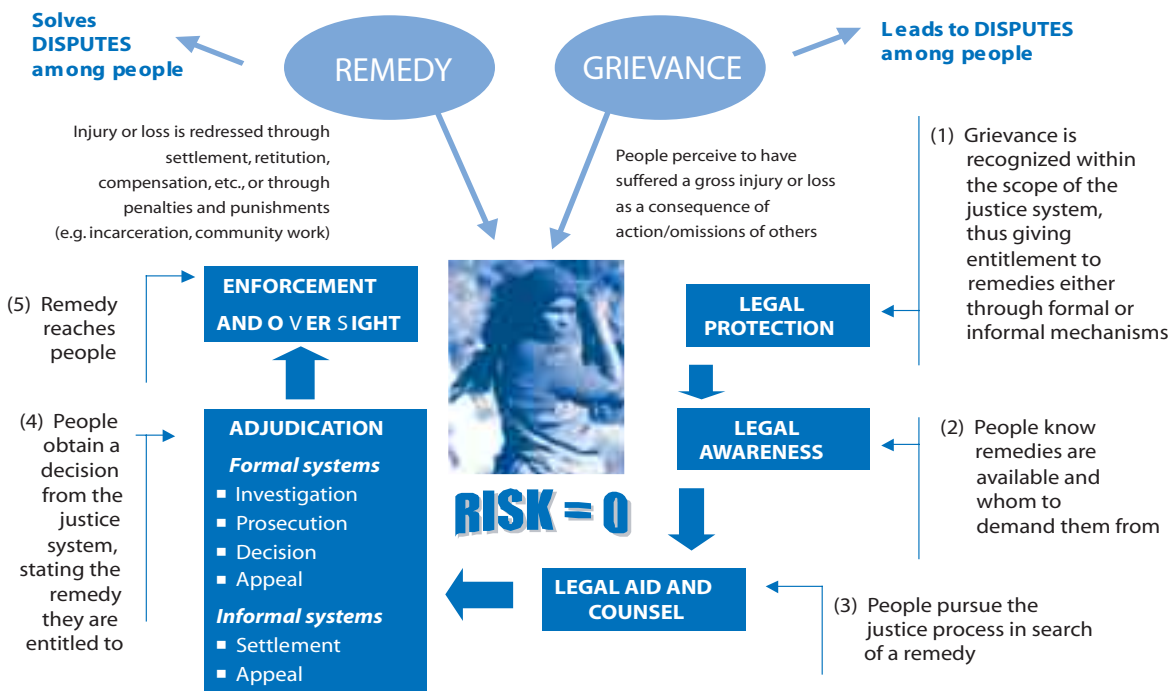
- **Supply of remedies** – Includes capacities enabling adjudication of decisions, enforcement of remedies and accountability of the process through civil society and parliamentary oversight.

- **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"> <li>- Parliament</li> <li>- Ministries of Foreign Affairs</li> <li>- Ministries of Law and Justice</li> <li>- National Human Rights Commissions</li> <li>- Law Reform/Legislative Commissions</li> <li>- Legal drafting cells of relevant ministries</li> <li>- Local officials involved in legal drafting</li> <li>- Judges, particularly of courts whose decisions are binding on lower courts or, under the law, are able to influence courts in other jurisdictions</li> <li>- Traditional Councils</li> <li>- Community leaders (chiefs, religious leaders)</li> <li>- Civil Society Organizations</li> </ul>
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"> <li>- Ministry of Justice</li> <li>- Ministry of Education</li> <li>- National Human Rights Institutions</li> <li>- Legal aid providers</li> <li>- Quasi-judicial bodies (human rights, anti-corruption and electoral commissions)</li> <li>- Local government bodies</li> <li>- Non-Governmental Organizations</li> </ul>
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"> <li>- Ministries of Justice and state-funded legal aid programmes</li> <li>- Public Attorneys</li> <li>- Bar Associations</li> <li>- Court system (e.g. to deal with court fees)</li> <li>- Police and the prison system</li> <li>- Local governments</li> <li>- Non-Governmental Organizations</li> <li>- Law clinics (often linked to university faculties of law)</li> </ul>
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"> <li>- Courts</li> <li>- Prosecution</li> <li>- National Human Rights Institutions</li> <li>- Alternative Dispute Resolution (ADR) mechanisms attached to the court system, or to administrative bodies</li> <li>- Traditional ADR mechanisms</li> </ul>
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"> <li>- Prosecution</li> <li>- Formal institutions (police and prisons)</li> <li>- Administrative enforcement</li> <li>- Traditional systems of enforcement.</li> </ul>
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"> <li>- NGOs working on monitoring and advocacy</li> <li>- Media</li> <li>- Parliamentary select and permanent committees</li> </ul>

