CHAPTER

CAPACITY TO PROVIDE JUSTICE REMEDIES

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OVERVIEW OF CHAPTER

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

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

The chapter is divided into five sections:

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

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

4.1 The Ministry of Justice

4.1 THE MINISTRY OF JUSTICE

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

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

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

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

In some cases, the Judiciary, the Public Prosecutor's Department, the Department of Prisons/ Corrections, the Office of the Ombudsman, the Attorney General's Office, the Law Commission, Mediation Boards, Anti-Corruption Commission, Judicial/Legal Training, etc. all fall under the Ministry of Justice. The Ministry may also represent the State in international legal disputes, as well as civil cases against the Government, and facilitate international efforts in the justice sector.[1]

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

The Role of the Ministry of Justice in Sri Lanka

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

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

UNDP Sri Lanka

Role of the Ministry of Justice in Strengthening Access to Justice

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

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

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

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

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

Legal Aid and the Ministry of Justice

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

UNDP Viet Nam

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

Inadequate capacity of staff

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

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

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

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

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

Insufficient infrastructure

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

Insufficient legal dissemination

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

Inadequate political support

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

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

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

- **Political rivalry.** Rivalries between different ministries can be detrimental to the work of the Ministry of Justice. Activities may be blocked, progress may be hindered, or projects may behalted for political reasons.

- **Lack of coordination between different government branches.** The coordination between different branches of the Government is crucial when addressing access to justice issues. Lack of coordination between the Ministry of Justice and other governmental agencies (e.g., the Home Ministry or the Ministry of Women and Social Affairs, etc.) can causes delays and duplications, which pose serious obstacles to achieving reform.

- **Lack of budgetary support.** Lack of political support often translates into inadequate funding. This can severely limit the number, type and quality of the activities that can be conducted by the Ministry.

Safeguarding Judicial Independence

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

Capacity Development Strategies for the Ministry of Justice to Enhance Access to Justice[2]

Build justice values

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

- **Scrutinize government activities.** The Ministry can play a role in monitoring the activities of the Government to ensure the principles of human rights and access to justice are adhered to. A Minister of Justice must ask justice questions as routinely as the Minister of Finance asks, "Do we have a budget for this?" The Justice Minister should ask, "Is this the most 'just' decision?" Such simple questions need to become a regular part of cabinet deliberations as well.

- **Act as a government watchdog.** The Ministry of Justice should work with other Ministries and hold them accountable in terms of the justice and human rights dimensions in their work. Ministry of Justice officials should ensure that justice values are adequately protected in all government programmes. This includes not just asking, "Is this programme/policy legal?" But also, "Is there access to justice?", "How will this affect women, minorities and other disadvantaged groups?", and "Will justice and the public interest be served if this course of action is taken?"

- **Improving justice values within the Ministry of Justice.** The Ministry of Justice also needs to be the promoter of justice values in its own activities. For example, the Ministry should ensure that its programmes in legal aid, juvenile justice, witness protection, etc., incorporate and promote justice values. This will help to build an awareness of rights and a sense of entitlement among citizens and create the synergies that build justice values.

Encouraging the MoJ to Develop a Strategy for the Legal Sector

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

UNDP Lao PDR

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

Improve the capacity of ministry staff

- **Training in rights-based approaches and access to justice.** Ministry officials should be given basic training on rights-based approaches which take into consideration their role as duty bearers who are expected to provide information and services to people. Training should include how to talk, listen, and respond to people, especially those who are disadvantaged. Anti-corruption training (e.g., ethics) should also be provided.

- **Increase staff motivation.** Motivation is extremely important for the success of capacity development strategies. Study tours to enable staff to learn from and replicate best practices of other countries can be useful. In addition, motivational retreats, workshops and seminars can be conducted. Peer reviews and cross-training with officers from other countries can also help maintain high levels of motivation.

- **Use IT to improve the efficiency and effectiveness of staff.** New technologies can assist ministry officials in case management. For example, computerization of court offices can help in tracking court information and setting up legal databases can assist staff in their work. Training needs to accompany technological enhancements so that it is used effectively.

Strengthen the legal drafting process

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

Improve accountability of the Ministry of Justice[3]

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

Modernizing the Justice Sector

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

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

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

UNDP Yemen

[3] *See UNODC website for more references to research papers and technical guides on anti-corruption. [http://www.unodc.org/unodc/en/corruption.html].*

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

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

Encourage legal dissemination to improve awareness

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

- **Awareness campaigns.** Claim holders, especially those from disadvantaged groups, should be made aware of the services they can obtain from the Ministry. This can be achieved through poster campaigns targeted at disadvantaged groups, through media campaigns (TV and radio shows, newspapers), etc. The Ministry of Justice could also collaborate with parliamentary commissions, the Ministry of Education, and the media and civil society in broader civic education initiatives (also see Chapter 5).

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

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

Build coalitions within and outside of the Ministry of Justice

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

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

The Justice Systems Project in Timor-Leste – Building Coalitions

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

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

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

UNDP Timor-Leste

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

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

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

Encourage civil society and civilian oversight of the Ministry of Justice

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

- **Lobbying and Advocacy.** Civil society representatives can make presentations before parliamentary oversight committees.

- **Involving the media.** The media could be encouraged to report on the activities of the Ministry of Justice to raise public awareness and access to information.

- **Civilian participation.** Citizen participation could be increased via suggestion boxes, complaint hotlines and other such methods to obtain citizen feedback. The feedback could be used to further strengthen or refocus training and awareness programmes for Ministry officers, which could improve the MoJ's responsiveness to the needs of citizens.

4.2 The Court System

4.2.1 The Courts
4.2.2 Prosecutors

4.2 THE COURT SYSTEM

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

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

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

Criminal Cases

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

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

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

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

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

4.2.1 THE COURTS

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

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

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

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

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

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

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

The following sections examine the five key areas of intervention:

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

A. OPERATIONAL EFFICIENCY

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

Operational inefficiencies can serve to hide corrupt or discriminatory practices or behaviour by judicial and administrative staff.[11] An inefficient justice system will result in delayed decision-making. Such delays can have a greater impact on poor and disadvantaged people. For example, undue delays in solving property or commercial issues involving a poor citizen are likely to deprive them of their livelihoods. In addition, a disorganized and uncoordinated court system can in many cases suffer from communication problems between the centre and the periphery and between the different levels of courts, thereby producing inconsistent and unpredictable decisions. It can also negatively impact other institutions within the justice system. An overly bureaucratic, complicated and inefficient system is also less accessible to all and less likely to be accessed by those who don't trust or understand it.[12] Another key obstacle to operational efficiency can be the inability to enforce judicial decisions (see the section on Enforcement later in this chapter). Operational inefficiency may impede the enforcement of court orders and decisions, and could encourage individuals to use alternative means of resolving disputes (e.g., violence, bribery, etc.), further weakening the justice system.

Challenges to Operational Efficiency

Lack of necessary resources and capacities

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

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

Typology of Legal Systems

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

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

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

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

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

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

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

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

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

Lack of streamlined procedures

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

Lack of laws, legal information and jurisprudence

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

Overly bureaucratic attitudes and behaviour

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

Strategies to develop capacities for operational efficiency

Increase the human resource capacity of the justice system

In cases where a shortage of personnel leads to case backlog, strategies to increase the number of judicial personnel should be developed. This shortage is especially apparent in countries coming out of long periods of conflict. Strategies should aim to do more than simply increase the number of judges as this alone may not lead to increased efficiency. It may be more successful to find ways to increase the efficiency of the court systems rather than increase the number of staff. For example, in some cases it may be advisable to reduce the number of judges and increase their pay or increase the number of court support staff instead. Strategies for interventions will need to be carefully assessed within the context of each country. [13]

Poor Pay for Court Support Staff

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

Utilize available resources more efficiently

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

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

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

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

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

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

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

Expand the role of alternative dispute resolution

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

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

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

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

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

Provide training for judges and court staff in operational efficiency techniques

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

Provide support to coordination mechanisms

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

Streamline the organizational structure of the courts

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

Restructuring the Judiciary

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

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

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

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

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

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

Availability of information for legal personnel

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

Support the development of and adherence to sentencing and evidentiary guidelines

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

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

Public access to information should be a priority

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

Measuring Court Performance

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

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

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

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

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

Support external monitoring mechanisms

Public oversight, discussion and debate are a necessary part of a democratic process, providing checks on the judiciary and ensuring impartiality, transparency and accountability. Such public participation can be encouraged while still maintaining judicial independence. For example, consultations between stakeholders in the court system (police, lawyers, legal aid, NGOs, etc.) on issues of concern regarding the operational efficiency of the court system could be encouraged. As discussed later in this chapter, in the section on civil society oversight, ultimately, the judiciary, like other institutions of democratic governance, should be accountable to the public for both its decisions and its operations.[21]

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

B. HUMAN RESOURCE DEVELOPMENT

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

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

Objectives of Judicial Training Programmes

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

In reform programmes, training may have additional purposes:

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

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

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

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

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

Table 5: Critical Lessons on Operational Efficiency

PROCESS ENTRY POINT	INTERVENTIONS	PROS	CONS
REDUCING INPUTS INTO THE JUSTICE SYSTEM	■ Government litigation policy to reduce new cases ■ Reduce automatic appeals after the first appeal ■ Granting of time served to those in pre-trial detention	■ Direct approach ■ Existing practices remain in place ■ Little training needed ■ Consistent with existing professional ethical guidelines ■ Granting of time served may be a HR obligation	■ Current inefficient practice may actually lead to less litigation ■ Eliminating trials prevents closure for victims, accused, and society at large
EXPANDING THE ROLE OF ALTERNATIVE DISPUTE RESOLUTION[23]	■ Court-annexed ADR ■ Community-based ADR ■ Specialized ADR ■ Ethnically-oriented ADR ■ ADR clearing houses	■ Best mechanism for reaching poor, marginalized, and illiterate populations ■ Consistent with local customs, norms, practices	■ Not appropriate for serious criminal cases ■ May allow discriminatory biases ■ May become as slow, complicated, and expensive as traditional adjudication ■ Lack of accountability ■ Lack of appeals ■ Opposed by lawyers
CASE MANAGEMENT, TIME SCHEDULES, AND PROCEDURAL STREAMLINING	■ Case screening and assignment to specific tracks ■ Specialization/clustering similar cases ■ Pre-set schedules depending on case type ■ Judicial management of cases	■ Proven effectiveness ■ Large body of experience from many jurisdictions ■ Some interventions are relatively simple to implement	■ Can compromise standard of justice ■ Discourages individualized treatment of cases ■ Demands significant changes from legal actors ■ Could lead to abuses
BUILDING THE CAPACITY OF THE EXISTING JUSTICE SYSTEM	■ Hiring more judges, prosecutors, administrative staff ■ Hiring better qualified personnel ■ Building new courthouses ■ Improving judicial infrastructure ■ Ensuring steady supply of court materials, maintenance, simplifying reimbursement procedures for court inspectors	■ Does not demand changes by legal actors ■ Would be popular among existing players	■ Demands a high level of resources ■ Does not address underlying systemic/process inefficiencies
TEMPORARY MEASURES TO REDUCE BACKLOG	■ Commissioning temporary judges and courts to reduce backlog ■ Mobilize retired judges on a short-term basis	■ Effective for discrete, relatively small levels of backlog ■ Doesn't need changes in institutional culture ■ Demands fewer resources	■ Does not address pervasive, deep-seated inefficiencies

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

PROCESS ENTRY POINT	INTERVENTIONS	PROS	CONS
INFORMATION AND TECHNOLOGICAL INNOVATIONS	■ Providing electronic access to legal databases ■ Collecting and indexing judicial opinions and other texts ■ Video recording of evidence and video conferencing	■ Popular and relatively easy to fund ■ Best mechanism for allowing access to information ■ Represents the direction in which legal systems are moving	■ Does not address institutional inefficiencies ■ Requires substantial training ■ Victims may not want to come forward if private information is disseminated ■ May seem unfair if criminal defendants do not appear in court while the prosecutor and judge are in the same courtroom
LEGAL AND PROCEDURAL REFORM	■ Decriminalization ■ Plea bargaining ■ Simplifying civil and criminal procedure ■ Standardizing local laws	■ Most far-reaching and fundamental reform ■ High potential for long-term impact	■ May incur lengthy, contentious political processes ■ May adversely affect public safety and human rights

Challenges in Human Resource Development

Insufficient funding for training programmes

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

Poor Donor Coordination

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

Inadequate numbers of qualified, competent and committed teachers and lawyers

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

Limited access to updated judicial and legal tools and text books

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

Assessment of the needs of the judiciary is incomplete and inadequate

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

Understanding of international human rights norms is limited

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

Training for higher-level judges and administrative staff is limited

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

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

Entrenched attitudes and behaviour that compromise reform initiatives

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

Strategies to Build Capacities for Human Resource Development

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

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

Start reforms in judicial education at the university level

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

Support the development of bench books

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

Encourage attitudinal change in the judiciary

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

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

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

Judicial Activism

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

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

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

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

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

Encourage specialized training and promote a diverse judiciary

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

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

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

To maintain a high level of knowledge within the judiciary, specialist trainers are needed. Judicial educators should work with professional educators and adopt a multi-disciplinary approach, using a variety of teaching methods such as case studies, focus group discussions, class presentations, study tours, videos and lectures. Training and education activities should also include mentoring and training-of-trainers. Members of disadvantaged groups should be encouraged to take part in the training programmes to train and raise awareness as well as participate in training themselves.

Evaluating the Effectiveness of Judicial Training

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

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

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

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

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

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

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

C. INTEGRITY AND ACCOUNTABILITY

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

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

Challenges to Ensuring Integrity and Accountability in the Court System

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

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

Tolerance of corruption

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

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

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

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

Corruption also emanates from within the justice system

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

Low salary levels of the judiciary/prosecutors

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

Lack of legal knowledge of prevailing laws and regulations

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

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

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

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

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

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

Inadequate data/statistics on the extent of judicial corruption

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

Lack of effective mechanisms for employee selection, promotion and discipline

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

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

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

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

Support lobby groups to sensitize and encourage government ratification of the Convention Against Corruption[26]

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

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

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

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

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

Introduction of clear sentencing guidelines

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

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

Support the formation and development of professional organizations for judges[27]

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

Disciplinary mechanisms must be in place to address corruption

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

Streamline court administrative procedures

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

Computerization of court files

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

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

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

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

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

Declaration of assets

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

Ensure the security of judges handling sensitive cases

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

Improve access to information

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

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

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

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

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

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

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

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

Restore Public Trust and the Credibility of the Judiciary

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

D. INDEPENDENCE

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

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

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

Challenges to the Independence of Courts

Inadequacy of constitutional provisions for judicial power and independence

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

Inadequate budgets for the judiciary and inadequate control over expenditures

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

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

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

Inadequate mechanisms for judicial appointment

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

Lack of security of tenure and unclear disciplinary mechanisms

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

Deficient law school training, judicial training and continuing legal education

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

Judicial Councils

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

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

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

Efforts for reform may meet with resistance from the legislature, the executive, political parties, special interest groups, judicial hierarchy and other self-interested groups.

The tension between independence and accountability

Judicial independence and judicial accountability are often believed to stand in irreconcilable opposition. Independence frees the judiciary from external control over its decisions. On the other hand, accountability focuses on having mechanisms in place which require the judiciary to explain its decisions, often to external bodies or assessors. To ease the tension between accountability and independence, a mechanism should be developed that is not vulnerable to misuse by the executive or other influences.

Capacity Development Strategies to Enhance the Independence of the Courts

Reform of the judicial appointment, promotion and transfer process

The development and application of distinct selection criteria and procedures should be undertaken to assist in the selection and appointment of judges. Criteria for judicial appointments should be objective, clear, and made accessible to the public. A broadly representative selection body such as a judicial council can be an effective mechanism to screen candidates.[31] However, it is necessary to minimize the potential for politicization of such a screening body and ensure that members have the requisite experience, abilities, and/or training to assess the qualifications of candidates. Any method of judicial selection and promotion should be based on merit. It is crucial to build in transparency at every stage of the process so that the public is informed and the risk of political manipulation is reduced.

Support the development of codes of ethics

These can be valuable to the extent that they stimulate debate and discussion and understanding among judges, as well as the general public about what constitutes acceptable and unacceptable conduct. Because debate and discussion of ethical issues are among the most important results of a code of ethics, the process of developing such a code of conduct can be as important as the final product. Enforcement mechanisms for a code of ethics also need to be addressed.

[31] *Other methods include selection by the executive or the legislature, election of the judiciary (with a system for retaining judges who have been once elected) or competitive examination.*

Develop the leadership necessary for judicial independence

Training of entry level judges as well as more senior judges to strengthen their commitment to judicial independence and their abilities to resist public pressure can assist judges when they have to make unpopular decisions in controversial cases. Such programmes are also useful in developing good working relationships and helping to identify potential reformers within the system.

Strengthen security of tenure as a fundamental safeguard of judicial independence

Judges need to have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, which should not be subject to government interference. Judges should be removed only if an independent investigation with formal proceedings and procedural protections recommends removal on the grounds of professional misconduct (i.e., corruption or incompetence).

Provide non-monetary incentives

Judges and court staff should be provided with adequate monetary remuneration, however non-monetary incentives can also encourage improved performance, for example, providing opportunities for additional training.

Training programmes for judges and staff should be included in budgeting and planning

Success in gaining a budget allocation for training programmes is more likely if resource needs are well documented, all court levels participate in identifying needs, and a strategic approach is developed to defend those needs to the Ministry of Justice.

Effective judicial reform requires hard facts

Poor diagnosis of problems increases the likelihood of reform failure. Measuring and analyzing demand for an independent judiciary is an important area of inquiry, as is the development of statistical systems to measure the performance of the judicial system. Polls and sectoral surveys of judges and the public can be an effective tool for gathering information and can be used as part of a media strategy or for coalition building itself. The statistics generated by good case tracking and information systems not only allow courts to better manage their operations, but they also enable outside watchdogs to observe trends and identify aberrations.

External monitoring mechanisms can be a powerful tool for enhancing the independence of the judiciary

Public review, discussion and debate are all necessary checks on the judiciary to ensure impartiality, transparency and accountability. However, external monitoring can also have its deficiencies, for example, an irresponsible public statement by a member of civil society can have the effect of politicizing the judiciary.

Promoting societal respect for the role of an independent judiciary

If a society expects and demands an independent judiciary it will most likely get one. However, if expectations are low, the likelihood that the judiciary will operate fairly is equally low. Legal empowerment and legal literacy interventions can be successful in developing constituencies that place such demands on actors within the judicial and political institutions (see Chapter 5).

Clarifying links, separating powers and developing cooperation

The judiciary, the prosecution service, the police and other justice sector agencies can contribute to the strengthening of judicial independence by respecting the role and function of the judiciary and by working in cooperation with it.

The judiciary should be accountable to the public for its decisions and operations

Judicial independence does not render judges free from public accountability, however the media, and other institutions should be aware of the potential for conflict between judicial independence and the monitoring of judicial activities. Accountability requires that clear criteria be developed by which courts, individual judges, and others are held accountable. Developing judicial accountability and integrity without interference is critical to ensuring that the judiciary is able to fulfil its role and hold governments accountable.

E. ACCESSIBILITY

Accessibility refers to the right of every person to access an independent and impartial court and the opportunity to receive a fair and just trial with a view to providing an effective remedy to a grievance. Impediments to such access can be numerous, including high court costs, delays, inadequate normative framework and improperly narrow interpretation of laws by the judiciary, restrictive jurisdictional rules, overly complex regulations, language barriers, geographical proximity, ineffective enforcement mechanisms,

security of would-be litigants and corruption. It is also linked to judicial independence and legal literacy.[32] Accessibility is a pre-requisite to justice for all.

Many of the world's poor have difficulty accessing their legal systems and face unfair decisions, intimidation, high costs, and the risk of productive time lost in proceedings they feel they cannot win. Those living in rural areas, as well as those with claims that are small for the court system but important to the claimant, and those who need speedy justice, can find the courts completely inaccessible.

While this chapter is looking at accessibility from the side of the provider, many issues relating to accessibility are also covered in the capacity to seek justice section of the Guide in Chapter 5. Also specific challenges of accessibility for disadvantaged groups are discussed in Chapter 6.

Challenges to Ensuring Accessibility of the Court System

Court costs are too high for people to seek a remedy

Many people cannot afford to go to court and are therefore deprived of a judicial remedy. Legal aid systems usually apply only to criminal matters. Family, property and civil matters are not covered and access to justice with respect to them is effectively denied because of the expense and complexity of such cases. For example, as family law issues are generally not covered by legal aid, women often suffer disproportionately from the high costs of litigation and legal services and have to represent themselves in complex legal matters.

The costs involved in obtaining a judgement are proportionally more expensive for small amount disputes, creating a further impediment. A system needs to be put in place a system where access to an effective legal remedy is also affordable for small claimants.

The lack of clarity in the normative framework on the justice dimensions of social, economic and cultural rights

This prevents people from seeking remedies through the courts for violation of rights, and leads to the failure of the State to fulfil their obligations in relation to such rights. (For further discussion on this see the section on Normative Protection in Chapter 3).

Restrictive rules of 'standing' act as a barrier to accessing justice

'Standing' is fundamental to access to justice. Standing is a party's right to make a legal claim. In essence, the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. Often the argument is improperly used that restrictive rules of standing guard against a flood of litigation or against damaging and meddlesome interference.

Complex regulations and procedures are alien and off-putting to the majority of the population

Poorly trained or unhelpful court staff can also inhibit people from referring their claim to a court. Court support staff are the first point of contact for most people entering the court system and they should assist people in their attempt to access the court system.

Geographical and physical barriers

Those living in rural and remote areas sometimes find the courts and legal services inaccessible due to remoteness and poor transportation. Courts are mostly located in towns and large cities and it may take days of travel for people living in rural and remote areas to access the justice system. Further, there are fewer lawyers in rural and remote areas as these areas are less able to attract well-trained legal professionals.

Cultural and linguistic barriers

For people from culturally and/or linguistically diverse backgrounds in multicultural and multilingual countries, the judicial system can be too alien or complex for them to understand. For example, there may be no provision of interpreter services and translated legal information materials. There may be a subtle or overt lack of cultural awareness, sensitivity and compassion to the needs of cultural, linguistic and ethnic minorities among judges and legal professionals. Lack of female court staff may be a barrier for women in seeking assistance from the courts in matters such as sexual assaults and domestic violence. Women may be reluctant to try to access the court system if female court staff are not available to hear their complaints.

[32] *Though narrow interpretation of the law can be an obstacle, allowing wide discretion in interpretation of the law can also raise problems of accountability.*

Capacity Development Strategies to Enhancing the Accessibility of the Court System

Make courts more accessible

Provide support to make courts more accessible through implementing measures such as:

- **Reducing litigation costs** such as bail, transcript, filing and enforcement fees, waiver of court fees;
- **Providing defence attorneys** at a low cost or for free for those who are unable to pay, introduction of legal aid systems throughout universities and law schools, and encouragement of volunteerism by members of the bar;
- **Streamlining rules and procedures** for courts to make them more accessible to the public and improving case management to speed up trials;
- **Establishing small claims tribunals** or other alternative mechanisms where disputes can be resolved more quickly, cost-efficiently, and less formally, without a lawyer;
- **Raising awareness** of the different access problems faced by people that may prevent them from seeking out remedies for their grievances;
- **Mainstreaming gender** in the judicial process;
- **Using mobile courts** to ensure territorial coverage;
- **Providing information** about the courts to the public through publications, public notice boards, radio, TV, help lines, ICT etc.;
- **Promoting the use of plain language** in legislation and legal documentation; use of local languages to conduct trials and publish court records; and publishing of laws and decisions in all major languages;
- **Encouraging regular interaction** between judges and people of local communities to better understand each other;
- **Sensitizing judges** to the cultural, linguistic and religious needs of minorities;
- **Increasing opportunities for candidates from disadvantaged groups** to qualify as judges;
- **Better coordination** between courts and other dispute resolution mechanisms;
- **Providing secure court premises** which are necessary for victims and vulnerable persons (e.g., victims of sexual assault and domestic violence, children, etc.). Witness protection services should be provided to those who file a complaint to protect them from intimidation before their testimony or criminal retaliation after;
- **Ensuring that there is no discrimination in the selection of judges and lawyers.** Women and minorities should be encouraged to seek judicial office.

Rules on standing

In order for the right of access to justice to be truly effective, the rules on standing should be sufficient to allow any member of the public having an interest in a matter or being affected or potentially affected by a matter to have the right to make a legal claim. Therefore, support should be provided to the development of inclusive standing tests, rules and procedures.

An Example of a Public Litigation Success Story

Barse, a journalist, filed a petition in the Supreme Court against the State of Maharashtra in India. Barse argued that women prisoners were being subjected to violence while incarcerated in prisons within the City of Bombay. The Supreme Court ordered a third party to conduct an investigation and issue a report on the findings. As a result of the report, the Supreme Court ordered that women prisoners should only be held in prison cells guarded by female police officers and that a woman officer be present at all times during interrogations.

Public Interest Litigation:

"…public interest litigation is a collaborative effort on the part of the petitioner, the court and the Government or the public official to see that basic human rights become meaningful for large masses of people. It merely seeks to draw the attention of the authorities to their constitutional and legal obligations to enforce them so that the rule of law does not remain confined in its beneficent effects to a fortunate few, but extends to all, irrespective of their power, position or wealth".

Both the example and the quote are taken from "The Indian Judiciary: Public Interest Litigation and Alternative Dispute Mechanisms" Honourable Justice A.S. Anand, in Charles Myers

Duty bearers should be pro-active in the provision of justice and in ensuring human rights are not violated

Protection should be given even when those whose rights are being violated are not aware of the violation. Public interest litigation should be encouraged as it can help those who are disadvantaged, through third party action, to seek legal redress for human rights violations.

Sufficient pool of interpreters

There should be enough interpreters, trained to function in courts, who are competent, accredited and available to interpret in the languages needed. Courts should have staff to manage interpreter services. Interpreters should have a professional code of conduct, e.g., they should not interpret for both the witness and the defendant. Judges should ascertain the language competence of litigants to follow court proceedings and order interpreter services when needed.

Judicial Interpretation of the Law, an Indian Example

Failure to effectively enforce environmental laws and non-compliance with statutory norms by polluters resulted in an accelerated degradation of the environment and adverse effects on public health in India. This prompted environmentalists and residents of polluted areas, as well as NGOs to turn to the courts for a suitable remedy.

The judiciary referred to constitutional provisions to provide the Court with the necessary jurisdiction to address this issue. The Court observed that Article 21, "The right to live, includes,…the right of enjoyment of pollution-free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has the right to have recourse to Article 32 of the Constitution".

Adapted from Justice B.N. Kirpal, "Developments in India Relating to Environmental Justice"

Provide advocacy and support for judicial interpretation and application of laws using international and national human rights frameworks and instruments

Such support is necessary especially to promote and protect social, economic and cultural rights. However, unenforceable judgements should be avoided as they can undermine the credibility of the courts.

Build political will and encourage local ownership

For reform efforts to be successful and sustainable, they must build on solid political will and local ownership. If the judiciary is not brought into the process, or judges feel attacked by the reform process they can become effective opponents. However, once engaged, they can help design and refine programmes based on their pre-eminent understanding of what the challenges to independence are. Reform of the formal justice system is a long-term goal that will require sustained effort on the part of reformers and the UNDP.

4.2.2 PROSECUTORS

Prosecutors play a crucial role in the administration of justice, in particular criminal justice. They enjoy a range of statutory positions, which include private lawyers prosecuting public cases, civil servants working for the executive, and prosecutors enjoying the independence of a quasi-judicial status[33]. Their main responsibilities are to file criminal cases and to prosecute defendants. With the power to request the conditional release of detainees, prosecutors act on behalf of states to protect the rights of all parties, which include the accused and the public, in criminal proceedings. The aim of prosecutors is to help the delivery of justice rather than to punish. They are responsible for investigating both incriminating and exonerating, circumstances. In addition, prosecutors supervise the police in investigating and gathering evidence. They may also be entrusted with supervising the enforcement of the judgments of the courts.

The role, duties, and responsibilities of prosecutors are affected by various factors, such as the Constitution, the political system, the legal system and framework in place, international organizations present in the country, ethnic, religious, cultural, and linguistic diversity etc. As their role and duties may differ slightly from one jurisdiction to the other, this section addresses the general principles, challenges, and strategies concerning prosecutors in access to justice programmes. However, as prosecutors are part of the court system, many of the issues addressed in the previous section also concerns prosecutors.[34]

Prosecutors have a considerable impact on poor and disadvantaged persons' access to justice. In court proceedings, disadvantaged groups are often uninformed of the notion of their rights under the law, including fundamental human rights, and they seldom locate the appropriate channels to report injustices and gross violations of their fundamental freedoms. There is potential for

[33] *The World Bank web site on legal and judicial reform includes a discussion on the Prosecution which also includes references to useful links and resources. [http://www4.worldbank.org/legal/leglr/institutions_p.html]*

[34] *See also Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990)*

prosecutors to take advantage of this lack of legal knowledge and violate the rights of those involved in the judicial process, especially disadvantaged groups. For example, prosecutors may prevent access to legal advice and delay trials unjustifiably and to their own benefit. In some systems, the discretion of the prosecutor as to who to indict is a quasi-judicial power, and can also be abused. Hence, careful selection and rigorous training of prosecutors is crucial, and independent and stringent disciplinary measures should be put in place to discourage abuses.

In common law countries, using an adversarial system of trial, prosecutors represent the interests of the State in front of a neutral third party (the judge) in an adversarial trial in which the ultimate aim is to have one party's position win over the other. They have a minimal supervisory role over the police in investigations. Only in special cases involving corruption, bribery or corporate crimes do prosecutors perform an investigative function.

Prosecutors play more of a so called 'inquisitorial' role in the civil law system. They not only initiate prosecution but also supervise investigations from the outset. [35] They exercise a quasi-judicial power to see that the rights of suspects are protected.[36] They contribute to the judicial role of seeking 'the truth'.

The prosecution service is an essential part of the justice system. Generally, the public prosecution service is headed by a chief lawyer who represents the State, participates in executing the criminal policy of the State, and inspects the application of laws by courts.[37] The chief prosecutor is assisted by deputy attorneys and many other public prosecutors who take action in criminal cases or in civil cases involving the State.

The table below describes briefly the role of prosecutors in different legal systems in three Asian countries:

Table 6. The Role of Prosecutors[38]

COUNTRY	CHINA	THAILAND	SRI LANKA
LEGAL SYSTEM	Communist/Socialist	Civil Law	Common Law
ROLE OF THE PROSECUTORS	The Supreme People's Procurator is in charge of prosecution and legal supervision. It approves arrest, conducts prosecutorial and investigative works, and initiates public prosecution. It is not involved in investigations, detentions, and preparatory examination of criminal cases.	Civil LawState attorneys institute prosecution of criminal cases and direct enforcement of criminal sentences. They have a large amount of discretion in controlling and directing criminal cases. They investigate certain categories of criminal cases (especially those involving money laundering or corporate crimes) on their own initiative, without assistance from the police and other law enforcement agencies.	The Attorney General acts as the chief law officer. [39] The District Attorney conducts indictment and criminal prosecution in the name of the Attorney General after the police have investigated the case.

[35] Prosecutors in civil law jurisdictions often have little control over the police who rely on their own hierarchical structures. This can inhibit prosecutors' ability to conduct efficient investigations.

[36] The quasi-judicial power of prosecutors might include the abilities to 1) assess and make legal decisions based on guidelines, rules of professional conduct, and directives from senior management; 2) dismiss pending cases; 3) decide when to issue warrants; and 4) control certain aspects of judicial proceedings.

[37] In many jurisdictions, this individual is known as the attorney general; in other jurisdictions, the person is called the solicitor general or the prosecutor general. Some jurisdictions have even instituted both the attorney general and the solicitor general to prosecute government cases, with the solicitor general assisting the attorney general. The attorney general often plays a dual role of acting as the chief legal advisor to the State and as the chief prosecutor. This becomes problematic in situations where government officials are prosecuted and the attorney general

[38] Bureau of Justice Statistics. 2003. The World Factbook of Criminal Justice Systems. US Department of Justice. [http://www.ojp.usdoj.gov/bjs/abstract/wtcj.htm].

[39] The chief law officer represents the Government in any criminal or civil proceedings and provides advice to the Government on legal matters and the constitutionality of national laws and policies. The individual can also institute, conduct, or discontinue proceedings for any offence without government control.

Challenges in Ensuring Access to Justice through Prosecutors

Operational efficiency

- **Lack of adequate resources,** especially in civil law jurisdictions where prosecutors are more activelyinvolved in investigations, can prevent prosecutors from doing their jobs efficiently. In addition, inadequate government resources and funding to the Justice Department or Ministry could lead to inadequate mentoring programmes and insufficient training for prosecutors on human rights issues.

- **Limited communication between the Government and professional/bar associations of lawyers.** Without communication and cooperation between the State and legal, members of bar associations are less likely to be educated on the importance of human rights in the justice system or aware of governmental goals with respect to human dignity or are less likely to function as an advocacy and oversight mechanism over government policies. [40]

Integrity and accountability

- **Tolerance of corruption can encourage improper conduct by prosecutors.** For example, they may accept or pay bribes to expedite/dispose of cases or to overlook critical evidence during investigations. Prosecutors may also knowingly disregard the basic rights of disadvantaged individuals, assuming that their lack of legal knowledge and resources would make them incapable of seeking public remedies and speaking out against abuses.

- **Low salary levels of prosecutors in many countries**. Prosecutors who are inadequately rewarded for performing their duties might be tempted to accept bribes. Poor pay also tends to only attract junior and inexperienced lawyers to the ranks of prosecutors. This creates a high turnover of prosecutors leading to poor prosecution capability.

- **Lack of national qualifications for the selection, promotion, and transfer of prosecutors.** Without clear selection criteria for prosecutors, there is a risk that prosecutors will be appointed based on subjective conditions (e.g., prejudice, bribery or discrimination).[41] The absence of criteria can also hinder states in promoting qualified prosecutors who are aware of the ideal and ethical duties of their office, uphold the constitutional and statutory protections of the rights of the suspect, and defend the human rights and fundamental freedoms recognized by national and international law.

- **Lack of clearly detailed codes of conduct and ethics for prosecutors.** Without establishing clear codes of conduct and ethics for prosecutors, states cannot inform the general public as to the role of prosecutors and they may also fail to establish objective standards that determine whether prosecutors have violated a suspect's rights. A code of ethics is a pre-requisite for holding prosecutors to account for ethical breaches.

- **Imprecise criminal procedural codes.** Prosecutors should always follow the criminal procedural codes in filing charges and prose cuting individuals. Imprecise criminal procedural codes allows prosecutors to detain suspects for unreasonable amount of time, therefore depriving suspects of basic rights to legal counsel, timely trials, etc. Procedures should be put in place to deal with the re-filing of charges after dismissal or adjudication in order to address double jeopardy concerns.

Independence

- **Government setting of prosecutors' agenda.** While it is appropriate for the national Government to set priorities, there is a need to guard against political interference with investigations and prosecutions. For example, a change in government should not impact on the conduct and role of law enforcement agencies.

- **Tension between police and prosecutors.** As prosecutors and the police fall in most cases under the supervision of two different government divisions (the Ministries of Justice and the Interior respectively), strengthening the independence of prosecutors is likely to affect their collaborative relationship with police in investigative work.

- **Prosecutors overstepping their quasi-judicial power.** Prosecutors, particularly those working in rural or remote areas, are often asked by locals to mediate or arbitrate disputes. Such acts contradict the fundamental nature of prosecutorial work and overstep the function of judges, local magistrates, and ADR groups in resolving these matters.[42] Prosecutors in civil law jurisdictions may also be seen to be working too closely with the judiciary and perceptions of judicial independence can be called into question.

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[40] *Cooperation between the Government and bar associations does not mean that the agendas of bar associations should be dictated by national policies. Bar associations should act mainly as instruments that flag government activities and programmes for the purpose of promoting public awareness. The cooperative relationship between the Government and bar associations needs to be monitored carefully and assessed continuously.*

[41] *Prosecutors, for example, can be appointed by the executive with the advice and consent of the legislature. As a result, there is a dual screening, and the prosecutors are directly accountable to the executive and indirectly accountable to the electorate.*

[42] *Prosecutors in Laos PDR have immense quasi-judicial power over judges. They can overrule judges' decisions de facto by bringing cases to the National Assembly for rehearing. Such unrestrained quasi-judicial power is problematic.*

- **Lack of personal safety for prosecutors and their families.** When the safety of prosecutors or their families is threatened, prosecutors are much more vulnerable to external pressures when trying cases and are more likely to compromise their goal of delivering justice to victims.

Accessibility

- **Attitudes of prosecutors.** Sometimes, prosecutors can be indifferent or unhelpful, which discourages disadvantaged groups from seeking legal remedies.

- **Geographical and physical barriers.** Individuals living in rural areas might find the prosecutors' office inaccessible due to their remoteness or the area's poor transportation. This lessens their tendency to seek legal assistance from prosecutors.

- **Cultural and linguistic barriers.** People with culturally and/or linguistically diverse backgrounds might have difficulties accessing services and understanding complex legal proceedings that are based on different customs and languages.

Capacity Development Strategies to Enhance Access to Justice with Prosecutors

Operational efficiency

Maintain essential facilities and funding in justice institutions to reduce corruption among prosecutors. Adequate resources and funding provide prosecutors with the opportunities to learn from mentors and programmes about their role while ensuring individual freedoms and rights in court proceedings. States should produce annual reports detailing the funds allocated to justice institutions to improve accessible and support for disadvantaged groups. Funding and essential facilities like information and administrative management greatly improve prosecutors' efficiency in processing and prosecuting cases. Provision of new resources, however, must be carefully supervised to ensure that they are not diverted for inappropriate or unlawful purposes.

Human resources development of prosecutors

- **Increase support on human rights understanding by lawyers.** Organizations such as the National Human Rights Commission, the Association for the Prevention of Torture, and the International Association of Prosecutors can help to equip lawyers with an adequate understanding of human rights principles and can encourage discussions on human rights violations. Such organizations could provide training to prosecutors on the content and application of international conventions relating to policing and prosecution. They should also actively promote programmes to inform the public about their rights and duties under the law and the role of prosecutors in protecting their fundamental freedoms. Increasing awareness and demand for basic rights from the public can in turn ensure prosecutors uphold human rights principles in the justice system.

- **Increase prosecutors' awareness of gross human rights violations.** Such awareness could be increased by giving prosecutors intensive trainings on the principles of human rights and the need to assist disadvantaged groups, particularly women, children, and other disadvantaged groups, to assert these rights. Although the administration of justice is essentially a domestic matter and the national constitution, legislation, and legal culture, is of paramount importance in domestic courts, they also need to pay attention to the human rights standards set by international human rights instruments. Trainings on prosecution of gross human rights violations are necessary to ensure that consistent standards and respect for international human rights norms are upheld. States can also foster sensitivity among prosecutors by creating incentives and conditionality that encourages them to uphold human rights principles among disadvantaged groups. In addition, sanctions need to be put in place for prosecutors who commit human rights violations (both by commission or omission).

- **Train prosecutors in case management, evidence gathering and investigation.** Although the role of prosecutors in investigating cases and gathering evidence varies from minimal to substantial involvement, prosecutors should have the skills to assist or supervise the police when necessary and determine whether or not evidence has been obtained lawfully. Further, specialized trainings on specific topics, e.g., case scheduling, budget planning, etc., are necessary for prosecutors to effectively streamline case management procedures for monitoring and accountability purposes.

Integrity and accountability

- **Help states to establish codes of conduct and ethics for lawyers.** This should be done in accordance with national law and recognized international standards.[43] Legal institutions and experts should advise and assist states on establishing codes of conduct and ethics for lawyers, which would function as standards for gauging the prosecutors' performance, particularly when prosecutors have grossly exceeded or taken advantage of their authority in judicial proceedings. For example, supporting legislative reforms to define the boundaries of prosecutorial discretion to institute and waiveprosecution. The codes should give the public a general understanding of the role of prosecutors. The Guidelines on the Role of Prosecutors[44] provides a good starting point on principles.

- **Detailed criminal procedural codes should be created.** To ensure that prosecutors respect the rights of suspects, especially those from disadvantaged groups, states need to codify their criminal procedures and specify the conditions of detention (e.g., the severity of the crime, the maximum time period for detaining the accused before charges are brought, when warrants should be issued, etc.) and the suspects' rights to legal advice. Legal experts and institutions should coordinate with and assist the Justice Department or Ministry in creating these codes. The code provisions should give detainees the right to a prompt appearance before a judge to challenge unlawful, excessive detentions in accordance with international human rights standards.

- **Maintain sufficient funding.** Adequate funding and compensation/reward packages in justice institutions decrease the likelihood that prosecutors will disrupt the effective functioningof a fair justice system. Sufficient funding should also be put into place to attract experienced lawyers into the ranks of the prosecution and enable them to conduct full investigations.

- **Hold prosecutors accountable for their conduct in court.** Courts should impose high standards on prosecutors when investigating and prosecuting criminal cases, based on a code of conduct and ethics. Prosecutors who violate the rights of a suspect, e.g., unreasonably detaining the accused, failing to withdraw charges when evidence is insufficient, falsified, or improperly obtained, or carrying on prosecution without adequate investigation, should be subjected to sanctions by the court. Another way of holding prosecutors accountable is by ensuring that the promotion of prosecutors is based on objective factors such as professional qualifications, ability, integrity and experience, as determined according to fair and impartial procedures.

- **Authorities should cooperate with professional associations, legal institutions, and human rights groups to monitor the activities of prosecutors.** Other groups such as these can be useful partners in generating public discussion on laws and observing the conduct of prosecutors. Most importantly, disadvantaged groups might have easier access to these groups and be more willing to report corruption and human rights violations by prosecutors.

Independence

- **Give prosecutors discretionary power to divert criminal cases from the formal justice system,** particularly cases that involve juvenile defendants[45]. States should fully explore the possibility of adopting diversion mechanisms to avoid overburdening prosecutors with cases involving lesser crimes and to avoid the stigmatization of minor defendants as a result of pre-trial detention, indictment, conviction, and imprisonment[46]. Prosecutors should consider available alternatives when deciding whether or not to prosecute individuals, particularly disadvantaged persons and juvenile defendants. Before filing charges, prosecutors should look into the nature and gravity of the offence, protection of society, and background of the suspects. Most importantly, although prosecutors should have the discretionary power to choose alternative mechanisms to dispose of cases, they should not be involved in mediation.

- **Prosecutors should enjoy the freedom to form and join professional associations** to represent their interests, to promote their professionaltraining and to protect their status.

Accessibility

- **Encourage community outreach and education projects by prosecutors.** These efforts will not only increase the credibility and reputation of prosecutors' offices, but will also challenge misconceptions about their indifferent attitudes, allowing disadvantaged individuals to understand more about prosecutors.

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[43] *Timor-Leste is a good example of incorporating codes of conduct for prosecutors and the judiciary (the Superior Council for the Public Prosecution and the Superior Council for the Judiciary) in its constitution, in accordance with international standards. [http://etan.org/etanpdf/pdf2/constfnen.pdf].*

[44] *UN (United Nations). 1990. "Guidelines on the Role of Prosecutors." Adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders. 27 August to 7 September 1990, Havana, Cuba. [http://www.unhchr.ch/html/menu3/b/h_comp45.htm].*

[45] *Giving prosecutors discretionary power would require a substantial adjustment in the functioning of the judicial system. It should be noted that the prerequisite for this capacity development strategy is legal reform—the Government must be willing to grant more power to prosecutors.*

[46] *This discretionary power, nevertheless, needs to be well-defined and carefully monitored so that prosecutors do not overstep their prescribed power.*

- **Recruit prosecutors from disadvantaged or minority backgrounds.** For example, women, cultural and linguistic minorities, those from rural or remote areas, etc. Prosecutors with similar backgrounds as the individuals they serve may understand better the difficulties of the poor and disadvantaged in seeking legal remedies and could address their needs and grievances more effectively. The relationship between prosecutor and defendant is generally one of power, thus encouraging prosecutors from disadvantaged groups may help in mitigating cases of abuse and discrimination. See Chapter 6 for more on Disadvantaged Groups.

- **Ensure the views and concerns of victims are considered** and that they are informed of their rights.[47]

[47] *Paragraph 13(d). UN (United Nations). 1990. "Guidelines on the Role of Prosecutors." Adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders. 27 August to 7 September 1990, Havana, Cuba. .*

4.3 Informal Justice Systems

4.3 INFORMAL JUSTICE SYSTEMS

Informal justice systems refer to processes of resolving disputes outside of formal court systems.[48] This includes state sanctioned Alternative Dispute Resolution (ADR) processes as well as non-state justice systems i.e. traditional and informal justice systems.

ADR mechanisms can be set up by the State to address perceived short comings of the formal courts or by non-state actors such as NGOs or religious groups to provide easier access to those in need of such services. Informal justice systems can help in reducing court backlog, expediting dispute resolution, and are a cost-efficient alternative to formal court litigation.

In contrast to this, Traditional and Indigenous Justice Systems (TIJS) are pre-existing methods of resolving disputes within communities. The State in these cases needs to engage with TIJS to promote the positive aspects of TIJS and ensure that they function in accordance to national laws and international human rights standards.

While the goal of ADR and TIJS are often the same – to provide alternatives to the formal system different strategies need to be adopted in each situation. This section is broken down into two parts. The first section addresses ADR and the second examines TIJS.

Interface between the Formal and Informal Systems

In order to assist the Government of Cambodia in its *Strategy for Legal and Judicial Reform*, UNDP Cambodia undertook a study to assess the access to justice situation in Cambodia. The study used a national survey, detailed case studies, in-depth interviews and participatory workshops to examine people's use of formal and informal system to resolve conflicts. It looked at people's demand for justice and ability of institutions to respond to these demands. The courts, ADR (Cadastral Commission) and community and indigenous justice systems were evaluated during the workshops to determine the ability of people to access them and their degree of effectiveness. Recommendations emerging from this survey will feed into UNDP projects in the sector as well as influence the Strategy for Legal and Judicial Reform.

UNDP Cambodia

4.3.1 ALTERNATIVE DISPUTE RESOLUTION (ADR)

Alternative Dispute Resolution (ADR) refers to processes that are available for the resolution of disputes outside the formal courts of justice. This includes not only state-sanctioned ADR such as court-annexed ADR, but also community-level ADR mechanisms and ADR services provided by other non-state actors (e.g., civil society). ADR typically includes:

- **Arbitration** - A simplified version of a trial involving less strict rules of evidence. Decisions made in arbitration hearings are usually binding, even if the disputing parties don't agree with them. Arbitration is often used to resolve commercial and business disputes.
- **Neutral evaluation** – A non-binding process where a third party with expertise in the subject matter hears the arguments of the disputing parties and suggests a likely outcome of a court hearing. This process may encourage disputing parties to come to a settlement.
- **Mediation/conciliation** – The terms 'mediation' and 'conciliation' are often used interchangeably. Mediation involves a third-party intervention (the mediator or a panel of mediators) in which the disputing parties meet and negotiate face-to-face and where the mediator may advise on, or determine the process of, mediation.

Mediation at the community-level is a form of ADR frequently used by disadvantaged groups; therefore, UNDP programmes should consider this option to improve access to justice for disadvantaged groups. For example, community mediation boards can be established through legislative acts and commissions can be set up to monitor their activities. They are often free of charge to users and mediation boards generally meet once a week to discuss cases in public. Community mediators are typically local volunteers who are trained to resolve conflicts and are not required to have academic or professional credentials but generally represent the diversity of the community served. They are often individuals of some standing and moral authority within that community who are well respected and are likely to be accepted by those coming before them with disputes. Most community mediators are retired teachers and civil servants living within the community, religious leaders, or volunteers.

Community Mediation – Sri Lanka

In Sri Lanka, community mediation boards have been established by the Ministry of Justice to reduce court backlog and facilitate access to justice for disadvantaged groups. The Mediation Boards Act was passed in 1998 to provide the legal framework for community mediation boards. Mediators were trained (along with trainers so that capacity building of mediators could continue) and mediation boards were established at the local level to increase access to alternative means of dispute resolution.

[48] *There is much debate about the term 'informal justice system' as in some cases these systems may be set up by the State (e.g., state sanctioned ADR) and therefore can be considered formal. In this case, informal justice system refers to traditional justice systems as well as different forms of ADR.*

Informal ADR also has the potential for strengthening local-level (community) governance since it can play a role in empowering communities to be self-supporting. Given that many local disputes or conflicts arise from disempowerment and diminishing social cohesion at the community level, this is an important subsidiary aim of ADR mechanisms.

Role of ADR in Strengthening Access to Justice

Though ADR cannot be a substitute for the formal court system, it can serve as an alternative that complements formal systems. Access to justice, especially for the poor and disadvantaged, is facilitated through ADR mechanisms as it addresses key obstacles facing these groups and is more accessible than formal courts. Some characteristics of ADR that promote access to justice include:

- Faster than court settlements
- Lower costs in comparison to litigation in court (no lawyer and court fees, etc.)
- Not as formal as court systems and people may feel less intimidated to approach them
- Local communities often already have their own ADR, reducing linguistic and cultural barriers
- As many mediators are from the community and are well known, disputing parties may more willingly trust them and their suggestions than judges in the formal system
- Helps in reducing court backlog

ADR (formal and informal) plays an important role in prevention as well as control. It can be used at an early stage, reducing the chances of escalation. The formal system, however, usually functions retrospectively, i.e., after a conflict or crime has taken place.

ADR is also about finding win-win solutions to problems, thereby eliminating the adversarial nature of court decisions, which are often win-lose decisions. When community members have to live closely together after the conclusion of a dispute, this type of win-win situation can play a big role in ensuring harmony at the local-level.

Challenges in Ensuring Access to Justice through ADR

Ineffective enforcement of ADR decisions

There is some debate on whether referrals to mediation should be mandatory (ordered by the court) or voluntary. Some judicial systems require litigants to mediate prior to court action while others make mediation voluntary. In either case, mediation awards have no enforceability under law. Since no rules of evidence or laws are followed in a mediation hearing, and there are is no legal representation of the parties, enforcement of mediation awards is not compatible with the law. Because there is no punitive action for violating the award, there are instances where the agreement reached during mediation is broken, and parties go back to the beginning of the problem, which, along with extensive delays, may also cause the community to lose confidence in mediated settlements.

Unpredictability of ADR decisions

The essence of mediation is that parties in dispute agree on a solution that is acceptable to both in that specific instance without the decision necessarily being legally correct. Since ADR often lacks formal procedures in decision-making and there is a lack of substantive laws to follow, outcomes of decisions primarily depend on negotiations between the parties as well as the mediation skills of the mediator/panel.

- Mediators can come from diverse backgrounds and may have different levels of qualifications that can affect the outcome. They are often inadequately trained, partly due to insufficient funds, but also because the training itself may not be comprehensive.
- Not all countries have laws and regulations on mediation, or binding codes or minimum standards for mediators to follow.

Lack of impartiality

The impartiality of mediators from the community may be questionable. Issues of corruption and nepotism are likely to arise, especially at the local-level where structural inequalities may be perpetuated by decisions made by the mediator.

Unclear standards and guidelines

Mediators may not be aware of, or may be unwilling to apply, national or international human rights standards. As a result, outcomes of mediation settlements may not be compatible with international standards. Some local customary practices, especially those applying to women, may directly contradict protections provided by international law. There is often no clear distinction in terms of the jurisdiction of community mediation and formal courts. Some disputes are simply not eligible for mediation. Serious crimes (such as murder, rape, grievous bodily harm, torture, armed robbery etc.) fall in to this category. In promoting mediation, it must be clearly articulated that such offences need to be addressed through the formal justice system courts (which have clear enforcement mechanisms), and no attempts must be made at mediation.

Lack of political will and funding

It is often a challenge to obtain state and donor funding for ADR mechanisms. Though ADR itself is not costly, funds are needed to train mediators and ensure proper monitoring of ADR processes. It is also necessary to have political commitment on the behalf of the State to establish and support ADR processes, especially when they face resistance from other judicial and law enforcement branches who may see them as 'competition' or may be dismissive of their abilities. In these cases, the judiciary and the police may not be supportive of referring cases to ADR mechanisms.

Capacity Development Strategies to Enhance Access to Justice with ADR

Increasing public awareness and confidence in community mediation

In any mediation programme, as a first step, the public must be made aware of the availability, modalities, and benefits of mediation. The public includes all duty bearers in the system including lawyers, police, politicians, community and religious leaders, as well as claim holders within communities. Awareness raising must take into account background conditions including political support, the institutional and cultural situation, human and financial resources, and power plays within communities. Some strategies could include:

- **A series of targeted focal group meetings** to increase awareness among duty bearers.
- **A wide media campaign** accompanied by focal group meetings for claim holders.
- **Awareness programming in schools** to 'educate' young persons on how to resolve their disputes through mediation.

Any meetings and campaigns must be conducted by experts, experienced in the process of mediation and knowledgeable of local conditions.

Obtaining political and financial support from government

Financial support is key to the success of mediation programmes. While programmes can commence with donor funds, sensitizing governments and increasing political will to allocate sufficient funding is crucial for the sustainability of mediation programmes when donor funding comes to an end. The Ministry of Justice can be an effective entry point for supporting community mediation boards and other ADR process. It can be seen as a champion of community mediation and ADR. However, it is also necessary to get the courts and the formal legal system to support these alternative processes as well.

Improving referral mechanisms to mediation boards and increasing caseloads at mediation boards

Sometimes, a mediation programme may have sufficient awareness and funding, but not enough referrals. In these instances, a clear interface between courts and community mediation systems should be set up so that they are both clear about the roles they play, when to refer cases to each other and what their monitoring duties are. For example, preparing guidelines on when to refer cases for mediation would help in reducing the caseload for lower courts. Also, sensitization of the police, promoting conflict management and mediation skills within the police and developing criteria for referrals by the police are some other strategies.

Formal Mediation

In an effort to promote mediation as a way to reduce the backlog of cases in courts, UNDP Nepal has helped district courts to organize "Settlement Fairs" – events in which dozens of pending court cases are settled simultaneously through trained mediators. After the success of these events, permanent mediation centres are now being established. The District Court rules were also amended, allowing the Court to refer cases for mediated settlement to appropriate institutions or individuals.

UNDP Nepal

Training in community mediation

As mediation becomes more and more widespread there is considerable expertise within the field and this expertise must be used for foundation level training, advanced training and training of trainer courses, and continuous training for mediators. A code of ethics, human rights and minimum standards for mediators, and a handbook on how to apply the code of ethics should also be developed and be used as part of the training curriculum.

Avoiding conflicting roles

There are a growing number of NGOs and civil society groups providing mediation and conflict resolution training at the community level. While these groups are generally seen to be providing a valuable service, there are also potential problems. For example, there may be confusion over who has the authority to resolve disputes at local levels which can undermine the authority of formally trained magistrates as well as traditional leaders. In Papua New Guinea, this issue has resulted in a concentrated effort to ensure that mediation/ADR training is accompanied by awareness raising on how informal mediators trained by NGOs should

be used in relation to both formal magistrates and police, as well as what their role is in relation to traditional leaders. Therefore, there must be a clear mapping of the roles of the various justice players at the local level (formal and informal) and this should be widely disseminated through awareness programmes in order to avoid confusion and "forum shopping".

Community involvement

Local communities, especially disadvantaged groups, should actively participate in, and monitor, ADR processes to ensure that they do not have a bias. Women and minorities should be trained as mediators, and encouraged to take part in ADR hearings. Claim holders can also help in monitoring ADR mechanisms by:

- **Developing a local report card system** to evaluate the success and sustainability of settlements.
- **Formulating civil society watchdog groups** within the community to monitor the implementation of settlements.
- **Overseeing progressive realization** of settlements.
- **Including members of disadvantaged groups** in mediation panels.

These elements are essential ingredients for encouraging community involvement and making mediation more meaningful and relevant.

Using ADR to complement the formal justice system

ADR is an important area for UNDP's work as it can facilitate access to justice for disadvantaged groups. ADR programmes developed by UNDP should complement UNDP's access to justice programmes designed for formal courts. As courts become more congested, the need for community mediation can only grow. One of the challenges for the community mediation sector is to ensure that societal demand for mediation is met by professional and effective services in this area, and 'justice' is received by all claimholders, especially those representing disadvantaged groups.

4.3.2 TRADITIONAL AND INDIGENOUS JUSTICE SYSTEMS

Traditional and indigenous systems of justice refer to the types of justice systems that exist at the local or community level which have not been set up by the State.[49] It can also be seen as a system of justice that usually follows customary law or an uncodified body of rules of behaviour, enforced by sanctions, varying over time.

Traditional and indigenous systems of justice exist throughout the Asia-Pacific region and serve as an alternative for many people who are unable to, or choose not to, access the formal justice system (courts as well as formal ADR).[50] Though law making and enforcing is one of the core functions of the State, traditional and indigenous justice systems often fill in the gap when the State is not able to fulfil its duties or when people simply opt to use traditional systems. In particular, groups that are marginalized by the State often feel it more worthwhile to seek systems of justice that better suit their needs and represent their values. As a result, traditional and indigenous justice systems (TIJS) handle the bulk of the cases in the Asia-Pacific region and when working on improving people's access to justice, programmes need to recognize their existence and seek entry points in improving the role and function of TIJS.

It is difficult to generalize about traditional justice systems, as there are a wide range of TIJS with varying degrees of structure. They range from systems dealing with small-scale civil disputes to those dealing with capital crimes, from systems that promote harmony and restorative justice to those that seriously violate human rights. They include arbitration and mediation systems, and disputes are resolved by single persons or by collegial bodies. The common denominator of TIJS is merely that they exist and function largely outside the purview of state governance. This, and their lack of homogeneity, presents a major challenge when developing solutions and strategies to improve the functioning of TIJS.

The Salish System– Bangladesh

Salish mediation councils are a type of traditional alternative dispute resolution system that is often used at the local level. An estimated 60-70% of local disputes are solved through the Salish. They are often used for the resolution of small disputes or as an alternative to expensive and time consuming court processes and are accessible to disadvantaged groups. Marriage, family, dowry and land issues are also often dealt with through the Salish councils. Encouraging and supporting the Salish with procedures for recording, conducting and making decisions helps increase the ability of people to access justice at the local level.

It is important to recognize that TIJS has its limitations, and may not always be able to deliver appropriate and equitable forms of justice. While many of the failings attributed to TIJS (e.g., nepotism, corruption, human rights abuses, gender bias, etc.) are similarly applicable to formal justice agencies/systems in many countries, these limitations need to be recognized in order to

[49] Penal Reform International, for example, defines 'traditional justice systems as 'non-state justice systems which have existed since pre-colonial times.'

[50] Dinnen, for example, states that in Papua New Guinea, traditional systems of justice are used 98% of the time. See Annotated bibliography for publication details.

address them. TIJS may be susceptible to elite capture and may serve to reinforce existing power hierarchies and social structures at the expense of disadvantaged groups. Popular and community justice traditions may be exploitative and violate the basic human rights of individuals (e.g., vigilante justice where the community takes its own form of vengeance, often violent, against perpetrators). Programmes that seek to work with traditional and indigenous forms of justice should attempt to promote the positive aspects of TIJS – simplified process, easier access in terms of understanding the language and rules, lower cost, geographical proximity, and restorative focus – and reform the negative aspects that compromise human rights standards.

Role of Traditional Systems in Strengthening Access to Justice

TIJS can compensate for the State's unwillingness (lack of political will) or inability (lack of capacity) to provide justice for all. Below are some reasons why people may avoid formal justice systems and instead use TIJS:

- In remote areas and societies, and also in areas not under state control, the courts are often physically too far away and the only accessible form of resolution for disputes may be TIJS.
- The costs associated with the formal justice system (court and counsel fees, travel costs, delays) are often too high, especially for the poor and disadvantaged.
- TIJS can play a role where the State is overwhelmed with a backlog of cases because of a lack of financial or staff capacity.
- Intimidation can be an important factor preventing people from seeking justice under formal systems. Unfamiliarity of formal procedures and the formal court atmosphere can be an obstacle. As traditional forms of justice are often conducted in the local language and follow local customs, people are less likely to be intimidated by the proceedings.
- Traditional judges are usually aware of the local context. For example, the case may be about livestock theft, but during the hearing, other issues such as land disputes may emerge and the traditional system has the flexibility to address those problems as well.
- People also may prefer to use traditional justice systems because the process of dispute resolution is usually much faster than formal systems. Long court delays thus can be avoided.

Along with facilitating access to dispute resolution mechanisms, traditional and indigenous processes often take a restorative approach to implementing justice. The goal often is not just to punish the perpetrator, but also to compensate the victim for their loss, prevent the accused from committing the crime again, and to reintegrate both the victim and the offender back into the society. As a result, traditional processes tend to seek restitution, reconciliation and rehabilitation, and emphasize compromise rather than applying strict legal sanctions. However, because of a lack of formal enforcement mechanisms, traditional systems rely largely on social pressure and the consent of both parties to the ruling, which may not always follow human rights standards.

In addition, the existence of traditional or indigenous systems enables legal pluralism. In many countries in the region, the formal justice system is based on the legal system of their former colonial rulers, and as a result is not necessarily well understood or respected by many ordinary citizens. Building bridges between the formal sector and TIJS is not only a way of trying to regulate TIJS and ensure their compliance/consistency with state law; it is also a way of building understanding of, and respect for, what are often exceedingly fragile formal justice systems. It is important to focus on strengthening the intersections between the two in a manner that promotes the rule of law and respect for human rights.

Preference for TIJS

The Pnong community in Cambodia have their own system of justice which involves using village elders to conciliate and settle their dispute. Part of the settlement includes a payment of 'Leas Leang' where the village elder determines the payment that must be made by the wrongdoing party. During the Access to Justice Workshop held in Mondulkiri, Cambodia in November 2004, the participants expressed the following reasons for their preference for using indigenous systems of justice to resolve their problems:

- Lower cost/free of charge
- Less time consuming than the formal system
- Easy to get to
- Can use their own language and speak out freely
- Community leaders understand the context of the conflict
- Amicable settlement
- Simpler procedure
- Less nepotism/corruption than in the formal system

UNDP Cambodia

Challenges to Ensuring Access to Justice through Traditional and Indigenous Justice Systems

Even though traditional courts can play a role in facilitating access to justice, there are limitations as to how effective, efficient and impartial they can be. Customary traditional laws often reflect social hierarchies and can be discriminatory in their rulings. Often, the rulings depend on the knowledge and skills of the individual mediator/arbitrator. Further, there are no minimum standards that have to be followed and the rights of victims and suspects are protected only by customary norms. Therefore, it is important to regulate these systems so that abuses do not occur. The following section details some weaknesses of TIJS that may be an obstacle in terms of access to justice.

Gap between traditional laws and human rights standards

TIJS needs to respect human rights, at its most basic level the right to equality and non-discrimination. As traditional judges and community members are often not aware of human rights and related duties they are usually not upheld. Another problem arises when human rights standards directly contradict local customs and beliefs. For example, public humiliation and physical violence may be considered an appropriate punishment for someone who has committed a crime in the community. However, this would be in direct opposition to human rights laws that protect individuals from torture and cruel forms of punishments.

Inappropriate use of traditional and indigenous justice systems

The differences between human rights systems and traditional and indigenous justice systems can become especially problematic in the case of capital crimes, such as rape and murder. The informality of procedure, which may be a strength in dealing with small scale civil and criminal cases makes these systems inappropriate for cases in which formality is needed to protect the rights of both the victim and the offender. This includes the right to due process and to legal assistance, rules of evidence and presumption of innocence. In contrast to this, traditional and indigenous systems may put the burden of proof on the accused, use torture to effect a confession, or allow serious offenders to escape legal responsibility for their actions.

Exclusion of disadvantaged groups

TIJS throughout the world are often dominated by men of high status and tend to exclude women, minorities, younger people and most disadvantaged groups. The traditional justice system in India, for example, is usually run by those from higher castes. As a result, social hierarchies and biases are reinforced in the dispute resolution system and there is little opportunity for people from disadvantaged groups to appeal against decisions made by those in power. Traditional laws can also be biased and can discriminate against women and other disadvantaged groups. For example, in Melanesia, women accused of adultery are imprisoned whereas their male counterparts are not punished. Also, decisions are often made not on merit alone, but as a result of outside pressures such as powerful connections or threats of violence or sanctions. This seriously compromises the integrity of TIJS.

The Barangay Justice System (BJS) – Philippines

Traditionally, Barangay leaders were respected members of Filipino communities and were often responsible for resolving disputes. In 1978, the BJS was restructured into a formal system and eventually incorporated into the Local Government Code of 1991. Though the BJS was not used very much initially, a concentrated effort was made to increase people's awareness of their rights and the functions of the BJS which includes mediated settlements. For example, even if crimes such as domestic violence are beyond the jurisdiction of the BJS, they can help families come to an agreement, especially when the goal is to induce a change in behaviour rather than sending people to prison.

"Forum shopping"

When jurisdictions are not clearly defined or overlap, it poses a problem for an effective justice system. For example, if one party in a dispute is not satisfied with the outcome of the decision, they have the option of appealing against the decision in other forums. This undermines the ability of TIJS to rule effectively and their positive role in reducing the backlog in formal systems.

Lack of enforcement mechanisms

TIJS are often centred around the concept of restorative justice where emphasis is placed on reconciling the victim and the offender and reaching a consensus about settlement. However, because traditional systems do not have specific enforcement measures to back their decisions, often they are non-binding and rely primarily on social pressure. Though this may be sufficient for minor cases, for serious offences however, accountable enforcement mechanisms need to be in place that are both humane (i.e., avoid cruel and degrading treatment) and effective.

Enforcement mechanisms that violate human rights

Sometimes, corporal, cruel and inhuman punishment for committing even minor crimes is used by some TIJS, attempting to enforce customary law. These violations of rights need to be addressed when developing strategies to improve TIJS.

Corruption

Some structural deficiencies make TIJS susceptible to corruption. Traditional leaders with the authority to resolve disputes may abuse their power to benefit those who they know or who are able to pay bribes. Traditional judges are often not paid or are insufficiently paid and may rely on gifts and bribes for an income, influencing the outcome of the hearing. Nepotism is also a problem in traditional systems. Traditional judges may be chosen on the basis of who they know or are related to, not on their ability to make appropriate and fair decisions. Finally, traditional justice systems may also lack independence and decisions may be influenced by outside (political) concerns and pressures.

Capacity Development Strategies to Enhance Access to Justice with Traditional Indigenous Justice Systems

TIJS does not make up for the shortcomings of the formal justice system

There is a danger in relying too much on traditional systems to solve all disputes. However, in many parts of Asia, TIJS remains the cornerstone of access to justice for the majority. Hence, the strategy should be one of engagement with TIJS to ensure that people who are not able or not willing to go through formal processes have access to some form of justice.

Combining rather than choosing between formal justice and TIJS

A more innovative approach entails designing hybrid justice institutions that combine the elements of both the formal justice system and TIJS. A good example of this is Papua New Guinea's Village Court. This court was created by statute with a defined jurisdiction which is subject to review by district courts. Village court magistrates are local villagers appointed by their peers and charged with settling local disputes in accordance with local custom. Their weakness in practice is that the Government often fails to provide the prescribed allowances, training, manuals, etc., and the district court magistrates are less than dutiful in fulfilling their supervisory obligations. This is essentially a failure of the formal system (e.g., the State fails to pay, train and supervise) although in practice it is often portrayed (especially by lawyers) as an indication of the inherent failings of the informal justice system.

Start with thorough research and knowledge development

The large variety of traditional systems requires thorough research and knowledge development activities to enable programmes to effectively respond to the particular strengths and weaknesses of the TIJS. Research on customary law and indigenous institutions also implies the different laws and methods will be recorded. This can be helpful so that people can easily access previous cases when necessary. Though some argue that it may go against oral traditions, recording and researching laws and traditions can be useful as long as these laws are not codified and allow for flexibility. Research and publication of customary law may also help judges and other staff of the formal justice system to better understand and take into consideration indigenous methods of justice when they have to deal with cases relating to indigenous peoples.

Codification of traditional law

The issue of codification of customary law is a frequently debated subject. Customary law is often defined by its fluidity: each case is judged on its own facts without referring to a written set of laws. This allows customary law to change with the community and be as flexible as the situation demands. This becomes problematic only when attempts are made to codify traditional judicial customs and laws, as norms can change from village to village. The codification process will freeze the laws in place, and will not allow them to develop and change with the time. In special cases codifying customary law may lead to legal insecurity. Hence, it is best to devise programmes based on research and documentation of practices in consultation with indigenous communities, but codifying customary procedures themselves may be counterproductive.

Build linkages between formal and traditional justice systems

Building linkages between the formal and traditional justice systems is a key strategy in developing both the State justice system and TIJS. Linkages between Indigenous Peoples Organisations (IPOs), the State and indigenous justice systems can be a way to start discussions about indigenous issues and devise ways in which to work together in complimentary manner while respecting each other's jurisdictions. By creating clear guidelines for the role of the State vis-à-vis indigenous peoples and their territory while at the same time engaging in dialogue with them

can be a constructive means of working with the State. Also, encouraging other alternatives such as the State setting up hybrid justice institutions that combine elements of both the formal justice system and indigenous justice systems can be a means of interface between the formal and indigenous justice systems. For example, the formal justice system could adopt a more restorative and rehabilitative approach in the court room and in sentencing rather than an adversarial one.

Establish regulatory mechanisms

Regulatory mechanisms help to clarify the mandate (serious criminal offences should be referred to the formal courts) of TIJS, establish monitoring and accountability mechanisms (including against corruption and nepotism), and to ensure that decisions made and enforcement measures pursued adhere to certain minimum standards in line with national laws and human rights. However, it is best if these mechanisms and lobbying for setting up these mechanisms come from within indigenous communities. Often indigenous peoples have their own methods of holding their chiefs and elders accountable for their decisions.

Establish clear accountability lines

Accountability must be to the State justice system so that the State can ensure the protection of the rights of minority and disadvantaged groups and make sure that:

- The lower-level courts (e.g., district court) oversee traditional systems.
- An ombudsman-like institution is established to oversee the functioning of TIJS.
- Training is provided for basic documentation and record keeping in traditional justice institutions so that monitoring can be more easily carried out.
- A system of checks by civil society and local political representatives is promoted so that abuses of power are reduced.
- The legal empowerment and literacy of the community is enhanced so that they can also play a monitoring role.

In turn, traditional justice systems should also be able to demand accountability of the State mechanisms and ensure that their rights, and the rights of their community and their jurisdiction, are respected by the State.

Include popular TIJS methods into the State system

State justice systems could adopt a more restorative and rehabilitative approach in dealing with cases, they could allow community representatives to express their views during formal hearings, and could encourage a less adversarial approach in courts. These types of reforms can help state systems become more user-friendly and can increase the willingness of people to seek out formal systems.

Conduct training on human rights and national and international standards

Traditional leaders and judges should be made aware of their mandate and their duties, including the standards they need to follow. Legal awareness programmes can help communities ensure that their rights are not violated by traditional judges and that these judges fulfil their responsibilities to the community. If awareness programmes are promoted by the formal local courts, it may encourage linkages with the community and TIJS. Awareness programmes can also provide information on alternatives to traditional systems as well as where and how to appeal decisions made by traditional judges.

Working with Traditional Systems

To get an understanding of indigenous systems UNDP Nepal commissioned several studies in remote areas in Nepal and found that these century-old community mediation systems are functioning very effectively, including the implementation of and adherence to rulings in criminal cases. Based on the studies, a meditation manual was prepared that was used to train traditional mediators in order to raise awareness about the formal law. It was essential to convince traditional mediators of the added value of adhering to formal law as well as providing them with the best international practices on mediation.

UNDP Nepal

Include disadvantaged groups

Along with setting up laws that prohibit traditional systems from engaging in discriminatory behaviour, it is necessary to also address underlying beliefs and practices. Changing attitudes and behaviour can take time and the State and civil society need to be involved through active advocacy and behavioural change programmes to encourage traditional systems to be more inclusive. This can include promoting members of disadvantaged groups to actively participate and be part of the traditional tribunals, encouraging programmes that raise awareness about the rights of disadvantaged groups, and encouraging disadvantaged groups to mobilize themselves to make demands from traditional systems.

Build bridges between TIJS and the formal justice system

TIJS need to be considered as more than alternative systems that can fill in the gaps when the State is unable to provide adequate services. Further, it is necessary to move away from viewing the relationship between the formal system and TIJS in dichotomous terms (either/or alternatives). Building bridges between them is a way of achieving the ultimate objective which is to build a unitary (national) system capable of accommodating different justice traditions. Citizens, for example, can take their disputes to the local traditional judges (except for serious criminal cases which must be investigated by the State) which are monitored by the formal system and, if need be, have the choice to appeal the decisions in the formal courts. Ultimately, TIJS should be viewed as an integral part of the national justice system, not as an alternative to it.

4.4 Oversight

4.4.1 National Human Rights Institutions

4.4.2 Civil Society Oversight

4.4.3 Parliamentary Oversight

4.4 OVERSIGHT

Accountability is one of the key principles of the rights-based approach, and to ensure that the justice system is accountable it is necessary to set up oversight mechanisms. This section discusses three key actors that can play a role in external oversight of the justice system to ensure that it respects and promotes the rights of all people but especially those who are disadvantaged.

National Human Rights Institutions, including National Human Rights Commissions, Ombudsman offices, and thematic commissions investigate human rights abuses and make recommendations with regard to improving legislation and implementation of legislation that protect people from human rights violations. Civil society, including the media, can investigate abuses, publicize irregularities and advocate for changes within the justice system. Parliamentary oversight of the justice system is also necessary to ensure that the system functions properly and to address discrepancies in the system.

By establishing national human rights institutions, encouraging civil society to monitor the justice system and advocating for Parliament to engage with the justice system, additional checks are put in place so that the formal and informal justice systems work towards promoting access to justice for all.

4.4.1 NATIONAL HUMAN RIGHTS INSTITUTIONS

National Human Rights Institutions (NHRIs) are established by the State, according to specific legislation (e.g., constitutional amendment), in order to promote and protect human rights at the national level. The application of human rights and establishing NHRIs can be part of a remedial process for grievances. They are quasi-judicial or statutory bodies whose mandate generally includes (i) investigation of complaints in cases of human rights violations, (ii) promotion of human rights education, and (iii) review of potential legislation. [51]

In 1993, the UN General Assembly adopted what is generally known as the Paris Principles: a set of standards for national human rights institutions that stress the importance of certain institutional requirements – such as a broad mandate, a sound legal foundation, an independent appointment procedure, autonomy from the State and adequate funding – for institutional effectiveness in ensuring access to justice. [52]

The responsibilities of NHRIs may include:

- **Reviewing draft legislation and administrative actions** and suggesting measures to improve the human rights situation such as amendments or additions to the existing legislation, or policy changes. [53]
- **Investigating individual human rights violations** by seeking to settle a dispute, for example through consultation or mediation, between individual and the government body.
- **Acting as independent monitors of the executive's action,** including the activities of enforcement agencies and other actors within and outside the justice system. This is important in order to strengthen overall accountability in the system.
- **Promoting and ensuring the harmonization of national legislation and governmental practices with the international human rights instruments** to which the State is party to, as well as encouraging ratification of, or accession to, these instruments.
- **Promoting human rights education and awareness** through various means, including research and analysis on human rights, collaboration with academia, civil society and the media.
- **Litigating directly on behalf of disadvantaged and marginalized groups,** or indirectly as amicus curiae (friends of the court).

The International Coordinating Committee of National Institutions for the Protection and Promotion of Human Rights evaluates NHRIs from around the world and determines their accreditation status by the extent to which they adhere to the Paris Principles.[54] Political commitment of the Government and the establishing frameworks (along with human and financial resources) is also crucial in allowing NHRIs the independence to fulfil their duties.

Though NHRIs do not have judicial or lawmaking capacities (and as such do not have the mandate to issue binding judgments), they can still work through other means, including external ones such as the media and civil society organizations, to put pressure on government to respect human rights.

With regard to disadvantaged people, NHRIs can help them reach remedies that would otherwise remain inaccessible and can help strengthen their capacity to seek a remedy.

[51] *According to the International Council on Human Rights Policy's study on National Human Rights institutions. The term national human rights institution is "a hybrid category and includes many different varieties within it. As far as this study is concerned, the defining point is simply that it is a quasi-governmental or statutory institution with human rights in its mandate. That would exclude a government department on the one hand (say a human rights office in the Foreign Ministry) and an NGO on the other. But it would include human rights commissions, ombudsmen, Defensores del Pueblo, procurators for human rights and an infinite variety of other institutions. [http://www.international-council.org/ac/excerpts/4.pdf].*

[52] *UNHCHR (United Nations High Commission for Human Rights). April 1993. "National Institutions for the Promotion and Protection of Human Rights, including the Paris Principles: Fact Sheet No.19." United Nations, Geneva. [http://www.unhchr.ch/html/menu6/2/fs19.htm].*

[53] *It is important to keep in mind that the role of NHRIs is to review rather than draft legislation.*

[54] *The National Human Rights Institutions Forum has a list of NHRIs from around the world and their accreditation status: http://www.nhri.net/*

TABLE 7: THE ROLE OF NATIONAL OVERSIGHT BODIES

INSTITUTION	DESCRIPTION	ROLE
NATIONAL HUMAN RIGHTS COMMISSIONS	■ Established by the State, but independent and based on a pluralist representation ■ A form of civilian oversight over the implementation of rights and standards by private and public institutions ■ A means to protect, promote and monitor human rights at the national level ■ Promotes access to information, ensures institutional cooperation and seeks to encourage linkages to prosecutions from NHRI reports ■ Plays a role in implementation of international human rights norms by intervening at policy level as well as intervening on a case-by-case basis ■ A quasi-judicial body that lacks law-making or judicial capacities, but can seek to reach amicable settlements of disputes through conciliation or through binding decisions ■ Mandate derived from the Constitution and/or through legislation ■ Similar function to the more specific thematic commissions but has a broader human rights mandate	■ Monitor both public and private sector, especially the State's implementation of human rights ■ Investigate human rights complaints of individuals and groups ■ Advise government on human rights related issues ■ Provide comments, opinions and recommendations and publish reports on the national human rights situation ■ Review draft legislation, and propose new legislation and amendments to existing laws to promote human rights ■ Work with the media and other civil society organizations to publicize human rights violations and to inform people of their rights ■ Follow up on situations of grave human rights concerns and issue advisory opinions to the State to end such situations ■ Establish working groups as necessary and set up local or regional chapters ■ Promote alliances and coalitions between different groups – civil society, media, and government in order to address human rights issues
OMBUDSMAN	■ An individual or group of persons usually appointed by the Parliament to provide an additional means of remedy to victims of abuse of authority and/or institutional policies ■ Established by the State as an oversight body to monitor misadministration and ensure good governance ■ In most cases, monitoring duties limited to public administration but some may have a wider mandate to examine complaints of human rights violations	■ Ensure fairness and legality in public administration ■ Investigate complaints by individuals or groups about violations of the rights of individuals or discrimination on the part of public administration ■ Can make recommendations based on the investigation of abuse when necessary ■ May mediate among the grieved parties and find amicable ways out of a situation or conflict ■ Monitor and report on problems in the public sector identified by the investigations

INSTITUTION	DESCRIPTION	ROLE
THEMATIC COMMISSIONS (WOMEN'S COMMISSIONS, EQUAL OPPORTUNITY COMMISSIONS, COMMISSION FOR PEOPLE WITH HIV/AIDS, ETC.)	■ These commissions are set up by the Government but are independent and can monitor the activities of the State with regard to a particular theme ■ Can be set up by Presidential Decree (e.g., National Commission on the Role of Filipino Women) or by a legislative act (e.g., the Women's Commission in Nepal) ■ Though the National Human Rights Commission works on all human rights and discrimination issues, these specific commissions work on monitoring and advocacy of specific issues ■ Monitoring, promotion and follow up on implementation of certain thematic rights also to show state's commitments in bring equal participation of all ■ These commissions are often made up of senior members of state, CSOs and judiciary	■ To ensure that the Government pays attention to the concerns of specific disadvantaged groups (e.g., the Women's Commission works to ensure gender issues are mainstreamed into government policies and programmes) ■ Promote affirmative action/ positive discrimination of disadvantaged groups ■ Report regularly on government activities, including monitoring and reporting on specific international treaties ratified by the Government (e.g., Women's Commission can ensure that the Government follows CEDAW standards) ■ Provide policy guidance in terms of both national policy and programme implementation (e.g., conduct studies and research on specific topics and submit recommendations to Parliament) ■ Advocacy work in conjunction with other civil society actors to promote awareness about the rights (as well as the violation of rights) of specific disadvantaged groups ■ To coordinate, advise and encourage the enforcement of laws (e.g., the Commission for People with HIV/AIDS can recommend that legislation be drafted that is sensitive to the concerns of people living with HIV/AIDS) ■ Investigate complaints and represent cases (e.g., cases of ethnic or racial discrimination at the work place)

Role of NHRIs in Strengthening Access to Justice

National Human Rights Institutions take many forms, but primarily manifest themselves through National Human Rights Commissions, various thematic commissions (e.g., women's commissions, indigenous people's commissions) and through national Ombudsmen. The function of the Ombudsman is to ensure fairness and legality in public administration[55], while other NHRIs are more specifically concerned with protection and promotion of human rights. [56]

These institutions facilitate access to justice by monitoring human rights situations and providing the means through which members of society can seek redress for violations of their human rights. First, as state institutions, they are by their existence a statement of the Government's commitment to human rights, especially when enabling legislation provides them with an expansive mandate. Second, these institutions are under national ownership, which alleviates people's fear of external intervention. Third, a national human rights institution develops the country's capacity to respond to human rights issues internally, at a much faster rate than even the best-intentioned external actors and even more than the domestic courts.

NHRIs can help poor and disadvantaged people obtain remedies that would otherwise remain inaccessible to them. The presence of NHRIs may also be useful in preventing future grievances. These institutions often create a necessary space for human rights dialogue between state institutions and non-governmental entities. NHRIs

[55] *In some case, Ombudsmen may have a wider human rights mandate (e.g., in the CIS Georgia, Azerbaijan and Kyrgyz Republic).*
[56] *In situations of conflict, NHRIs also play a role in monitoring the implementation of international humanitarian standards.*

can also act as independent monitors of the executive's actions, including the activities of enforcement agencies and other actors within and outside the justice system. This can be critical to strengthening of overall accountability within the system. Finally, NHRIs are also involved in legislative review and advocacy, which can improve normative protections for disadvantaged groups. NHRIs can further strengthen people's capacities to seek justice remedies through their role in human rights education.

Challenges in Ensuring Access to Justice through NHRIs

Deficient legal frameworks ensuring minimum standards for the institution

In many countries NHRIs are relatively new and their establishment may be seen as merely a token gesture by the Government and not really incorporating the true essence of international human rights standards. In fact, NHRIs may be provided with a narrow mandate, independence or authority, which would limit their ability to complete their duties in accordance with the Paris Principles. Also, there may not be a clear definition of the role of NHRIs which can lead to confusion over what is included within their mandate and responsibility. However, unless NHRIs meet the minimum standards of independence and are provided with the appropriate mandate to protect and promote human rights, the International Coordinating Committee of National Institutions for the Protection and Promotion of Human Rights (ICC) will not accredit these institutions, compromising their legitimacy.

Unsatisfactory performance

Performance refers to the extent to which a NHRI addresses human rights grievances, particularly those of the poor and disadvantaged. NHRIs' performance is critical to determine whether its existence contributes to greater access to justice, or perpetuates impunity by shielding governments from criticisms. There is also a risk that NHRIs focus too much on processing individual cases and do not focus sufficiently on broader human rights policy and implementation issues. The performance of NHRIs is also dictated by their mandate. If the legislation that establishes NHRIs is limiting, then their performance is confined within those parameters. Performance can also be compromised by appointing a commissioner who may not have the necessary expertise. It is important to ensure that commissioners are not just political appointees but have the necessary competence and a background in human rights.[57]

Perception of insufficient legitimacy

The legitimacy of NHRIs depends on the extent to which they are accepted (by both the Government and society) as independent human rights monitoring bodies. If the recommendations and opinions of NHRIs are not honoured and there is no respect for minimum standards, their legitimacy will be eroded over time. If the institutions are not perceived to be completely independent and objective, or are not able to perform their necessary duties (i.e., highlight human rights violations as well as discriminatory conduct and omissions on the part of the Government), then their legitimacy is compromised. Also, if there is no mechanism of follow up defined in NHRI legislation NHRI's will not be perceived as a credible and effectively functioning institutions. An indicator for the lack of legitimacy is the trust people have in civil society organizations rather than NHRIs and their reluctance in seeking assistance from NHRIs.

Establishing a National Human Rights Commission – Bangladesh

As courts are very expensive, time consuming and largely inaccessible especially for the very poor, UNDP Bangladesh is focusing on developing preventive strategies with regard to human rights, including the creation of a strong, independent NHRI to provide accessible remedies. However, despite having conducted a PRA study on institutional development of human rights in Bangladesh that pointed out the need for a central organization to deal with cases of human rights violations, a national human rights commission still has not been established. Though the PRA was helpful in developing baselines, the initiative lacked overall detailed guidance in setting up the NHRC. Also, while participation of all stakeholders should be encouraged, a prolonged political process may be disastrous, especially in a context where governments are unstable and policies change frequently. As a result, a national human rights commission has yet to be established in Bangladesh.

Limited political commitment

Government commitment is necessary in order to establish NHRIs. Legal arrangements (within the legislation) should be included in the legal framework as a proof of political will. After establishing a NHRI, it is then crucial to provide it with adequate financial and staff support as well as the necessary mandate and freedom to access information and fulfil their role. Provision of adequate resources can be a basic indicator of political will. Without adequate political commitment, the Government can undermine the goals and work of NHRIs. For example, if governments fall short of fulfilling their obligations to provide NHRIs with the necessary resources, both human and financial, or if NHRI members and staff face threats, intimidation or harassment by state agents, this can obstruct their ability to do their jobs.

[57] *Though commissioners may not be overt in their support for the ruling party, they may display subtle executive-mindedness and may be partisan in their decision-making or the cases they choose to pursue.*

Inadequate budgets

A national human rights institution depends to a large degree on public expenditure to determine the scope of its work. Government control over the budget allocations for a NHRI may limit its independence, neutrality and effectiveness. As the Paris Principles note, in order to secure the smooth conduct of activities of the national institution, it is necessary to have adequate funding. This funding should be used to enable NHRIs to have their own staff and premises so as to maintain control of their operation. In addition, their budget should be granted directly from the State budget and not through a particular Ministry.

Lack of efficient, qualified and experienced staff

The work of NHRIs requires committed and experienced staff – both to work in the capacity of policy, strategy and decision-making and to ensure implementation of programmes. However, low budgets restrict NHRIs ability to recruit the necessary level of qualified and experienced staff. This also affects the motivation of staff to carry out their duties. Sometimes, governments underpay ombudsmen or do not fund fulltime commissioners for the NHRI, making it difficult for the NHRI to be effective. As per the Paris Principle, a more pluralist representation should also be required.[58]

Capacity Development Strategies to Enhance Access to Justice with NHRIs

Ensure legitimacy

- **Establish sound founding legislation.** NHRIs should ideally be established by law or, preferably, by constitutional amendment, as presidential or other kinds of decrees make them vulnerable to having their powers limited or abolished. In order to establish NHRIs within the appropriate legal framework, there needs to be sufficient political commitment that can be generated by the Government itself or encouraged through advocacy by citizens' groups, NGOs and other civil society organizations.

- **Strengthen NHRIs' accountability.** Ensuring that NHRIs report publicly on their activities is a way to strengthen their accountability. Reporting may be done formally to a parliamentary body and/or to a committee representing different sectors of society, or informally through periodic meetings with civil society organizations, government officials, etc. Generally, an annual report on the activities of the NHRI should be submitted to Parliament and shared with the media.

- **Allow for investigative powers and develop capacities to address systemic violations.** NHRI's founding legislation should allow for investigative capacity with respect to all human rights violations (civil and political as well as economic, social and cultural). They should have the authority to investigate all actors, including government officials, insurgent groups, armed forces, the police, etc. They need to have freedom to access, for example, all places of detention, and their security along with those whom they speak to must be guaranteed. Their ability to access information, documents, materials and evidence from different actors is also critical in ensuring public legitimacy. NHRIs may also be granted the power to initiate legal proceedings on their own, to conduct public enquiries on issues where systematic patterns of abuse may be found, and provide the necessary recommendations for addressing and improving the human rights situation in their country. NHRI's capacity for policy analysis and identification of systemic problems can maximize the impact of its investigative work. Also, it is necessary to establish a way of linking (in given cases) NHRIs with the Chief Prosecutor for imely prosecution of human rights violations.

The Islamic Human Rights Commission – Iran

The experiences of the Islamic Human Rights Commission (IHRC) in Iran demonstrate that a human rights watchdog organization can operate successfully, despite the lack of a strong legal mandate, if it is anchored well in the national governance structure. Though the IHRC has a limited mandate (and has a status similar to that of an NGO), it is treated by the Government as a national institution and functions in a similar capacity. It works on human rights complaints, human rights education, and human rights reporting as well as building partnerships and networks. By supporting such institutions, UNDP can be involved even in sensitive and controversial issues.

- **Ensure financial sustainability.** NHRIs should be able to present and defend their case for funding to Parliament without depending on the executive to do so. Sensitizing of parliamentarians through committee structures is important to increase Parliament's awareness of the work carried out by NHRIs and encourage allocation of sufficient resources. Also, alternative routes of funding (e.g., through international cooperation) can be explored without compromising financial sustainability.

Secure autonomy and independence

Autonomy and independence are crucial to NHRIs. Without autonomy and independence to monitor and report on human rights issues, they will be

[58] *In countries where there are multiple NHRIs there may be a limited number of efficient, qualified and experienced staff to meet the needs of all the institutions.*

unable to fulfil their duties. To guarantee this independence, it is necessary to ensure that:

- **Appointments are made through a transparent process** that selects the best-qualified members and at the same time ensures a pluralist representation of society.
- **Membership and staffing of NHRIs is diverse** (including from disadvantaged groups) and qualified in working on human rights.
- **Clear terms of appointment are defined** so that commissioners cannot be removed simply because they criticize the Government.
- **The authority to hire and fire staff** lies within the jurisdiction of the NHRI.
- **Commissioner/ombudsman/staff should not hold or perform incompatible functions elsewhere** - in either government or civil society.
- **Immunity should be provided for staff from prosecution** for words spoken or acts performed under the mandate of the NHRC.

Increase accessibility

Accessibility of NHRIs can be improved in order to facilitate reporting of human rights violations. By ensuring that complaints-making mechanisms are accessible is one way to accommodate civilian complaints. Some strategies to increase access, especially for disadvantaged people, to NHRIs include:

- **Expanding geographical outreach** through developed structures (regional and local).
- **Non-threatening/neutral location of premises** (including premises that are sensitive to the needs of disadvantaged groups – e.g., accessible for people with physical disabilities).
- **Ensuring representation of disadvantaged groups** in the institution's membership.
- **Establishing linkages with NGOs** working on particular issues and with disadvantaged groups.
- **Initiating investigations focused on issues facing disadvantaged groups.**
- **Promoting public enquiries.**
- **Advocacy work on the rights of the disadvantaged,** for example, through outreach to the media.

Build linkages

Improve coordination with the judiciary, prosecution, police and prisons. NHRIs should complement the work of the formal justice system. NHRIs should have the mandate to ensure that cases are dealt with, e.g., by filing cases in court or by having them automatically filed by the prosecution where they lack prosecutorial capacities. Though NHRIs usually have no powers to enforce their decisions, they can help facilitate the judicial process when they work with the formal system. In such circumstances, the judiciary is critical to ensuring appropriate redress and prevent impunity. Linkages with police and prison institutions can expand NHRIs' access to persons in detention. Ways to build linkages include:

- **Strengthening cooperation between different types of NHRIs.** Where there are multiple national institutions for the protection of human rights, maximum coordination needs to be ensured through joint planning and regional and international cooperation among national human rights institutions. This can serve to mutually develop the capacities of the various institutions working on specific human rights issues, as well as reducing role confusion among NHRIs. Cooperation can also strengthen the internal security of the institution itself, if its activities make it vulnerable to threats by those complicit with human rights violations. Cooperation and planning strategically can help in making the optimal use of limited resources.
- **Constituency building to ensure maximum legitimacy.** Legitimacy is indispensable for NHRIs to be effective. Initial legitimacy can be strengthened through ensuring maximum participation of different sectors of society, particularly those involved in human rights within and outside government (including human rights activists and civil society organizations) during the process of establishing NHRIs. Much of the public legitimacy of NHRIs lies in the extent to which they succeed in developing links with the Government, the media, professional groups (lawyers, forensics, etc.) and other civil society institutions, and address urgent social issues, which are often controversial. In addition, a well-maintained case handling process can increase its reputation in society in general. Cooperation with UN and regional human rights bodies and special procedures on the follow up to government commitment can also assist NHRIs in their work and in building networks regionally and internationally.

4.4.2 CIVIL SOCIETY OVERSIGHT

Civil society actors, in particular civil society organizations (CSOs) and the media can act as watchdogs over the justice sector and function as a force for accountability. Civil society is a crucial agent for limiting authoritarian practices, strengthening the empowerment of the people and improving the quality and inclusiveness of the justice sector. [59]

Role of Civil Society in Strengthening Access to Justice

Civil society actors have a five-fold function in improving access to justice:

- As campaigners and advocates pressing for reform.
- As monitors, fostering accountability within the justice sector.
- As disseminators and communicators of information.
- As educators through legal empowerment and legal literacy initiatives.
- As direct agents helping people access justice through legal aid and representation services.

This section focuses on the first three functions of communicator, campaigner and monitor; the others are covered in Chapter 5.

Experience shows that without considerable public pressure, governments and other state institutions are unlikely to foster the transparency and accountability needed to curb malfeasance by officials. Therefore, it is important that civil society actors engage in dialogue to pressure and negotiate with justice institutions and political authorities to change practices in the justice system and to ensure that new regional and international systems of protection are given effect in national justice systems and institutions.

Civil society actors can improve access to justice through systematic independent observation, monitoring and evaluation of the justice system and sustained reporting back to actors within and outside of the justice system about procedures, behaviours, and practices. Scrutiny applied by the media and civil society can aid the successful and just resolution of disputes and strengthen overall accountability within the justice system.

While there are no explicit international standards which guarantee civil society's role in access to justice, several instruments state the importance of civil society involvement in ensuring transparent and accountable governance processes in all sectors of society.[60] In addition, two international legal instruments guarantee freedom of association and thus, define the parameters within which a government may restrict or regulate CSOs – the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights. [61]

Challenges in Ensuring Access to Justice through Civil Society Oversight

Civil and political rights may not be legally protected

Despite being enshrined in international conventions and resolutions, if civil and legal rights are not protected under national legislation, civil society actors wishing to use these rights to challenge the State or other more powerful actors may be threatened or intimidated.

No accountability or enforcement mechanisms

In many countries there are no mechanisms to enable the public to claim their right to information, and no public and media access to court proceedings.

No effective media

In its absence, CSOs or coalitions advocating reform, work largely in isolation and are deprived of the opportunity to influence and mobilize public pressure.

Journalists may lack professional skills

In many countries where civil society has been repressed or is weak, the media often lacks the professional skills, understanding and resource base needed to undertake investigative reporting.

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[59] *There is no one standardized definition of civil society, however there is agreement more or less on two main principles about what civil society is not. First, civil society is not part of the Government or state apparatus. Second, civil society is not the market; it is non-commercial and therefore excludes profit-seeking firms. The media are considered part of civil society because of the role they play in the formation of public opinion even though they are technically considered firms. CSOs in this section include NGOs, CBOs, PVOs and the media.*

[60] *One example is the Copenhagen Declaration on Social Development and the Report of the 1997 Special Session of the UN General Assembly. Further, the GA Resolution 48/134 on national institutions for the promotion and protection of human rights and the Commission on Human Rights resolution 2003/76 on National Institutions state that the composition of national institutions ensures the pluralist representation of the social forces (or civil society), highlighting the importance of partnerships and increased cooperation with representatives of NGOs, universities and qualified experts.*

[61] *Some states are not signatories to the International Covenant on Civil and Political Rights, 1966 and the Universal Declaration of Human Rights by its nature was never opened for signing. Despite this, the Universal Declaration has been accepted as having the force of international customary law since 1968 and as such lists rights which are universal in nature. These rights apply to all people of the world, and the Covenant falls under the same category by virtue of its adoption and application. As such, the basic rules are binding.*
experts.

Few civil society actors prepared to advocate for justice and legal reform

Often CSOs in lesser developed countries are dominated by middle-class professionals and based in urban centres. Consequently, they generally represent relatively small constituencies, which exclude the poor, vulnerable and disadvantaged. Therefore, even if they are vocal and active, individual CSOs often exercise very little leverage on behalf of a reform agenda.

CSOs may be unable to form coalitions to champion reform agendas

Constraints to collective action vary, but are largely as a result of policy issues and leadership styles. Many CSOs are personal expressions of dynamic leaders who, having founded an organization, are reluctant to share power with or subordinate their identity to a coalition involving other CSOs.

Misuse of the principle of 'judicial independence'

While some judiciaries welcome civil society involvement, the principle of 'judicial independence' is often misused as an argument to reject any form of public control or accountability. The notion that the justice system should be considered a public service is not widely understood.

Non-lawyers may be ill-informed

Legal professionals often argue that non-lawyers do not understand the law and what they do and are therefore incapable of contributing usefully to their work.

Civil society may lack the expertise and willingness to monitor effectively

In many countries civil society is reluctant to engage in activities which involve monitoring, analyzing and criticizing justice institutions as it is considered as dangerous. Being too vigorous in criticism could lead to trouble, either officially or unofficially. There is also often widespread pessimism about what, if anything, civil society actors can achieve in such matters.

Other capacity constraints faced by CSOs

- CSOs often lack the internal capacity to fulfil their role, including limited resources, knowledge and technical skills, and as a result they often lack the necessary legitimacy and credibility required tomeet their objectives.

- Competition for resources among CSOs may be fierce.

- CSOs often lack sustainable funding and are seen as lacking in transparency and accountability due to limited capacity for proper financial and administrative management.

- CSOs are sometimes more accountable to donors than their constituents and are criticized for being donor-driven.

- The way in which governments and civil society react to each other can be an obstacle. Non-democratic states, which often have corrupt and inefficient bureaucracies and are dominated by patronage networks, generally do not respond positively to reform initiatives. CSOs can also view the Government as the main obstacle to achieving their objectives and can become unnecessarily critical and antagonist rather than engaging constructively with the Government.

Capacity Development Strategies to Enhance Access to Justice with CSOs

Monitoring

- **Organized and routine court monitoring normalizes the observation and information-gathering process.** The objective of civil society court monitoring groups (ideally comprising of media and CSOs) is to report on what takes place in courts and to make recommendations for improvement. This type of monitoring provides a comprehensive way to examine a local justice system and is particularly useful for reformers within the system. It protects them from external threats and frees them from internal pressures to deliver a verdict in favour of one party regardless of the evidence. In the Philippines, observers attend courts to monitor and study court performance and report to the Supreme Court any violations of judicial ethics and procedures they observe. The information gathered from these observations is published in the hope that it will stimulate reform and improvement. Reports indicate that judges are altering their conduct because of the project and are ordering their staff to be on their best behaviour. In this particular project, the monitors are not known to the judges, and there is no way of knowing when the monitors might be present in the court.

- **Effective monitoring mechanisms are complex, and more effort needs to be dedicated to their design and refinement.** This should involve developing the technical capacity of civil society to effectively monitor and evaluate the functioning of justice sector

institutions. Developing this technical capacity should include the preparation of reliable empirical studies of justice system functioning and the impact of reforms.

- **Provide support to judicial councils or other institutions playing a role in judicial selection processes.** Only with judicial leadership fully committed to justice reform, will it be possible to move forward on commitments related to access to justice and succeed in efforts to eradicate corruption and overcome impunity. The strategic and organized public participation in judicial appointment processes can have a significant impact on the outcome of these processes by ensuring that persons who are qualified to dispense justice, in terms of competence, integrity and dedication, are recruited to key positions.

- **Providing hard facts is important.** Faced with accurate and reliable data, it is much harder for officials to contend that allegations are baseless. This can also help in constituency building, as one crucial foundation for informed public debate is sound data and analysis on the system's internal workings. This typically involves research to generate information, and can also involve innovative and participatory methods, which in themselves act as awareness raising and mobilization mechanisms. A lack of reliable data will also impact on the ability to conduct investigative journalism into, and legal analysis of, the judicial system.

- **Public opinion surveys provide empirical evidence on public opinions towards the justice system.** While such surveys often reveal little that is not already known or suspected, they can present opinions about public issues in a way that is difficult for leaders to deny or ignore. Such data alone cannot force reform, but it contributes to a climate in which political will for reform is easier to encourage.

- **Civil society involvement will have more impact if it is ongoing and constructive.** This means sustained engagement with the issues and institutions of the justice sector and constantly taking the initiative to present proposals for the development of transparency mechanisms or other mechanisms to improve the justice system. CSOs should remain active and vigilant even after completing a successful campaign as ingrained non-transparent practices can easily reassert themselves.

Networks and coalitions

- **Linking civil society with wider networks,** nationally and internationally can have a larger impact on the reform process and make individuals less vulnerable to threats, intimidation and other risks inherent in community mobilization. Linking CSOs with National Human Rights Institutions designed to oversee the actions of state institutions and protect human rights, can establish a nation wide presence through regional offices and local networks. International organizations can function as a remote accountability mechanism at the local level. Human rights CSOs have been particularly adept at using international counterparts and institutions to draw attention to governmental policies and behaviour not in accordance with international conventions ratified by the Government. International CSOs such as Amnesty International, Human Rights Watch and the International Federation of Journalists have successfully drawn the attention of donor governments and key actors in the international community to harmful state practices, after having been alerted of cases and problems by local CSOs.

- **Support coalition building to strengthen support networks.** Given the limited size, resources and impact of most CSOs, partnerships between CSOs, the media, civil society, and reformers within the justice system can build astrong support network able to hold the legal system more accountable, and create a widespread demand for change. Coalitions that include diverse groups, which have established reputations and credibility are likely to have greater impact. Successful coalitions have a broad membership, ideally one which cuts across classes or other social divisions, demonstrating the legitimacy and relevance of the concern, and limiting any suggestions it might be a narrow interest group.

- **Support e-governance and the use of networking technologies to strengthen CSOs.** Foster interaction and partnerships between CSO networks through international, national and local e-governance initiatives. CSOs can enhance their own internal capacities and networks, and take a stand vis-à-vis issues relevant for the local context by harnessing both expertise and knowledge through new and existing CSO networks.

Media

The media can be an effective advocacy tool to promote behavioural change, disseminate information, raise awareness and monitor the obligations by duty bearers.

- **Use the media to catalyze the justice sector.** This has been done either through exposing bad practice or corrupt behaviour by officials, or alternatively by praising good practice or good behaviour and reinforcing positive service delivery innovations. Individual cases can also be used as opportunities for broader advocacy by highlighting success stories, which can have a wider effect and help create an enabling environment for future cases.

- **Media capacity development interventions.** Strategies could include the education of journalists about legal processes, about their responsibilities and their rights, and how to effectively and responsibly report on the judicial system in order to support legal reform initiatives. It is important that there are specialist journalists writing in this field, as non-specialists may use terminology inaccurately or inappropriately, sensationalize or personalize issues, or fail to put the issues into a broader context.

- **Investigative journalism and professional legal reporting can make the justice system more transparent.** By making the system more transparent, it becomes more difficult to conceal corruption and malfeasance. In Sri Lanka, the Asia Foundation has supported the development of a university degree programme in investigative journalism. In the Philippines, the Centre for Investigative Journalism has provided training to journalists and sponsored investigative press reports, which have exposed judicial malfeasance.

4.4.3 PARLIAMENTARY OVERSIGHT

The justice system includes formal and informal institutions, mechanisms, and processes that are meant to provide remedies for disadvantaged individuals' grievances within national and international human rights frameworks. By using its monitoring and legislative powers, Parliament can oversee the various aspects of the justice system to ensure that the institutions function properly.

Parliament should reflect public and social concerns in order to retain public legitimacy and promote the participation of constituents, particularly members of disadvantaged groups. When disadvantaged groups are given a voice, Parliament's oversight function can play a significant role in ensuring the delivery of constitutionally guaranteed socio-economic rights and the further strengthening of a rights-based culture. Responsible parliamentary oversight of the justice system is therefore, an essential component of good governance and democracy.

Role of Parliament in Strengthening Access to Justice

Parliament can exercise its oversight functions through a wide range of means. One of the most obvious controls that Parliament exercises over the judiciary is the ability to confirm, review and impeach executive judicial appointments. Through this power, Parliament is able to monitor the composition of the courts.

Parliament also exercises a significant influence over the justice sector through its power of budgetary allocation. Parliament is responsible both for allocating funds and overseeing their usage.

Another one of the most direct forms of parliamentary oversight of both the judiciary and the police is through committees. Committees provide parliamentarians with the opportunity to organize their work and to focus expertise. In addition to specific judiciary and police oversight committees, a number of other parliamentary committees perform relevant oversight functions. For example, counter-corruption committees investigate claims of corruption among judges or police. Some ad hoc or select committees influence justice and security sector policy and undertake other types of oversight of specific justice system actors. Committees also allow for direct communication between Members of Parliament (MPs) belonging to different political parties. Access to committees by all constituents, for instance through public hearings, petitions and the media ensures that their effectiveness is maximized.

Parliament can also perform oversight functions through a range of actors. Parliament has the power to create or enhance National Human Rights Commissions (NHRCs) so that they can monitor the actions of the justice system as a whole and to initiate litigation or provide *amicus curiae* submissions when necessary. As mentioned earlier in this chapter, Ombudsmen can also be important tools for oversight. Parliament has the power to create an ombudsman office charged with the task of overseeing specific sectors of the justice system. In addition, MPs can work with NGOs and think-tanks that can act independently to monitor the justice system in order to have access to more information. Parliament can also create specialized think-tanks to provide it with additional expertise when needed. Finally, Parliament often exercises

"ultimate oversight", even over watchdog institutions such as human rights commissions to ensure that they in turn are effectively carrying out their mandates.

Other means of strengthening parliamentary oversight include:

- **Inviting experts from civil society** to participate in parliamentary hearings.
- **Engaging research institutes and universities** to carry out research and audits.
- **Ensuring that NGOs can have access** to all relevant public policy documents.
- **Stimulating the existence and functioning of NGOs** by lowering the bureaucratic barriers for legal recognition of NGOs or giving financial support.
- **Allowing the media to cover abuses** and encouraging training in media awareness on issues relevant to the justice sector.
- **Requesting that independent institutions conduct research** on the executive's budget and activities.[62]

Through its role in overseeing the executive, Parliament can also exercise oversight of ministries that control various aspects of the justice system. Parliament must hold the executive branch accountable for their policies and activities. In this context, the most relevant bodies within the executive are the Ministry of Justice, which oversees prison systems and sometimes, the Attorney General's Department; the Ministry of the Interior, which oversees the police; and the Ministry of Defence when the military is performing policing functions. This can be accomplished through enacting laws and providing the executive with legal guidelines. Through this legislative power, Parliament is able to control the finances of agents of law enforcement. Parliament can have significant legislative, financial and oversight power available to it. Some tools at its disposal include:

- **Questioning officials** on their activities and intentions.
- **Conducting public hearings** on new legislation proposed by the executive.
- **Responding to complaints** of constituents regarding the justice system.
- **Setting up special parliamentary inquiries.**
- **Deciding on defence and security budgets.**
- **Holding a vote of confidence** on the executive or impeaching a specific minister.
- **Releasing information to the public.**

Challenges in Ensuring Access to Justice through Parliamentary Oversight

The greatest challenge to parliamentary oversight is striking a balance between intervention and respect for the independence of the judiciary. Judges must be able to make decisions in an atmosphere free from intimidation from the legislative branch. However, at the same time, the judiciary has to respect Parliament's duty to keep it to account.

A clear line must also be drawn between parliamentary oversight and executive control. Parliament should not micro-manage the justice system. However, Parliament's constitutional duty to oversee the executive must be respected. The executive must operate transparently and share all relevant information with Parliament.

Ombudsmen and NHRCs can also face limitations. Since their mandates originate in Parliament they may not be entirely independent, which can hinder the effectiveness of their work.

Political sensitivity can also pose a major challenge. For example, it is relatively rare for parliamentarians to challenge executive nominations to the judiciary since such nominations are generally considered a privilege of the executive.

An additional challenge is posed by the difficulty of ensuring that disadvantaged groups are enfranchised. Parliament does not always listen to the concerns of their least influential constituents. Yet, these are the groups that most desperately need their assistance. Programmes that promote participation should be particularly focused on these groups.

Another challenge is that development organizations, including UNDP, tend to work with Parliament and the justice sector separately. Working together with both of them could enhance their relationship.

[62] *Born, Hans. 2000. "Representative Democracy and the Role of Parliaments: An Inventory of Democracy Assistance Programmes." 4th International Security Conference, Geneva, November 15-17, 2000. International Security Fourm, Geneva. [http://www.isn.ethz.ch/5isf/5/Papers/Born_paper_IV-2.pdf].*

Capacity Development Strategies to Enhance Access to Justice with Parliamentary Oversight

By supporting parliamentary oversight of the judiciary, UNDP can ensure that a system of checks is put into place and that judiciary is held accountable. Providing support to parliamentary committees dedicated to overseeing the judiciary, including providing information (e.g., by encouraging experts to participate in parliamentary hearings, engaging research institutes to carry out research and audits, etc.) and assisting in building commitment and political will, can be a strategic entry point for UNDP.

Some specific strategies:

- **Promote awareness** among MPs about criteria for objectively assessing potential justices.
- **Provide policy advice** to the executive or the legislature in any of the areas falling within parliamentary oversight of the justice sector.
- **Provide comparative and other research** to enhance the institutionalization of parliamentary oversight.
- **Advocate for budgetary reform** that addresses impediments facing the disadvantaged, especially in accessing justice.
- **Promote the enhancement of oversight** components in the mandates of various parliamentary committees.
- **Assist in ensuring that committees are empowered with sufficient research and other resources** to fulfil their oversight role.
- **Encourage constituent participation** in the work of committees.
- **Emphasize the role of socio-economic factors** in determining the conduct of members of the justice and security sectors.
- **Assist in the creation of advocacy-based organizations and institutions** and facilitate transparent links to Parliament.
- **Facilitate dialogue** among the executive, legislature, and civil society regarding improvements to the justice system.
- **Work with Parliament and the justice system in tandem** through joint programming, budgets, steering committees etc.
- **Provide support to parliamentary committees.** Through committees, parliamentarians have the opportunity to organize their work and to focus expertise. A well-developed committee structure is needed if Parliament is to be effective in its oversight of the justice system. Committees are vital as they allow for direct communication between parliamentarians belonging to different political parties.

4.5 Enforcement

4.5.1 Police

4.5.2 Prisons

4.5 ENFORCEMENT

The two institutions charged largely with the responsibility of enforcing the law are the police and the prisons system. Without enforcement, legislation promoting access to justice and defending the rights of the disadvantaged will be ineffective. Programmes seeking to work in the area of access to justice of the disadvantaged need to engage with the police and prison system as they are often the most common point of contact disadvantaged groups have with the formal system

At the first stage of enforcement, the role of the police is crucial. From an access to justice point of view, the role and mandate of the police goes beyond the fighting of crime or serving as a security agency. They are also public service providers who have an important responsibility to uphold and defend human rights. Unfortunately, in some countries the police have not been so effective in preventing human rights violations, or have even been accused of abusing their discretionary powers, and infringing on the rights of the people they are supposed to protect.

Prisons are the second key element in enforcement. They are a place in which people are confined and deprived of a range of liberties. The prescribed function of a prison is to enforce judgments under criminal law. Conventionally, prisons are institutions authorized by government, which form part of a country's criminal justice system. The responsibility for the prison service normally falls under the Ministry of Home Affairs, although in some countries this responsibility lies within the Ministry of Justice.

4.5.1 THE POLICE

Role of the Police in Strengthening Access to Justice

The role of the police in access to justice is two-fold:

- **Maintenance of law and order**
- **Enforcement of judicial decisions**

These roles grant the police broad discretionary powers, including the use of force, which, if misused, can result in grave human rights violations. The police, in this context, must be defined within a human rights and justice framework, which considers the primary mandate of the police one which respects and protects human dignity and maintains and upholds the human rights of all people.

The right to use force,[63] which is central to the role of the police, can lead to human rights violations if there is unnecessary and excessive use of force. Police can also misuse their authority if they engage in arrest and detention without clear charges, thereby seriously undermining the right of individuals to freedom and liberty.

To guarantee that the discretionary powers of the police do not lead to human rights violations, there is a need to set up elaborate legal structures and accountability measures, which can monitor performance and successfully restrict the abuse of police powers.

A number of human rights instruments define the boundaries within which this power can be used. The instruments relating most directly to police performance are described below:

- **Code of Conduct for Law Enforcement Officials** defines, among other things, the circumstances under which force can be used; the accepted types of force; the principles of confidentiality with respect to sharing information, as well as issues of how to secure the medical health of persons in police custody.

- **Basic Principles on the Use of Force and Firearms by Law Enforcement Officials** defines the circumstances under which force and firearms should be resorted to; the rules guiding the use of force and firearms in terms of exercising restraint, minimizing damage and ensuring medical aid; the role of the Government when abuse of force takes place, as well as reporting and reviewing of procedures relating to cases of injury or death.

- **Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment** defines the circumstances under which detention should be carried out; how persons under detention should be treated and the rights and entitlements of people in detention.

Challenges in Ensuring Access to Justice through the Police

Inappropriate legal frameworks

Most police agencies in the Asia-Pacific region are still guided by past colonial laws and regulations that do not support the principles of human rights, such as accountability, transparency in actions and participation of the people. Some of the laws are in direct conflict with international human rights standards and constitutional guarantees of liberties. Inappropriate and outdated regulations can compromise the effectiveness of the police in serving the needs of the disadvantaged.

Discriminatory practices

Institutional and systemic discrimination by the police prevents many disadvantaged people, especially women, from seeking redress for a

[63] *To apprehend a felon, for example, or to negotiate a family dispute or engage with someone who is mentally ill.*

grievance. Behaviour can range from ridicule, ignorance, and hostility, to sexist and derogatory remarks. The police are often seen as favouring elite members of the community (either because these individuals can exert power over the police or because they can afford to bribe them). As a result, powerful people are often immune from the consequences of crimes they commit, blatantly violating human rights standards.

Insensitive behaviour towards victims of crime

Victims of crime are in a vulnerable situation, and often have to deal with poor service, lack of awareness and insensitivity on the part of police officers. For example, victims of rape need special kinds of services. Police should also be sensitive to the psychological and medical difficulties victims of sexual crimes face and should provide them with the care and support they require. In some cases, enforcement officials do not take rape cases seriously and claim that reports of sexual assault are exaggerated and deserve no special attention. Similar lack of sensitivity may also be displayed when dealing with people with physical or mental disabilities.

Lack of public confidence/faith in the police

Interaction between the police and the community in many Asian countries has traditionally been negative, with antagonism, mistrust and prejudice common to both sides. Many citizens do not feel welcome at police stations and feel discouraged from filing reports. The poor public image of the police is also caused by many instances of privileging the rich and powerful in society, common practices of corruption and bribery and non-registration of cases. Moreover, the police often do not include community perspectives in the planning and execution of their work which leads to further alienation and distrust on the part of the community.

Lack of transparency/access to information

Mechanisms to make policing more transparent and accountable are lacking in all countries in the region. People may generally have difficulties in accessing information about departmental rules, copies of complaints they have filed and data or information on crime, policies and procedures adopted while making arrests and detentions etc.[64]

Insufficient oversight and accountability mechanism

There is often an absence of suitable internal and external oversight mechanisms to monitor the quality of policing. For example, the "tough on crime" strategies adopted by many governments in the region often overlook abuses committed by the police. Also, mechanisms to ensure police accountability may be neglected or even weakened in the name of fighting crime or terrorism.

Influence of external actors is too great

The police force is often closely connected to the executive and consequently subject to various political influences and pressures, which may be detrimental to its proper functioning and performance. This lack of independence from external influences can encourage a culture of impunity within the police force. Unless the police are only accountable to the rule of law and guided by the framework of respect for human rights, their ability to fulfil their duties as defenders of human rights will be seriously compromised.

Excessive arrests

Disadvantaged and powerless sections of society often experience a higher number of haphazard and unlawful arrests by the police resulting in casual detention and victimization. Police in the Asia-Pacific tend to 'over-arrest' which not only leads to over-crowded prisons and pre-trial detainees, but as discussed in the next section on prisons, it is also a violation of human rights.

Poor protection of detainees

The conditions under which detainees are kept in police custody often violate their human rights. Detainees may be chained within offices, kept in police cells for long periods of time or not given adequate medical attendance. Clear regulations protecting detainees and training on respecting the rights of detainees is often lacking.

Poor working ethics and low police morale

Low pay rates and adverse working conditions serve as obstacles to good policing, creating low morale and poor ethics within the police force. This problem is also related to limited career prospects and lack of incentives, as few forces have a sustained and reliable motivation scheme for their members. Police staff often languish in their positions for long periods of time without due credit for good performance. This furthermore deprives the police service of the visionary and talented police officials who are needed to strengthen the quality of service provided.

Poor administration and insufficient training

Shortfalls in supervisory and managerial competence and insufficient human resource management lead to lack of discipline, ineffective management and poor administration. Further, the police are generally under-trained and many critical functions are consequently performed by incompetent personnel.

Lack of resources and mismanagement of funds

Police services are generally severely under-resourced and suffer from lack of basic amenities and tools. Also, poor resource management

[64] *Commonwealth Human Rights Initiative. 2004. "Policing – A Human Rights Perspective." February 2004: p. 6-7. New Delhi. Seminar organized by the Ministry of Home Affairs in association with the Commonwealth Human Rights Initiative and the Delhi Police, February 12, 2004.*

capacity within the police force makes it difficult to sustain various reform measures. Moreover, the police have a tendency to focus on protocol, ceremonial and static security tasks at the expense of providing other much needed public services.

Rampant corruption and malpractice

Corruption and malpractice in a variety of shapes and forms exists in most policing agencies. Rampant corruption is linked to the abuse of the wide discretionary power enjoyed by the police, as well as other factors mentioned above.

Inefficient crime prevention and weak investigation

The level of efficiency in crime prevention is low, and there is a critical need for improvements in crime investigation. Further, the police often lack appropriate strategies for engaging communities in crime prevention.

Poor coordination

Lack of coordination among police, prosecution, courts and other relevant agencies is another obstacle for ensuring access to justice. For example, police should be able to refer to the appropriate branch of the judiciary or even refer cases to ADR systems as opposed to the formal courts.

Police Reform and Strengthening the Police Force – Bangladesh

A key lesson learned from the police project in Bangladesh is the need for political will, determination for reform, high-level project management skills and conditional and sustained support from development partners to improve governance, the rule of law and equitable access to justice. It is crucial to detect change agents within the police force and build an internal constituency for reform through formal and informal discussions. Effective and independent monitoring and evaluation of reform progress is also essential. Police procedures should be monitored to ensure that they are poverty-sensitive and pressure from outside (e.g., CSOs) can ensure that procedures are implemented properly and in a sustainable manner. Addressing professional concerns and problems, for example, recruitment, posting, promotion, career management, strategic decision-making, intelligence-based investigation, oversight, future directions and planning, and managing politic interferences, etc., can also help build confidence within the police force and encourage the adoption of human rights in their work.

UNDP Bangladesh

Capacity Development Strategies to Enhance Access to Justice within the Police

Often access to justice problems stem from the fact that police have a responsibility to enforce judicial decisions and maintain security, law and order at the same time as ensuring that human rights are upheld and respected. In order to improve access to justice, strategies for police, reform should subsume traditional "public administration reform" activities under more human rights focused activities, specifically with regards to enhancing accountability, inclusion and adherence to human rights standards.

Law reforms

- **Revise laws, regulations and procedures that do not correspond to principles of good policing, or are directly in conflict with international human rights standards.** To this end, collaboration with the Ministries of Law or Justice and/or Law Commissions should be encouraged. Depending on the political will for reform in the country, strategies could support coalition building to bring about public pressure for reform, while direct support from the legislative branch and civil society can bring about legal reform that ensures police conduct adheres to international human rights standards. For more specific suggestions, refer to the earlier section in this chapter on Ministry of Justice and National Human Rights Institutions.

Accountability and transparency/access to information

- **Strengthen processes and procedures.** Organizational elements for strengthening accountability could include specific departmental policies and procedures, precise job descriptions as well as inspection systems and performance evaluations to ensure that rules are observed and undue and excessive use of power is curtailed including unnecessary 'locking up'.[65] Standard operating procedures are important to improve accountability, efficiency, uniformity and transparency. It is also important to adopt processes and procedures on substantive issues such as establishing an anti-corruption strategy and a robust code of conduct.

- **Internal body for oversight.** Support the establishment of institutions that deal with complaints about police conduct, for example, a professional standards unit. A professional standards unit is an investigative and administrative institution within the Police Department primarily responsible for ensuring

[65] *Penal Reform International and Regional Partners. 2002. "Access to Justice and Penal Reforms. Special focus: Under-Trials, Women and Juveniles", Second South Asia Regional Conference, Bangladesh 2002, Section 5, Point 10. [http://www.penalreform.org/download/SARO/dhaka_Conference.pdf].*

the integrity of the Department by focusing on matters of alleged violations or misconduct by police authorities as well as issues of corruption. Their mandate is to take disciplinary action and identify organizational conditions that may contribute to misconduct or poor efficiency. In addition, a periodic performance evaluation could help in monitoring individual officers, and it could also encourage improvement in services as they would be rated on the types of services they provided.

- **Involvement of Police Commissions and quasi-judicial institutions.** Support could be given to the setting up, or strengthening of, a Police Commission. A Police Commission is an independent agency with the mandate to investigate citizens' complaints about misconduct of municipal police officers. A Commission provides administrative and investigative support services and is empowered to hear and determine appeals against disciplinary penalties or dismissals and to conduct hearings into public complaints. Involvement of quasi-judicial bodies such as women's commissions and human rights commissions could also help in monitoring police conduct with regard to disadvantaged groups. See National Human Right Institutions in this chapter for more information.

Civilian Police Commissions

In Sri Lanka, a National Police Commission has been established where only civilians can be part of the Commission. The Commission, with the Inspector General of Police, has disciplinary control over police officers and controls the appointment, promotion, transfer, and dismissal process. It has the power to investigate public complaints of the police as well as individual cases brought against particular police officers or the police service and provide redress in accordance to the law. The Commission also sets the codes of conduct and standards as well as establishes schemes for recruitment, training, improving efficiency and independence of the police service. The Commission is ultimately accountable to the Parliament to which it has to report on its activities annually.

- **External oversight mechanisms.** As discussed in the previous section, civil society oversight as well as parliamentary oversight is critical to ensuring the accountability of the police. Initiatives to strengthen interaction between police officers and the community can help to identify officers who are misbehaving, and reward those who are performing well.[66] In addition, the media can also play a role in enhancing accountability, and access to non-confidential police information should be increased through the development of a police-media relations strategy.

- **Visiting systems.** Support could be given to independent custody visiting systems that allow volunteers from the community (NGOs, CBOs, etc.) to visit police stations to check on the treatment of detainees and to observe the conditions under which they are held. Similarly, support could be given to NGOs to help with the protection of witnesses in collaboration with the police system. However, these visits should only be conducted by appropriately qualified persons and with due discretion and confidentiality. Additional protection measures need to be put in place for witnesses under witness protection.

- **Access to information.** Maintaining proper records of cases brought before each police station can ensure suspects have access to information about their case, enabling records to be readily available for examination on request. To ensure that confidentiality is respected, ethical principles and control mechanisms should be developed.

- **Investigation of police misconduct.** Efforts to strengthen accountability should also include oversight mechanisms to ensure that any deaths, disappearances, or serious injuries of persons while in police custody (or shortly after the termination of police custody) are thoroughly investigated.[67] In addition, a system should be developed for the reporting and reviewing of all incidents involving the use of force by police.[68]

Improved human rights/gender sensitive approach

- **Training and sensitization programmes.** To counter discrimination in the police force, the development and implementation of training and sensitization programmes on human rights, especially with regard to the specific needs of disadvantaged groups should be supported (e.g., gender sensitization, awareness of needs of people with disabilities, concerns of people with HIV/AIDS, constraints facing Internally Displaced Persons, etc.). Initiatives in this direction could also include support for curricula/training material development for national police academies and training institutions. UNDP Bangladesh, for example, has developed a detailed human rights training manual for the police.

- **Strengthening the role and numbers of women and minority groups in the police force.** This could be done both by targeted

[66] *Numerous examples exist from around the world of civilian oversight bodies vested with the responsibility to deal with citizens complaints of alleged police misconduct. These include the Civilian Complaint Review Boards of the USA, Independent Complaints Directorate (ICD) of South Africa, the Independent Police Complaints Commission of the UK, and the Peoples' Law Enforcement Board of the Philippines.*

[67] *Principle 34, Body of Principles for the Protection of All persons under Any Form of Detention or Imprisonment. (General Assembly Resolution 43/173, 9 December 1988).*

[68] *Principles 22-26, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. (Adopted by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.*

recruitment procedures as well as by giving special training to police officers from disadvantaged groups, and by supporting networks of these officers across police stations. To make the police more sensitive towards minority groups, strategies could include advocating for a more diverse police service and supporting the development of strategies to this effect.

- **Enhancing society-police linkages through community policing.** Community policing is a philosophy and an organizational strategy that promotes a partnership between police and the wider community. It is based on the premise that both the police and the community should work together as equal partners to identify and solve problems of crime. Supporting community policing can be an effective strategy to make police services more responsive to community needs and more service oriented. In community policing, it is important to ensure the involvement of women and a diverse representation from the community. It is also important to ensure that checks are in place to prevent abuses of power. Further, there is a need to ensure that community groups do not inappropriately become substitutes for official law enforcement, and that members are properly trained and monitored in their new roles.

Community Policing in India

Community policing is characterized by greater interaction between communities, the police and local governments in formulating and evaluating strategies for crime prevention and reaction. In India, several innovative community-policing efforts have been supported by UNDP. For example, members of some residential colonies conduct joint patrols with the police, facilitating communication and interaction between the two groups. This type of police-community interaction helps not only in combating crime, but also improves relations between the two groups and helps to increase the level of trust in the police.

- **Dialogue and baseline surveys.** Based on the above points, UNDP entry points to improve human rights within the police force could include strategies to encourage dialogue with government and police authorities. Other initiatives could include the development of baseline surveys of citizens' perceptions about policing and the police service. Greater involvement of local governments in formulating crime prevention policies (along with oversight functions) can also improve police services and encourage them to be responsive to the needs of the local community.

- **Model police stations.** Strategies to develop "model police stations" that can function as lead agencies in demonstrating how pro-people policing can benefit the community can be undertaken. In India, such initiatives have included the development of training-of-trainers programmes on good policing directed at potential "change agents", who are then given the responsibility of moving the change agenda forward in their respective police stations.

Enhanced professionalism and service orientation

- **Public administration reform interventions.** Increasing professionalism can result in a stronger adherence to human rights standards. Professionalism within the ranks of the police can be increased through training as well as public administration reform. Regular public administration reform interventions contribute to the performance of the police by strengthening management, IT-systems, financial capacity and strategic planning.

- **Human resources.** To strengthen the management of human resources in the police force, strategies could include support for revision of recruitment processes, modernization of training curricula, development of professional trainers and police instructors, and development of quality training modules and training materials. To improve leadership in the police, extensive leadership training programmes could also be supported. Any strategy directed at improving the performance of the police should ideally be backed by the institutionalization of effective complaint mechanisms to monitor activities and performance of police services.

- **Improving work conditions.** Initiatives directed at improving incentive structures and working conditions for police could also be supported. Pay, work conditions and allowances for police officers need to better reflect the complexities and challenges of their work. Promotion and career prospects for capable officers should also be increased and organization and rank structures should be flattened to more accurately reflect contemporary policing practice. Establishing a separate pay commission for law-enforcing agencies could be an inception strategy in this area. In order to reduce human rights violations and inappropriate working conditions for police staff, it is crucial that police practices are demilitarized – both in terms of organizational structure, function, and the type of training and weapons they are provide with.

- **Strengthening of investigation processes.** To address inadequacies in criminal investigations, there is a need to strengthen investigation processes. Improving criminal investigation can help in fighting impunity in all fields, such as human rights violations, police abuses, corruption and also common crimes. Impunity leads to a lack of confidence in both the police and the judicial system. Strategies could include:

  - **Support for an adequate legal and policy framework,** including respect for human rights in the course of criminal investigations, greatly increased technical and managerial competency and improved equipment and physical facilities.[69]

  - **Examining of intelligence-gathering methods,** which are critical to crime investigations and ensuring that they follow human rights standards.

  - **Coordination between intelligence agencies and the police** and clear demarcation of jurisdiction and authority of the different agencies.

- **Ensuring access to the police at regional and local levels.** Police services should not just be available in important urban centres but should be made available in remote areas and at the village level as well. Better police force deployment is an important means of ensuring improved access to law enforcement.

Foster political will and commitment for reform

There is no scarcity of information about the problems and the need for police reform, but there is little evidence of substantial action to resolve the issues. A key lesson learned from this is the need for political will, better coordination among different actors of criminal justice system, commitment for reform, sustained support from internal change agents, and high-level project management skills to ensure equitable access to justice and enhanced compliance with human rights instruments. Effective and independent monitoring and evaluation of reform progress is also essential. For example, a programme for police reform can focus on capacity development to enable police to effectively perform their duties. A well-designed and implemented programme based on a larger access to justice and human rights framework can make a meaningful contribution to improving the image, efficiency and effectiveness of the police as a service provider and protector of human rights. It can also act as a means through which states can implement international human rights obligations they have ratified.

4.5.2 PRISONS

The nature of prisons and of prison systems varies from country to country. The UN Standard Minimum Rules for the Treatment of Prisoners (Rule 8) requires segregation of prisoners by sex, age, criminal record, the legal reason for their detention and necessities of their treatment. More specifically, men should be separated from women, untried prisoners should be separated from convicted prisoners, persons imprisoned for debt and other civil prisoners should be separated from persons imprisoned by reason of a criminal offence and young prisoners should have their own facilities.

In the domain of criminal justice, prisons are used to incarcerate convicted criminals, but also to house those charged with, or likely to be charged with an offence. Custodial sentences are sanctions, which are authorized by law for a range of offences. A court may order the incarceration of an individual found guilty of such offences. Individuals may also be committed to prison by a court before being tried in court, generally because the court determines that there is a risk to society or a risk of absconding prior to a trial taking place.

Incarceration is designed to mitigate the likelihood of individuals committing offences: thus prisons are in part about the punishment of individuals who transgress statutory boundaries. Prisons also serve to protect by removing individuals from society, who are likely to pose a threat to others. Prisons can also have a rehabilitative role in seeking to change the nature of individuals in order to reduce the likelihood that they will re-offend upon release.

Prisons and Access to Justice

The concept of imprisonment from a human rights perspective is complex, since by definition, keeping people in prison infringes on one of the most fundamental human rights – the right to liberty.[70] From a human rights perspective, imprisonment must be guided by the following three principles:

- Any infringement of a person's liberty should only be a last resort and options for non-custodial alternatives should always be exhausted;

- Imprisonment should only be utilized in criminal matters and in strict accordance with international law related to securing prisoners' rights and consistent with the presumption of innocence;

- Defendants should be granted release pendingtrial and excessive use of pre-trial detention should be avoided.[71]

[69] *Principles 22-26, Basic principles on the Use of Force and Firearms by Law Enforcement Officials. (Adopted by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.*

[70] *UNDP. "Supporting Citizens' Access to Justice". UNDP Mozambique.*

[71] *UN. International Covenant on Civil and Political Rights (ICCPR), Article 9 (1).*

The relationship between the court and the prison system is particularly important, since a strong cooperation between the two institutions is necessary to ensure a well functioning justice system and to guarantee access to justice for prisoners. The fact that the court is responsible for depriving people of their fundamental right to liberty means that it also has an obligation to ensure that the human rights of the imprisoned person are protected during the period of incarceration. The court is also empowered to review the continuance of a prisoner's detention and it can have an important role with respect to the re-entry of prisoners into society. In some countries, the legal framework enables prisoners to petition the Supreme Court when they have a grievance with respect to their imprisonment, giving prisoners an important forum for the enforcement of their rights.

Francies Corale Mullin vs. the Administrator

In India, the right of prisoners' to file a petition with the Supreme Court has led to some landmark judgments. One such judgment is the case of "Francies Corale Mullin vs. the Administrator, Union Territory of Delhi & Others" in which the Supreme Court explained the elements of personal liberty under the Indian Constitution (Act 21). The case arose because the detainee's access to his family was restricted to one visit a month and he was only allowed to meet his lawyer in the presence of an officer of the Customs Department. The Supreme Court ruled that the right to life and liberty included his right to live with human dignity and therefore the detainee was entitled to have interviews with family members, friends and lawyers without such severe restrictions.

Once imprisoned, all persons deprived of their liberty should be treated with humanity and with respect for the inherent dignity of the human person.[72] The rights of prisoners are protected through various international law instruments The International Covenant of Civil and Political Rights (ICCPR) prohibits torture and cruel, inhuman, or degrading treatment or punishment, without exception or derogation. ICCPR mandates that, "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." It also requires that, "the reform and social re-adaptation of prisoners" be an "essential aim" of imprisonment. Several international legal instruments specify the rights of prisoners and the duties of the prison administration of which the most important ones are:

- Standard Minimum Rules for Treatment of Prisoners
- Basic Principles for the Treatment of Prisoners
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
- United Nations Standard Minimum Rules for Non-Custodial Measures [The Tokyo Rules]

Despite these legal instruments, violations of prisoners' human rights remain of great concern in all regions and most countries in the world. From an access to justice point of view, this is particularly concerning, since the large majority of prisoners come from disadvantaged groups who, due to imprisonment, are further marginalized and made vulnerable.

Prisons have an important role to play as an institution of the integrated justice system. They act as a mechanism to hold lawbreakers responsible for their actions, thereby protecting citizens against violations of their rights. The actions and duties of prison staff are directly linked to the rights of prisoners, therefore, any prison reform intervention should look at both securing the rights of prisoners and the capacity of prison staff to fulfil their duties.

Challenges in Ensuring Access to Justice within the Prisons System

Outdated prison and penal legislation

Outdated prison and penal legislation govern the administration of prisons in many countries. In Bangladesh, for example, the Penal Code dates back to 1860. Such legislation tends to favour confinement and safe custody through punitive measures, with few alternative mechanisms to imprisonment, such as rehabilitation and social reintegration or parole/probation and community service.

Excessive use of pre-trial detention

Even though the international legal framework prescribes strict criteria for the use of pre-trial detention, the laws of many countries lack the necessary mechanisms for granting pre-trial release. Excessive use of pre-trial detention often leads to detainees being imprisoned for years before having their case processed.[73] In some countries, un-sentenced prisoners make up the majority of the prison population.

[72] *This is articulated in Article 9(3) of the ICCPR. Interpreting this provision, the UN Human Rights Committee has ruled that detention before trial should be used only to the extent it is lawful, reasonable and necessary. Necessity is defined narrowly: "to prevent fight, interference with evidence of the recurrence of crime" or "where the person concerned constitutes a clear and serious threat to society which cannot be contained in any other manner."*

[73] *See Human Rights Watch [http://www.hrw.org/prisons/pretrial.html] for a discussion on excessive pretrial detention.*

Disqualification from provisional liberty

In some countries, large categories of prisoners – such as persons charged with drug crimes or crimes of violence, or repeat offenders – may be disqualified from obtaining relief under the terms of provisional liberty.

Excessive imprisonment for petty crimes

Imprisonment is often used for offenders such as civil debtors, fine defaulters and those who commit petty crimes, who should ideally be dealt with through non-custodial options. As a result, the number of people imprisoned has dramatically increased in recent times.[74]

Violent and discriminatory practices

Violent and/or discriminatory practices in prisons towards certain groups of disadvantaged people such as women, people living with HIV/AIDS (PLWHA), children and juveniles, minority groups, people with disabilities, people with mental illnesses, drug addicts, etc., are a general concern in the region.

The Process of Imprisonment – The Short Story

When an individual has been arrested by police, he or she must be brought promptly before a judicial authority, such as a judge, whose function is to assess whether a legal reason exists for that person's arrest. The period of time between the arrest and the presentation before a magistrate depends on the national legal framework. During this period the defendant may be held in police custody. Once presented before a judge, the judge then determines the necessity of pre-trial detention for the person and the preliminary charge and detention order is issued or the person is released. Depending on the law pertaining to the offence, the defendant may file an application for bail, but if it is not granted, the defendant becomes a remand prisoner and the custody is usually transferred from the police to the prison authorities. According to international standards, remand prisoners are to be kept separate from convicted prisoners. All individuals who are charged with a criminal offence are entitled to be tried within a reasonable time. If the person is found guilty and sentenced to incarceration, he or she then becomes a convicted prisoner and will be transferred to a regular prison. The type of prison usually depends on the type of conviction.

Poor prison administration and lack of professionalism

Poor administration of prison services leads to poor provision of services and entitlements and exacerbates the poor physical and psychological conditions in many prisons. A contributing factor in this is the inadequate training given to many prison staff. Further, prisons are often ill-equipped, under-resourced and lack the necessary institutional support. Lack of professionalism also stems from low pay, poor entitlements, limited career and capacity development opportunities. These factors lead to demoralization, lack of incentive and low levels of professional pride. In addition, high staff turnover in prisons prevents systems and procedures from functioning smoothly and efficiently.

Lack of accountability and oversight mechanisms

A lack of mechanisms to monitor prison conditions effectively and ensure accountability in respect to human rights is a general phenomenon. Prison administrations are generally reluctant to open up prisons and the situation of prisoners to public scrutiny.

Inadequate access to information

The lack of transparency and accountability is exacerbated by the fact that it is difficult to get access to reliable information on the situation of prisoners, data on the number of pre-trial detainees, the health of prisoners and accurate prison records, etc. Maintaining complete, accurate and regularly updated records is crucial for ensuring respect for human rights of prisoners.[75]

Poor prison conditions

Lack of access to adequate food and drinking water can constitute a human rights violation. Severe overcrowding can lead to low physical standards in terms of floor space, ceiling height, lighting and ventilation. Access to private and hygienic sanitation in the cell and opportunities to use external sanitation is not always available when necessary. Basic health care facilities are generally not available for people with mental illness, people living with HIV/AIDS and pregnant women, leading to deterioration of a prisoner's general health as well as contributing to the spread of tuberculosis, hepatitis and HIV/AIDS. In addition, poor conditions can also lead to criminal offences within prisons and additional violation of human rights. For example, lack of separate facilities for women and juvenile inmates may expose them to sexual abuse and violence.

Insufficient coordination and knowledge sharing

Insufficient coordination and knowledge sharing between justice actors such as the police, courts and prisons can lead to ineffective processing of criminal cases. In some countries, the escort of prisoners to court is the responsibility of the police and when there is a lack of cooperation between the police and the courts and/or the prisons, this

[74] *Penal Reform International and International Centre for Prison Studies. A New Agenda for Penal Reform - International Penal Reform Conference. Royal Holloway College, University of London, Surrey, United Kingdom. 12-17 April 1999. [www.penalreform.org/english/models_egham.htm].*

[75] *See Principle 12 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (General Assembly Resolution 43/173, 9 December 1988) and Rule 7 of the Standard of Minimum Rules for the Treatment of Prisoners. (Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva 1955, and approved by the Economic and Social Council in resolution 663 (XXIV), 31 July 1957 and 2076 (LXII) of 13 May 1977).*

can lead to delays and bottlenecks within the system. Lack of coordination can also increase the risk of unlawful deprivation of liberty, as information about legal status with respect to documents regulating the enforcement of judgments may be inaccessible. In addition, lack of infrastructure, adequate transport and adequate means of communication between the different agencies can also pose as barriers.

Insufficient focus on rehabilitation and social reintegration

It is difficult for inmates to be successfully integrated back into society and get decent work once they have been released. Therefore, there is a need for better preparation for release and training of prisoners to assist them to live as normal a life as possible within their society following their release.

Widespread corruption in the penal system

This can lead to discrimination, impunity, inefficiency and increased human rights violations. For example, living conditions of prisoners are likely to vary according to their ability to bribe prison officials and reform initiatives are less likely to succeed due to resistance from people who are privileged through corrupt practices.

Special consideration for disadvantaged groups

Many of the problems outlined above are exacerbated for disadvantaged groups. Therefore, the protection of these groups needs particular attention in prison reform interventions. See Chapter 6 for further strategies.

Capacity Development Strategies to Enhance Access to Justice within the Prisons

Normative legal framework-penal legislation (also see Chapter 3)

- **Advocate for a revision of provisional liberty laws** since they often do not contain provisions to ensure that persons charged with drug crimes or crimes of violence are eligible for provisional release. Further, they often do not allow judges to grant pre-trial release for non-bailable offences.[76] Since poor people are generally at an disadvantage even when liberal bail acts are in place, advocacy efforts could also be directed at strengthening or introducing the practice of granting bail on personal recognizance. Reviews of the power and practice of arrest and detention by the police could also be undertaken to address the habit of exaggerated arrests.

- **Review of penal legislation.** The reform of the formal legal framework should also address the revision of penal legislation to ensure enhanced emphasis on rehabilitation and social reintegration.

- **Limit pre-trail detention.** Support should also be provided for legislative reforms to discourage and limit pre-trial detention.

- **Establish clear disciplinary rules and procedures.** Clear disciplinary rules and procedures that apply to convicted persons within the prisons should be established. The lack of clear disciplinary rules (or inappropriate disciplinary rules) could be a source of abuse and human rights violations.

Building coalitions for reforms

- **Reform in the prison system should be seen as part of a larger justice reform agenda** where the cooperation and involvement of other judicial actors such as the police, the court system, paralegal institutions, etc., is extremely important. Moreover, civil society involvement should be addressed. See other sections on Police, Courts, NHRIs, Civil Society Oversight, etc. in this chapter.

- **Engage the media, civil society, government and parliamentarians in building partnerships** to strengthen the reform agenda and support pressure from below. This could include initiating dialogue on how to hold perpetrators of human rights violations in the prison system accountable for their actions (see the section on Civil Society for more information).

Strengthen accountability of the prison system

- **Address corruption in the prison system** by enhancing transparency and accountability, externally as well as internally. Support could be given to the development of an internal complaints mechanism which would give prisoners an opportunity to register their grievances and report on any human rights violations taking place. These mechanisms are mandatory under international human rights instruments.[77] It is necessary to ensure that these mechanisms ensure anonymity to avoid prisoners being penalized for lodging complaints. External accountability measures could include the introduction of processes by which prisoners can appeal directly to the court. Further, support should be given to the establishment/strengthening of mechanisms

[76] *See Human Rights Watch [http://www.hrw.org/prisons/pretrial.html] for a discussion on excessive pretrial detention.*

[77] *See Principle 33 of the Body of Principles for the Protection of All persons under Any Form of Detention or Imprisonment and Rule 36 of the Minimum Rules for the Treatment of Prisoners. (General Assembly Resolution 43/173, 9 December 1988)*

to ensure that any deaths, disappearances, and serious injuries of persons while in custody (or shortly after the termination of detention or imprisonment) are thoroughly investigated.[78] Also see the sub-section on Accountability and Integrity in the section on The Court System in this chapter.

- **Ongoing monitoring** by civil society, i.e., community groups, NGOs, para-legal institutions, National Human Rights Institutions and media, is essential for the protection of prisoners from ill-treatment and for the promotion of decent detention conditions. Support should be given to these actors in the development and strengthening of monitoring programmes in prisons. Such monitoring programmes have been developed in India and Cambodia, where NGOs have established visiting schemes for regular consultations with the inmates.[79]

Civilian participation in prison commissions

- **Administrative capacity and the performance of prison officials.**

- **Support for material improvements in prison facilities and conditions**.

- **Support the development of prison regulations according to international standards** as well as the development of job descriptions and a code of conduct for prison staff with clear guidelines for disciplinary proceedings for misconduct etc. Initiatives in this area could also include management training for prison staff.

- **Support the development and implementation of training and sensitization the programmes** in the areas of human rights and gender to counter the widespread discrimination against disadvantage groups in prison. Gender sensitivity and respect for human rights needs to be infused into all aspects of training from training on administrative tasks to the use of force by correctional officers.

- **Support the creation of effective, merit-based and transparent recruitment mechanisms,** and the establishment of career development plans as a means of developing pride in, and loyalty to, the prison service and responsibility for the duties within the system. Also, recruitment of female correctional officers and those from minority and other disadvantaged groups is also recommended.

- **Support the development of communication and information-sharing mechanisms** between all criminal justice system agencies and stakeholders such as police, prison officials, judiciary, bar association, probation and welfare service, health service, local leaders, defence counsel and directorate of public prosecutions.

- **Strengthen the IT-capacity of prisons** by supporting the development of prison databases in which important court dates and details of sentences can be registered. In relation to this, it is also important to restrict access to the information by developing clear guidelines on who can retrieve confidential information. In cases where IT resources are absent or limited, support should be given to the development of manual record-keeping procedures to ensure that accurate, complete and regularly updated data regarding prisoners is maintained.

Rehabilitation of prisoners and restorative justice

- **Develop prisoners' rehabilitation agencies and livelihood programmes.**[80] This could be done by supporting coordination activities between health and psycho-social welfare, vocational training and educational departments. The purpose and justification of imprisonment is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure that upon their return to society, the offender is able to lead a law-abiding and self-supporting life.

- **Restorative justice is a systematic response to wrongdoing that emphasizes healing the wounds of victims, offenders and communities** caused or revealed by criminal behaviour. Support could be given to practices and programmes responding to crime through interventions directed at victim-offender reconciliation/mediation, victim assistance, ex-offender assistance, restitution[81], and community service.[82] Strategies in this area could also support the integration of the principles of "restorative justice" into the curriculum of law schools/academies and other educational institutions. As imprisonment generally has damaging rather than constructive consequences, restorative justice

[78] *See principle 34 of the Body Principles for the Protection of All Persons under Any Form of detention or Imprisonment. (General Assembly Resolution 43/173, 9 December 1988)*

[79] *For more see Common Wealth Human Rights Initiative in India [http://www.humanrightsinitiative.org/programs/aj/prisons/prisons.htm], and the Cambodian League for the Promotion and Defence of Human Rights [http://www.licadho.org/programs/monitoringoffice.php].*

[80] *There are good examples of initiatives involving civil society in prisoner rehabilitation initiatives such as the UNDP programme on judicial reforms in the Philippines, which facilitates the reintegration of offenders into the community after their release by allowing people who can relate their own life experience with the inmates to visit the prison.[http://www.undp.org/dpa/choices/2004/march/philippines.html].*

[81] *In its traditional sense, restitution has been defined as a monetary payment by the offender to the victim for harm reasonably resulting from the offence. However, restitution can embody both monetary payments and in-kind services to the victim.*

[82] *For more information on restorative justice, see [http://www.restorativejustice.org].*

mechanisms should be explored and adopted in appropriate instances as a preferred form of criminal justice bearing in mind the right of both victims and community. See also the section on Informal Justice Systems in this chapter.

Advocate for support to non-custodial alternatives

- **Alternative dispute resolution** provides options that may take disputes out of the penal justice arena and thereby can help to limit punitive measures and reduce the number of arrests. Therefore, potential ADR options should be explored and supported. See also the section on Informal Justice Systems in this chapter.

Preventative programmes for HIV/AIDS

Below are some types of interventions that can be applied within the prison context to address issues relating to HIV/AIDS. For more areas of intervention see Chapter 6.

- **Support programmes which sensitize prisoners and prison officials** (both headquarters and prisons) on STD related issues.

- **Initiate HIV/AIDS preventive programmes** with prison headquarters managing and controlling the intervention to ensure efficient monitoring and implementation, high level ownership and long-term sustainability.

- **Advocate with government and prison authorities for better health care facilities,** including proper treatment opportunities.

- **Support civil society organizations working in the area of HIV/AIDS especially networks of PLWHA.**

Legal aid and legal awareness

- **Initiate activities to provide legal aid to prisoners,** as prisoners on remand may be innocent or they may have been held in prison longer than the possible penalty for the offence they are charged with. Legal aid can be supported through links with bar associations, lawyers associations and legal aid clinics etc. These groups can provide support in submit ting bail applications and expediting trial. The Government also needs to fulfil its responsibility and ensure that prisoners who do not have counsel of their own choice (particularly when they cannot afford it) are assigned a counsel to assist them.[83]

- **Ensure that prisoners are aware of their rights and entitlements.** It is equally important the prisoners themselves are aware of their rights and entitlements vis-à-vis the criminal justice processes and judicial agencies. All prisoners have a fundamental right to be informed.[84] The development of legal iteracy programmes for prisoners should, therefore, be supported. Besides training, this could include the preparation of manuals to be used as guidelines as well as literacy work on the ground by NGOs or paralegal institutions. See the Civil Society Oversight section earlier in this chapter.

Focus programme interventions on disadvantaged groups

It is necessary to recognize that it is often the poor and the most disadvantaged that are found in prisons. Often the more advantaged parts of society will find a way to avoid imprisonment and it is usually people who may not have been able to afford lawyers or those who may not be aware of their rights that are imprisoned. It is not uncommon to find people who may be innocent or those who have not been sentenced to languish in prisons for long periods of time. As a disproportionate number of prisoners are from disadvantaged groups, UNDP needs to engage in reforming the prison system to ensure that it follows international standards that discourage discrimination as well as protects and guarantees the rights of prisoners.

[83] See Principle 17 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (General Assembly Resolution 43/173, 9 December 1988) and Rule 43 of the Standard Minimum Rules for the Treatment of Prisoners (Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva 1955, and approved by the Economic and Social Council in resolution 663 (XXIV), 31 July 1957 and 2076 (LXII) of 13 May 1977).

[84] See Principle 13 of the Body of Principles for the Protection of All Persons under Any Form of Detention (General Assembly Resolution 43/173, 9 December 1988) or Imprisonment and Rule 35 of the Standard Minimum Rules for the Treatment of Prisoners (Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva 1955, and approved by the Economic and Social Council in resolution 663 (XXIV), 31 July 1957 and 2076 (LXII) of 13 May 1977).