

# NORMATIVE PROTECTION

CHAPTER



CHAPTER 3

## Overview of the Chapter

- 3.1 Normative Protection and Access to Justice
- 3.2 National and International Framework of Normative Protection
- 3.3 Challenges to Achieving the Full Benefits of Normative Protection
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## OVERVIEW INTRODUCTION

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

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

### 3.1 NORMATIVE PROTECTION AND ACCESS TO JUSTICE

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

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

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

- The existence of rules, which can be international or domestic, constitutional or 'ordinary', procedural or substantive, formal or informal in nature;
- Processes through which rules are made, applied, interpreted and enforced in practice (i.e. rule-making, rule-enforcing and rule-changing); and
- Relevant actors and institutions involved in them<sup>2</sup>.

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

#### *Normative protection and behavioural change*

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

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

#### *Human rights and normative protection*

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

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

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

#### *Stigmatization of disadvantaged groups*

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

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

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

### Public scrutiny and accountability

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

## 3.2 NATIONAL AND INTERNATIONAL FRAMEWORKS OF NORMATIVE PROTECTION

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

### National Framework of Normative Protection

#### The Constitution

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

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

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

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

- Bill of Rights<sup>3</sup>
- Directive Principles (also known as Basic Principles or State Principles)
- Separation of power between the executive, legislature and judiciary
- Establishment of monitoring bodies such as the National Human Rights Commissions

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

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

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

### Challenges to Constitutional Reform

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

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

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

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

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

### Legislation

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

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

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

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

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

#### ■ Implementation of legislation through administrative rules and regulations.

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

### Indirect Discrimination

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

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

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

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

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

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

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

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

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

### Court Decisions (Jurisprudence)

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

Some examples of creative judiciary in action include:

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

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

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

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

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

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

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

### Reforming Legislation – An Example from Costa Rica

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

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

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

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

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

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

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

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

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

### Customary Practices (Informal Laws)

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

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

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

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

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

### Discriminatory Norms

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

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

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

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

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

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

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

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

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

### International Framework of Normative Protection

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

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

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

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

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

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

### Treaties

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

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

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

<sup>13</sup> Vienna Convention on the Law of Treaties, Article 1.

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

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

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

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

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

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

### ■ A system of reporting

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

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

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

### ■ General Recommendations or General Comments

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

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

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

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

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

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

#### ■ Complaints (or Communications) Procedure

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

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

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

#### ■ Inquiry procedures

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

#### Other treaties

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

- Rome Statute of the International Criminal

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

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

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

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

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

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

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

### Regional human rights systems

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

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

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

### International Custom

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

<sup>17</sup> *Velasquez-Rodriguez v. Honduras, Inter-American Court of Human Rights, Judgment of July 29, 1988, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988)*. Available at [http://www1.umn.edu/humanrts/iachr/b\\_11\\_12d.htm](http://www1.umn.edu/humanrts/iachr/b_11_12d.htm). This case documents numerous disappearances in Honduras from 1981 to 1984. This case also illustrates the development of a major human right case in the courts and the difficulties associated with it and the role that an international court can play when access to domestic remedies is precluded.

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

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

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

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

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

### *Jus Cogens*

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

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

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

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

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

<sup>20</sup> Vienna Convention on the Law of Treaties, Art. 53

<sup>21</sup> Henkin, pg. 92

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

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

### *Declarations, resolutions, principles and guidelines*

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

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

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

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

### **Recommendations on Using International Law at the National Level**

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

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

### *In countries where international law form part of national law*

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

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

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

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

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

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

- **As a source of standards**

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

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

Where there are no laws or where the laws are deficient, international law can fill in the lacunae by providing standards. These standards in many cases are the results of global consensus or the work of experts, such as UN treaty bodies. For example, in the case of *Vishaka vs. State of Rajasthan* (India), a group of women's NGOs brought a petition before the Supreme Court of India to address the pervasive problem of sexual harassment as there were no laws protecting them from this in India. The NGOs relied on India's constitutional provisions on equality, CEDAW and CEDAW General Recommendation No. 19 on Violence against Women. The court ruled that by ratifying CEDAW and by making official commitments to the 1995 Beijing World Conference on Women, India had endorsed women's human rights and thus, must undertake to protect women from sexual harassment as part of its stated commitments to gender equality. The court prepared guidelines to define sexual harassment and called on the State to regulate to actions of private and public employers. The court's definition in the guidelines closely follows that of CEDAW General Recommendation 19.<sup>25</sup>

#### ■ As a tool for interpreting the Constitution and national laws

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

#### ■ As a catalyst for changing discriminatory laws and standards

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

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

#### ■ As a guide for policy and rule-making

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

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

#### Duality of Norms: Not all norms are good norms

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

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

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

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

<sup>25</sup> *Bringing Equality Home: CEDAW* pg. 18-20

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

<sup>27</sup> *Bringing Equality Home: CEDAW* pg. 18-19

<sup>28</sup> COHRE pg. 54-55

<sup>29</sup> Available at [http://www.logos-net.net/ilo/150\\_base/en/init/ind\\_2.htm](http://www.logos-net.net/ilo/150_base/en/init/ind_2.htm) [e m0] Please clarify how can the constitution not apply to individuals that are citizens of that state.

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

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

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

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

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

### 3.3 CHALLENGES IN ACHIEVING THE FULL BENEFITS OF NORMATIVE PROTECTION

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

### Legal barriers

#### ■ Barriers in relation to international law.

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

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

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

#### ■ Constitutional and legal discrimination.

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

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

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

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

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

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

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

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

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

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

### *Institutional barriers*

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

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

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

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

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

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

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

■ **Lack of channels for participation.**

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

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

### *Political barriers*

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

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

### Social and cultural barriers

#### ■ Discriminatory social and cultural norms.

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

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

#### ■ Societal attitudes towards disadvantaged groups.

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

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

### Other barriers in relation to claiming rights

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

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

- Awareness of rights.

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

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

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

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

## 3.4 CAPACITY DEVELOPMENT STRATEGIES TO ENHANCE NORMATIVE PROTECTION

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

### Addressing Legal, Institutional and Political Barriers

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

#### Ratification and Accession Strategies.

##### ■ Information on Treaty Obligations

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

##### ■ Develop Strategic Partnerships and Advocacy Campaigns

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

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

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

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

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

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

### *Incorporation of human rights treaties and harmonization of national laws*

#### ■ Examine the Normative Framework

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

#### ■ Advocacy for Reform

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

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

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

#### ■ Support Engagement with International Law and Reporting Processes

Engagement with international law and

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

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

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

#### Recognizing Indigenous Customary Law

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

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

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

#### ■ Ensure Conceptual Clarity

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

<sup>33</sup> See Fáunderz, pg 388.

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

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

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

### ■ Support Reform of the Constitution

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

### ■ Monitor Laws and Their Impact

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

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

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

### ■ Promote Review of Existing Legislation

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

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

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

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

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

### ■ Develop and Monitor Rules and Regulations

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

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

### ■ Develop Progressive Judicial Decisions

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

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

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

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

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

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

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

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

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

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

#### ■ **Build on Customary and Traditional Law**

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

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

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

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

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

#### ■ **Support Institutional Capacity Building**

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

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

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

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

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

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

#### **Addressing social and cultural barriers**

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

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

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

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

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

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

### ■ Challenge Discriminatory Provisions

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

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

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

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

## Addressing other barriers to the claiming of rights

### ■ Raise Awareness and Improve Skills

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

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

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

### ■ Encourage Focus on Disadvantaged Groups

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

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

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

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

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

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

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

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

## Participation and Political Will

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