

DISADVANTAGED GROUPS

CHAPTER



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OVERVIEW OF THE CHAPTER

A rights-based approach emphasizes the principles of equality and non-discrimination in developing access to justice programmes. All people should be equal before the law and have equal access to legal remedies. The principle of non-discrimination implies special focus on those groups that do not have access. Accordingly, rights-based programmes should not only be non-discriminatory, but they should also actively promote specific measures that favour previously marginalized or excluded groups (see Chapter 1).

This chapter focuses on the poor and groups who may suffer discrimination (on the basis of gender, ethnicity, disability, etc.). Poverty and discrimination can prompt disadvantaged groups to pursue justice remedies. However, poverty and discrimination can also impede people's ability to access justice remedies, making them more vulnerable to poverty and conflict. This vulnerability can be further exacerbated if they do not receive the necessary support when approaching institutions to assist them in addressing their grievances.

Who is disadvantaged depends on the context; therefore it is necessary to conduct in-depth analysis of each situation. Some specific disadvantaged groups found in the Asia-Pacific region are discussed within this chapter. However, in each situation, the most disadvantaged will need to be identified and other groups (such as the elderly, children, sexual minorities, etc.) may emerge as those who face the most obstacles in accessing justice. It is also important to recognize that the issues faced by different groups may overlap, and multiple disadvantages can compound the barriers to access to justice.

6.1 GENERAL OBSTACLES AND CAPACITY DEVELOPMENT STRATEGIES FOR DISADVANTAGED GROUPS

While each disadvantaged group faces specific barriers in accessing justice, there are some strong similarities between them. Below is a list of common barriers that face disadvantaged groups:¹

Economic barriers

Poverty exacerbates the problems facing disadvantaged groups in accessing justice. The costs of court fees, lawyer fees, form fees, etc. may be too high for disadvantaged groups. In addition, transportation costs, food and living expenses, and accommodation during the trial can be costly, especially if there are court delays. The potential for loss of income/livelihood when involved in a trial is also a deterrent for many disadvantaged groups. Such costs add up and may prevent people with limited financial means from going through the formal court systems. Further, when the judiciary is corrupt, the poor are significantly disadvantaged as they cannot afford to pay bribes.

The high cost of justice is not the only economic barrier faced by poor people – additional barriers include illiteracy, lack of awareness, and lack of support in challenging powerful interests.

Legal and institutional discrimination

Laws may also discriminate against disadvantaged groups. They may ignore the special needs of certain groups or else actively discriminate against them, preventing them from seeking justice through the formal system. Even when laws themselves are not discriminatory, systematic or de facto biases and discrimination against disadvantaged groups may result in unfair rulings, inappropriate conduct or inadequate services for disadvantaged groups. Informal systems can be as equally discriminating against certain groups, as traditional laws may benefit those who are in positions of power.

Nepal is a party to 16 international human rights instruments, including the CEDAW, yet it still has at least 118 legal provisions in 54 different laws, that are discriminatory towards women.

Forum for Women, Law and Development, Nepal

Insensitivity/lack of awareness of particular needs

Even when disadvantaged groups are able to access the formal system, they may not receive the services they require or may be mistreated by legal

professionals or law enforcement officials. Legal personnel may not be aware of the particular needs of disadvantaged groups or the institutions may not be equipped to provide disadvantaged groups with the services that they need.

Insensitive comments by legal personnel may discourage disadvantaged groups from seeking their assistance.

Insufficient outreach to disadvantaged groups

The formal justice system may be too far removed from the realities of many disadvantaged groups who may not even be aware of their rights or how to seek justice when their rights have been violated. It is part of the duty of the formal justice system to reach out to disadvantaged groups and provide them with access to information through legal awareness and literacy programmes so that they know what services are available and how to seek remedies for their grievances.

Legal aid and awareness programmes can target their activities and information to particular disadvantaged groups. For example, if women's legal aid programmes focus on laws that are relevant to women, it arms women with knowledge of what to do to lodge a complaint.

Insufficient support for alternative mechanisms

Alternative mechanisms include civil society organizations, formal and informal Alternative Dispute Resolution (ADR) methods, as well as traditional and indigenous justice systems. These mechanisms are an extremely important component of access to justice programmes as they may be more widely available and disadvantaged groups are able to use them more easily. Civil society organizations can be effective in targeting and reaching disadvantaged groups, especially when working at the grassroots level. While formal and informal ADR methods as well as traditional justice systems can provide easier access for disadvantaged groups, it is necessary to make sure that monitoring mechanisms are put in place to oversee these alternative mechanisms in order to protect the rights of disadvantaged groups and prevent elite capture (see Informal Justice Systems in Chapter 4).

Limited communication

Language and literacy is a significant barrier for most disadvantaged groups. Disadvantaged groups may not only be intimidated by formal court processes and language (the courtroom atmosphere may be too formal or the legal jargon too complicated), but they also may not be able to communicate in the official language. In addition,

¹ As the common barriers are listed here, they are not repeated within the specific sections. It is advised that practitioners refer to this section in conjunction with the relevant disadvantaged groups section.

many members of disadvantaged groups may be illiterate which poses a huge obstacle when court procedures require forms to be filled out.

Even when people use their own strategies to overcome obstacles to accessing justice (such as collective organization, social integration, strengthening of collective institutions, and economic emancipation), there is often a lack of recognition of their initiatives .

Fear/lack of trust of formal institutions

Because of existing or perceived discrimination, disadvantaged groups often fear formal justice systems. Fear and the lack of trust in formal institutions may cause them to not exercise their right to remedy even when their rights have been violated. Despite enduring grievances, they may fear that if they turn to the formal system, not only will they not receive remedies for their grievances, they may face additional violations. For example, in many rape and sexual abuse cases, women are reluctant to report the crime, as they fear their own reputation will be tarnished.

Communication is a problem for many migrants and various minority ethnic groups and indigenous peoples. It may also be a significant barrier for people with sight, hearing, or mental disabilities.

Fear of reprisal/social ostracism

Social stigma can be a significant barrier for many disadvantaged groups. While they are already in a vulnerable position in society, they fear that if they make a complaint or seek redress for a grievance (especially if they oppose someone more powerful) through the formal justice system, they may face further social pressure or ostracism, or threats of reprisal. In addition, they may be ostracized by their community or they may be accused of destroying 'social harmony'. Intangible costs such as these can prevent disadvantaged groups from seeking out formal systems.

In 1996, a young woman was abducted and sexually assaulted by 42 men in Kerala, India. When she reported the crime, the police were unsupportive, the investigation was delayed, her privacy was violated, and the media was unsympathetic.

Lack of physical access

Physical access to formal justice systems is another difficulty for members of some disadvantaged

groups. Courts can be far away and claimants may need to travel long distances to get to them. Further, for people with disabilities, physically getting into the courthouse may prove to be difficult.

Access to Justice in Viet Nam – Survey from a People’s Perspective

The UNDP Access to Justice Survey conducted in Viet Nam in May 2004 revealed that only 6% of interviewees had used the services of a lawyer. Of those that had used lawyers, 13% were from high-income groups, while only 3% were from low-income groups. The rural-urban divide is also significant – 12% of those living in urban areas had accessed lawyer services, compared to only 2% living in rural areas and 1% in mountainous areas. A further 35% of those interviewed thought lawyers’ fees were too high.

UNDP Viet Nam

Designing and Implementing Capacity Development Strategies

In order to address the challenges mentioned above, capacity development strategies need to utilize a rights-based approach to specifically address the problems of disadvantaged groups and work with them to create solutions (for example, through participatory consultations). When doing this, it is necessary to adopt a holistic approach to providing support, since legal advice is often not the most pressing need of disadvantaged groups. For example, those suffering from torture or rape should be immediately provided with medical and psychological support along with options for legal assistance. Other assistance such as literacy programmes, food, health services, drug counselling, employment schemes, housing support, credit, etc. need to go hand-in-hand with legal aid. For those who suffer from harassment or other human rights abuses, counselling and victim services as well as medical services should be provided along with advice on how to file complaints.

Civil society can also be a powerful actor in facilitating access to justice for disadvantaged groups. They can help to fill organizational, networking and technical gaps within and among disadvantaged groups. As the needs of disadvantaged groups are sometimes neglected by the State, civil society organizations can play an especially important role in developing strategies to address problems facing disadvantaged groups. See the section on Civil Society Oversight in Chapter 4 for additional information on the role of civil society in promoting access to justice. Chapters 4 and 5 also list different types of capacity development strategies that can be undertaken to enhance the ability of disadvantaged groups to demand and receive justice remedies.

6.2 THE RURAL AND URBAN POOR

The poor are not a homogenous group and it is necessary to recognize that even within the categories of the rural poor and the urban poor, there are distinct groups of individuals who have specific concerns. For example, the urban poor include homeless people, those living in slums, street children, beggars and street vendors, people struggling with addictions, commercial sex workers, etc. In rural areas, the poor can include peasants, migrant labourers, livestock herders and subsistence agriculturists. Though there may be some overlapping concerns for both the urban and rural poor (e.g., economic constraints prevent both groups from seeking justice), each group has their own particular legal needs and distinct sets of barriers that they have to overcome. It should also be noted that there is a higher likelihood of disadvantaged groups being poor as their disadvantaged situation keeps them in poverty. Hence, the linkages between poverty and discrimination need to be taken into consideration when developing programmes on access to justice.

The UDHR and Access to Justice

“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”

*Article 8, Universal Declaration of Human Rights
Adopted and proclaimed by General Assembly resolution
217 A (III) of 10 December 1948*

International human rights instruments

The International Bill of Human Rights², consisting of the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR) and its two Optional Protocols, applies to all human beings and sets the basic level of rights and protection that should be guaranteed for all (see Chapter 3). For the rural and urban poor, as well as for all other disadvantaged groups, this cluster of rights should be the starting point from which national laws are derived and the framework under which legal protection is extended.

Article 2 of the UDHR recognizes that everyone is entitled to all the rights and freedoms set forth in the declaration without distinctions of any kind. Additionally, the UDHR specifically states that everyone should be provided the protection of the law (especially from discrimination, arbitrary arrests, detention, exile, etc.), presumed innocent till proven guilty, and have access to remedies and receive a fair trial (see especially Articles 6 through Article 12 of the UDHR).

The ICCPR builds on the UDHR and recognizes that every individual has the right to life (Article 6), to liberty and security of the person (Article 9) and to additional protection during the judicial process including the guarantee of equality before the law (Article 14).

Discrimination against Urban Pavement Dwellers

For urban pavement dwellers in Mumbai, India, the legal system often works against their rights rather than protecting them. For example, as they do not qualify as slum dwellers, they are ineligible to apply for protection or free housing. As a result they are more vulnerable to abuse and are often ignored by the formal system.

Enviro-legal Defense Firm, 'Access to Justice for the Poor and Disadvantaged People in India', January 2004

The ICESCR outlines basic social, economic and cultural rights including provisions for just and favourable work conditions, the right to join trade unions, the right to an adequate standard of living (food, clothing, housing, etc.), the right to the highest attainable standard of mental and physical health and the right to education. The rural and urban poor need to be aware of, and know how to, claim these rights in order to ensure their survival and well-being.

In addition, the Declaration on the Right to Development was adopted by the United Nations General Assembly in Resolution 41/128 on December 4, 1986.³ Although it is non-binding, it outlines people's right to development and the State's responsibilities in providing for those rights. In particular, Article 5 highlights the responsibility of the State to eliminate flagrant violations of human rights and Article 6 outlines the importance of protecting human rights, promoting non-discrimination and giving equal importance to social and economic rights along with civil and political rights.

Challenges

Legal and institutional discrimination

Not only individual laws, but the way the legal system itself has been set up may be biased against the rural and urban poor. Existing laws can pose barriers for the poor in claiming their rights. Discrimination can also be perpetuated by ignorance. For example, the rural poor are oftentimes invisible to lawmakers who are based in urban areas. Hence, legal resources and services are rarely made available to them. The urban poor are also often legally 'invisible' because they are not registered (e.g., for voting, births, etc.) and are not accounted for in censuses. As a result, data about

² See OHCHR Fact Sheet on the International Bill of Human Rights [<http://www.unhcr.ch/html/menu6/2/fs2.htm>].

³ UNHCHR. [<http://www.unhcr.ch/html/menu3/b/74.htm>].

their actual situation is often scarce and policymakers are unable to target their specific problems.

Intimidation and Repression in Urban and Rural Areas

In Bangladesh, in order to intimidate slum dwellers off public land, the police were accused of attempting to evict and arbitrarily arrest them despite a ruling that alternative accommodation must be provided for the slum dwellers beforehand. In rural areas, governments may also act brutally to repress the population, as is alleged in the case of the suppression of demonstrations by the Montagnards in the Central Highlands of Viet Nam.

Insecurity, fear and lack of trust of formal systems

As a result of negative encounters with government officials (the police, local government, army, etc.), the rural and urban poor may be unwilling to use formal legal channels to resolve disputes. This fear is a significant barrier for the poor in accessing justice. If they believe that the very people that are supposed to protect them (i.e. the police) are not on their side, then the poor may lose faith in the justice system as a whole. For the rural poor, land rights and environmental justice are crucial issues which may be in conflict with more powerful and wealthy interests. Lack of support in challenging these interests may cause disillusionment with the justice system with disadvantaged groups believing that it only assists those with wealth and 'connections'.

Physical access to information and services

For the rural poor, because they are often in remote areas, the formal court system can be too far away for them to access. Even if they can afford the cost of travelling to the nearest district court, court delays may cause them to abandon their claims. Access to information is also a critical barrier as outreach and awareness activities are rarely conducted in rural areas. Similar problems of access (including access to other basic services such as health, education, clean water, etc.) may also arise for the urban poor as they too are often overlooked by governmental institutions.

Capacity Development Strategies

Poverty poses a huge barrier for the rural and urban poor in accessing their rights. Hence, access to justice programmes need to take into account the root causes of poverty. For example, inequitable land distribution or control of land is one of the main obstacles preventing the rural poor from overcoming poverty. Laws can be put in place to guarantee more land rights for the poor or

policies can be promoted that advocate for land reform. Laws and policies that introduce other poverty elimination strategies – including education and employment – also need to be put in place. For example, support for informal sector workers' rights or micro-credit and small enterprise programmes.

More immediate service oriented interventions can include:

- **Waiving or subsidizing the cost of various court processes.** Court fees and other court costs could take into consideration the financial situation of the litigant before setting the fee.
- **Providing housing assistance and transportation to courts.**
- **Setting up mobile legal clinics** to reach those in remote areas (see Chapter 5: Legal Aid and Counsel).
- **Strengthening legal aid services** in rural areas and in urban poor communities, for example pro bono lawyer and paralegal assistance (see Chapter 5: Legal Aid and Counsel).
- **Targeting legal aid** to particular groups (even within the urban and rural poor) and establishing legal aid centres directed at specific communities. For example, urban justice centres can specialize in providing advice and services for the homeless, people living in slums, commercial sex workers, people with mental illness, people with addiction, etc. The rural poor also need specialized advice and NGOs working with them need to be knowledgeable about land rights and property law, human rights law, etc. (see Chapter 5: Legal Aid and Counsel).
- **Conducting legal awareness initiatives** among poor groups, focusing on aspects of institutional legal reform that affect them (see Chapter 5: Legal Awareness).
- **Police and judicial reform** including reducing the corruption of the judiciary (see Chapter 4: The Judiciary).
- **Institutional reforms** can also include locating courts at the regional or district level so that the rural poor have easier access to them.
- **Strengthening informal dispute resolution** mechanisms such as ADR and traditional justice that can be more easily accessed by the rural and urban poor (see Chapter 4: Informal Justice Systems).
- **Initiating reforms within prisons and police** so

that the poor are not arbitrarily arrested and detained (see Chapter 4: Enforcement).

6.3 WOMEN

The barriers faced by women in accessing justice are many and often overlap. Different issues often work in conjunction with each other preventing women from using the formal justice systems to address their problems. Since any programme to counter discrimination faced by women and to strengthen their access to justice will always challenge existing patriarchal power structures, it is important to be aware of the ways in which the interventions might be considered threatening for men. Therefore, strategies to deal with such perceptions should be developed at the same time. To implement successful access to justice programmes for women, it is important to understand culture, tradition, gender-relations, and the roles of important non-state and local actors. Additional research on the particular obstacles faced by women and the manner in which they cope with injustice or resolve conflicts is necessary in order to develop strategies in this area.

International Human Rights Instruments

Discriminatory laws and denial of equal rights not only impedes women's access to justice, but also exacerbates women's vulnerability to abuse and exploitation. International human rights instruments protect the rights of women. Specific instruments have also been established to address particular vulnerabilities faced by women all over the world. One example is the Convention for the Elimination of all forms of Discrimination against Women (CEDAW).⁴ CEDAW is the main convention that seeks to protect and promote the rights of women. It was adopted in 1979, and 178 states are party to the Convention.⁵ CEDAW is supported by an Optional Protocol that came into force in 2000. While CEDAW focuses on the roles and responsibilities of the State with regard to guaranteeing the rights of women, the Optional Protocol establishes a complaint mechanism for individuals.

Challenges

Legal discrimination/lack of legal protection

The formal legal framework of many countries reinforces discriminatory practices towards women. Laws can actively discriminate against women and condone violations of women's rights through the lack of adequate legal protection. Some areas of concern are:

Reporting on CEDAW

CEDAW requires that States that are party to the Convention report on the activities they have undertaken to implement CEDAW in their countries. Often, along with the official report submitted by the Government, 'Shadow Reports' are submitted by national civil society organizations based on their own analysis of implementation of CEDAW within the country.

- **Personal Status Laws or Family Law.** For example, discriminatory provisions relating to marriage, inheritance, and custody of children.
- **Criminal Law/Penal Codes.** Many violations of women's rights are not considered as crimes despite international legal standards. Other concerns include criminalization of female victims of violence and the differential principles of defence and evidentiary requirements applied to men and women.
- **Labour Laws.** For example, discriminatory provisions with regard to maternity leave, childcare, and lack of regulation in the informal sector.
- **Lack of Domestic Violence Legislation.** This includes the lack of recognition of rape within marriage, laws on incest and sexual abuse, etc.

Gender insensitivity in the justice system

A woman's decision to seek legal remedies can involve huge risks and costs: financially, socially and psychologically. Even when they do overcome their fears and attempt to seek justice, women often face an additional hurdle because of institutionalized gender discrimination at all levels of the justice system. For example:

- **Stereotypical views about women** can lead to discriminatory judgements being passed in the courts. Sanctions for crimes committed against women are often not comparable to those for other violent crimes. Principles of defence may discriminate against women, and defences such as honour or provocation allow perpetrators to escape criminal responsibility. Women may face further victimization by court proceedings, which do not comply with international standards for victim and witness protection.
- **Systemic gender discrimination** is evident among the police, who are often negligent in responding to reports of crimes against women (particularly in cases of domestic violence), and often do not take action to

⁴ UNHCHR. [<http://www.unhchr.ch/html/menu3/b/e1cedaw.htm>].

⁵ As of October 5, 2004. See [<http://www.un.org/womenwatch/daw/cedaw/states.htm>] for details.

investigate or prevent further crimes. Victims may suffer harassment, physical and sexual assault when reporting cases.

■ **Informal justice systems often promote traditional patriarchal values** and traditions which may violate women's rights and reinforce existing gender discrimination.

■ **Prisons and correctional facilities may not have adequate facilities** to protect female prisoners from abuse. Additionally, despite the fact that women in detention are vulnerable to sexual abuse and rape, they often have no means of complaining when such crimes are committed against them.

Such discriminatory attitudes and practices mean that women often have very little faith in the justice system and therefore are reluctant to take their complaints to courts or the police.⁶

Lack of institutional technical capacity and services

There is a general lack of understanding of gender-based violence in the police, a poor quality of police investigative techniques, and little protection of the crime scene or collection of forensic evidence. These are all serious barriers that prevent women from obtaining remedies. In addition, the lack of facilities and services responding to women's needs such as one-stop centres where victims of violence can receive legal, medical and other services, special women's desks at police stations, medical and psycho-social support and shelters serve as obstacles. Women who are victims of rape, sexual assault and domestic violence are generally treated insensitively, and are not provided with legal advice or given access to necessary support services.

Fear of reprisal or social ostracism

The cultural values and norms of many countries in the region may consider it shameful for women to seek a remedy in the justice system especially with regard to sexual crimes. Women wanting to go to court are therefore not supported by their families and may face outright resistance. This results in fear of social ostracism, which is especially widespread in cases of rape, sexual assault and domestic violence where there may be social pressure to preserve the victim and her family's honour rather than to punish the offender. Sometimes, families of the victim and the perpetrators negotiate a settlement among themselves in order not to involve the authorities and public.⁷ Further, in cases of sexual crimes, women may be unwilling to bring charges against the perpetrators for fear of being publicly labelled and ostracized by their communities.

Inadequate public services and outreach of NGOs

The lack of social support combined with the lack of information and economic independence means that women whose rights are violated need greater support from national institutions, and programmes and policies for the promotion and protection of their rights. The most successful initiatives are ones that involve partnership with civil society and women's organizations (also see Civil Society Oversight in Chapter 4).

Lack of economic independence

Women are among the poorest of the poor in most Asia-Pacific countries. Control of family resources is most often in the hands of the male head of the house. This can lead to women having a lack of power in household decision-making and priority setting. Their disadvantaged economic situation can lead them to becoming dependant on others and mean that they cannot contest violations of their rights in the context of the family, the workplace, government institutions, etc.

Reaching out through Civil Society and the Media

Women's Aid Organization (WAO), a Malaysian NGO, not only provides shelter and counselling for victims of domestic violence, but also works on raising awareness and conducting advocacy work to promote law reform. One strategy adopted by WAO is to publicize the issue and raise awareness through live talk shows on the radio. In addition, messages about why domestic violence is a crime and what people can do about it are aired two to three times a day. As radio reaches out to around 800,000 Malaysians, it has resulted in more people seeking assistance and information about addressing domestic violence.

'Education through Radio', Isis International

Capacity Development Strategies

Support legal reform programmes to change discriminatory laws and regulations

An effective and impartial legal framework is a good starting point in recognizing gender equality and women's rights. International treaties and conventions such as CEDAW and the Optional Protocol, ICCPR, etc. provide international standards on women's rights which countries should be encouraged to sign, ratify and implement. Accordingly, the national legal frameworks should be reformed so that women are ensured protection and their rights are guaranteed under national law. Antiquated laws (e.g., unequal inheritance laws) should be reformed and new laws (for example, recognizing rape within marriage) should be established to protect the

⁶ Asian Human Rights Commission-Human Rights Solidarity. 2000. "Impact of Corruption on the Criminal Justice System on Women." [<http://www.ahrchk.net/hrsolid/mainfile.php/2000vol1onoo2/1911>].

⁷ Such settlements have a risk of violating the rights of the victim, for instance when it is decided by the family of a girl who has been raped that she must marry her rapist to save her, as well as the family's, honour.

rights of women. To promote these types of reforms, advocacy programmes can be undertaken in partnership with United Nations agencies such as OHCHR and UNIFEM to encourage the Government to take a progressive attitude towards legal and institutional reform. Support to legal reform programmes to change discriminatory civil and criminal justice laws and regulations, including reconciliation between international instruments and national laws should also be considered (see Chapter 3). Support could also be given to research into court judgments to highlight gender insensitive verdicts.

Capacity development of law enforcement personnel and agencies

Police, judges, prosecutors, prison staff and other judicial staff need to receive training on gender and women's rights. Training and educating judicial personnel can help to make them more sensitive and responsive to crimes suffered by women. However, training may not always be sufficient for attitudinal and behavioural change and other measures may need to be put in place. For example, incentives could be offered to encourage law enforcement personnel and agencies to adopt gender sensitive approaches, with appropriate mechanisms put in place for oversight. Support could also be given to specialized programmes that assist police officers and medical personnel in handling sexual assault, rape and domestic violence cases, especially in areas such as human rights, gender and violence, investigation and the use of forensic evidence. (Also see Chapter 4, particularly sections concerning Enforcement and the Court System).

In addition, it is important to recruit people within law enforcement that are gender sensitive. Specific gender focal points and gender desks could be established to support women through the justice system. Links to protective services such as witness protection, women's shelters and victim support, could also be established to facilitate women's access to the formal legal system and assistance. Family courts could also be established that would expedite the legal process for women as well as reduce case backlog in other courts.

Support NGOs and CSOs for better legal service

Since NGOs are generally better able to work at the grassroots levels, support should be given to them to tailor their services to meet the legal needs of disadvantaged women. Support to strengthen networking between women's groups and NGOs working in the legal sector should also be facilitated. In general, partnership building between civil society and public agencies is most effective in addressing challenges from a more holistic and integrated approach. Financial support could be

provided for civil society-based organizations (such as self-help groups) since these groups are often the first place women turn to when they have a grievance.

Promoting champions from within the system

In order to accomplish widespread reform, more investment needs to be made in terms of both financial and human resources and it is necessary to have "champions" within the judicial system who are willing to support these reforms and investment of resources. Strategies can include promoting positive discrimination by placing women in decision-making positions. For example, in India, laws were passed "reserving" a third of parliamentary seats for women. This provides women with the opportunity to reform laws and invest in building capacity of institutions so that they may become more gender sensitive. However, it is equally as important to cultivate male champions both within and outside the system so that they can support gender sensitive policies and refrain from blocking reforms initiated by female representatives or from pressuring them to vote a certain way.

Ensure that the judicial system is responsive to women's needs by establishing accountability mechanisms

Institutions such as National Women's Commissions can work with other civil society organizations to monitor the performance of the judicial system with respect to women and promote effective affirmative action policies. Reporting on implementation of CEDAW to the CEDAW Committee, and reporting to other treaty bodies, is another way to facilitate dialogue and ensure accountability. States that have ratified CEDAW are required to report on their compliance at least every four years. Civil society and the Government could work together to ensure that their country adheres to these reporting requirements by submitting the National CEDAW report as well as a shadow report prepared by NGOs.

Support and strengthen gender-sensitive dispute resolution mechanisms

Fear of unfair results in courts, corruption, abuse and harassment mean that women often prefer to use traditional justice systems (where available) or alternative dispute resolution (ADR) mechanisms like mediation. ADR can be a cost effective and timely alternative to the formal system. However, ADR and traditional systems can also be problematic as they may perpetuate gender biases, therefore clear guidelines should be introduced and mechanisms should be put into place to monitor these systems. Further, formal and

informal systems should establish clear links and should be able to refer to each other. Serious crimes, such as rape, domestic violence and sexual abuse, should be referred to the formal system as it has better enforcement mechanisms as well as services such as witness protection, victims' assistance and shelters (see section on Informal Justice Systems in Chapter 4).

Increase representation of women in the legal system

To improve women's access to justice, it is important to ensure that women are represented in the justice system – both in formal and informal processes. For example, it often makes a difference if women police officers or female counsellors and psychologists are available for women victims of violence. Female judges, mediators and lawyers may be better able to understand and relate to women victims and be better able to support them through legal process. Judicial reform should seek to equalize the gender balance of judicial personnel, including recruiting women in leadership positions. At the same time, gender balance must be pursued with the ultimate goal of ensuring that the unique problems facing women are understood by the justice system. In order to do so, it may be important in some cases that a gender balance is achieved by recruiting women who are from vulnerable groups such as ethnic minorities rather than assuming that all women are willing and able to represent other women.

Design and support legal programmes with cross-practice linkages

Legal literacy programmes should be designed in an integrated way so that they empower women and can assist them to organize and mobilize for change. Legal literacy can be a powerful tool in developing women's capacities to understand, reflect on and critique laws and to take action to change those laws that limit their rights. Legal literacy is a process in itself; therefore, flexibility and innovations are important for any successful legal literacy programmes.

Legal literacy cannot be promoted in a vacuum, and cross-practice linkages to assist women in claiming their rights must be encouraged as well. For example, establishing literacy classes, micro-credit programmes or promoting entrepreneurship along with legal literacy programmes may be more effective than conducting legal literacy programmes alone.

Legal education should not merely provide legal information. Even women who know their rights may lack the self-confidence and support to exercise them in the face of social and family pressures.⁸ To overcome such social and cultural obstacles, legal programmes should combine legal

education with awareness raising and other activities so that legal knowledge can be translated into action (e.g., community organizing, mediation, or litigation).⁹ Chapter 5 on Legal Empowerment discusses these issues in further detail.

6.4 INDIGENOUS PEOPLES AND MINORITY GROUPS

Indigenous peoples and minority groups (ethnic, religious, linguistic, etc.) are often marginalized by the State and society. Their culture and traditions are commonly ignored, or worse, systematically erased. Dominant groups have historically pursued various policies of assimilation, apartheid, oppression or discrimination. The rights of indigenous peoples and minority groups are often unprotected and they face considerable obstacles when they attempt to seek justice through formal channels. Indigenous peoples and minority groups often live on the margins of society, enduring disproportionately high levels of poverty relative to the rest of the society. This is directly related to high rates of crime and victimization. A disproportionate number of people from minority groups are accused of crimes and face trial and there tends to be a high number of them imprisoned. This may result in a deep sense of alienation from a justice system that seems to them foreign and inaccessible. Their movements may be restricted, traditional laws disregarded or violated, and rights to ancestral land ignored.

International Human Rights Instruments

Human rights instruments protecting the rights of minorities and indigenous peoples also include guarantees on access to justice. These instruments include:

- Universal Declaration of Human Rights (1948)
- Convention on the Prevention and Punishment of the Crime of Genocide (1948)
- ILO Convention No. 107 (1957)
- International Convention on the Elimination of All Forms of Racial Discrimination (1965)
- International Covenant on Civil and Political Rights (1966)
- International Covenant on Economic, Social and Cultural Rights (1966)
- UNESCO Declaration on the Principles of International Cultural Cooperation (1966)
- Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981)
- Declaration on the Right to Development (1986)
- ILO Convention on Indigenous and Tribal Peoples, Convention No. 169 (1989)
- Rio Declaration on Environment and Development (1992)
- Convention on Biological Diversity (1992)

⁸ Vene Klazen, L. 1992. "Women's Legal Rights Organizing and Political Participation in Africa" in *Legal Literacy: A Tool for Women's Empowerment*. Margret Schuler & Sakuntala Kadirgamar-Rajasingham (eds.) Washington, DC: Women, Law and Development/OFF International.

⁹ Asian Development Bank (ADB). 2001. "Legal Empowerment: Advancing good governance and poverty reduction." Overview Report. [http://www.adb.org/Documents/Others/Law_ADB/lpr_2001_Part_2.pdf].

- Mattatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples (1993)
- UNESCO Universal Declaration on Cultural Diversity (2000)
- UN Draft Declaration on the Rights of Indigenous Peoples

The following conventions outline some of the specific rights that should be guaranteed for indigenous peoples and minority groups while the Declaration proclaims the commitment of member states to prevent discrimination based on religion and belief.

ILO Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries (1989) revised the earlier ILO Convention 107 Indigenous and Tribal Populations Convention and Recommendation (1957).¹⁰ It seeks to ensure that indigenous peoples stand on an equal footing with other members of society. It also aims to promote the realization of the rights of indigenous peoples with respect to their identity, customs, traditions, and institutions.

Reaffirming the Universal Declaration of Human Rights

“Discrimination between human beings on the grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations, and shall be condemned as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and enunciated in detail in the International Covenants on Human Rights, and as an obstacle to friendly and peaceful relations between nations.”

Article 3, Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, Proclaimed by General Assembly resolution 36/55 of 25 November 1981

The International Convention on the Elimination of All Forms of Racial Discrimination seeks to address all necessary measures for eliminating racial discrimination in all forms and manifestations, to prevent racist doctrines and practices, and to promote an international community free from all forms of racial segregation and discrimination.¹¹ Its provisions include revising national laws and policies, amending or eliminating discriminatory legislation, and promoting and enforcing non-discrimination especially in public institutions, and guaranteeing the right to equal treatment before the law. The Committee on the Elimination of Racial Discrimination monitors compliance with the Treaty.

General Assembly Resolution 36/55 proclaimed the Declaration on the Elimination of All Forms of

Intolerance and of Discrimination Based on Religion or Belief on November 25, 1981. This declaration affirms the freedom of thought and beliefs, advocates for tolerance and calls for repealing discriminatory laws.

Challenges

Lack of legal protection

Laws and the legal system in many countries may be biased against indigenous peoples and minority groups and provide little protection for the rights of minority communities. In many places, even when their rights are legally protected, the Government does little to uphold the rights of such groups. In the Philippines, for example, the Indigenous Peoples Rights Act was passed in 1997; however, many challenges still remain to be overcome with regard to reconciling local/customary laws with formal laws. The UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples visited the Philippines in 2002 and reported that while there were many complaints and some cases have gone to court, adequate remedial measures had not been taken by the authorities to redress the grievances of indigenous peoples. Further, while the Indigenous People’s Rights Act provides protection for indigenous peoples, it is not consistently applied.

Lack of awareness and cultural sensitivity/negative social attitudes

In addition to unprotected rights of indigenous peoples and minority groups, there is a general lack of awareness and sensitivity to the needs of diverse cultures, a mindset that tends to be institutionalized within justice systems. In cases where indigenous peoples demand recognition, the State may even go as far as to arrest, threaten, and pursue other aggressive policies against the indigenous community. Seeking redress for such violations through official channels is often difficult since the official channel may not be impartial or may be corrupt. Further, indigenous peoples may be in direct conflict with business and other more powerful interests (for example, in land disputes) and as they may not have the economic means to pursue litigation, their situation is often left unresolved. Indigenous peoples and minority groups may also be negatively stereotyped and the prevailing political climate may be biased against them. Indigenous laws and customs may be ignored, there may be racial profiling by law enforcement officials, they may be negatively portrayed in the media, or there may be aggressive campaigns against movements by indigenous groups. As a result, there can be high levels of disillusionment on the part of indigenous peoples and minority groups and they may mistrust and avoid the formal justice system.

¹⁰ Adopted on June 27, 1989 by the General Conference of the International Labour Organization at its seventy-sixth session; came into force September 5, 1991. [www.unhcr.ch/html/menu3/b/62.htm].

¹¹ Adopted and opened for signature and ratification by GA resolution 2106 (XX) of 21 December 1965; came into force January 4, 1969 in accordance with Article 19. [www.unhcr.ch/html/menu3/b/d_icerd.htm].

Institutional discrimination

Minority groups may be discriminated against by members of the judicial system itself, which can also prevent them from seeking redress for their grievances. They may be mistreated in police custody, abused in prisons or may not receive a fair trial because of prejudice against them. In situations of conflict, animosity between different minority groups can result in an increase of discriminatory practices: there may be arbitrary arrests based solely on the ethnic or religious identity of the individual, basic rights might be denied, people may be segregated along ethnic/religious lines, etc. All these discriminatory practices pose an additional, and often insurmountable barrier, for members of minority groups seeking justice.

Language/literacy barriers

As most court proceedings are undertaken in the official language, indigenous peoples and minority groups commonly face a linguistic barrier as they often have their own languages and may not be able to understand or follow the official court language very well. Even if they understand the language used, they may not be able to speak or write it fluently, limiting their ability to fill out forms or to express themselves in court. Services, such as interpreters or translated legal information material, may also not be readily available.

Capacity Development Strategies

Establish clear laws protecting indigenous peoples and minority groups

To ensure that the rights of indigenous peoples and minority groups are respected, the State needs to first make sure laws are put into place that protects their rights. For example, states can be encouraged to ratify ILO Convention No. 169 and to adopt the UN Draft Declaration on the Rights of Indigenous Peoples as a sign of their commitment to protecting the rights of indigenous peoples. Along with guaranteeing protection and recognizing the specific situation of indigenous peoples and minority groups, it is necessary for governments to outline their own responsibility and role in ensuring that these laws are enforced. Committees can be set up to monitor the Government's activities and to make sure that the interests of indigenous peoples and minority groups are represented. Advocacy campaigns for legal reforms and combating negative social attitudes towards indigenous peoples and minority groups can also be promoted.

Sensitize legal and law enforcement personnel on their duties and responsibilities

Law enforcement personnel, judges, lawyers, etc. need to be sensitized to the particular issues and concerns of indigenous peoples and minority communities. Courts should be established at the local level for easier access and personnel should be aware of issues related to the indigenous/ethnic communities in which they work. Police and prison officials also need to be trained not to discriminate against people of different religious or ethnic backgrounds.

Advocacy for and establishing multi-ethnic justice institutions

The State needs to have the political will to commit financial resources to promote access to justice for indigenous peoples and minority groups. Judges and lawyers from minority groups should be encouraged and members from under-represented backgrounds should be actively recruited into the legal system.

Work with traditional and indigenous justice systems

Indigenous communities may also have their own laws and traditions. Ignorance of traditional laws on the part of legal aid providers can also become an obstacle in their capacity to provide appropriate services. Developing paralegal capacities among indigenous peoples may help in documenting traditional laws and practices. Indigenous peoples and minority groups may trust and prefer to use internal dispute resolution mechanisms rather than formal court systems. It is, therefore, necessary for legal aid providers to understand the traditional justice system and ensure that in applying the formal system, the cultures and customs of indigenous peoples and minority groups are taken into account.

Reduce the number of indigenous peoples and members of minority groups in prison

Incarceration is a key issue as a disproportionate number of people from minority backgrounds are imprisoned. These high rates of imprisonment point to flaws in the official system in providing adequate access to justice. Below are some ways to address the high incarceration rate:

- **Address language barriers.** Inability to communicate because of language barriers or stereotyping of minority groups by justice officials may be a significant factor in the high number of minorities that are sent to prison. Legal aid provided to prisoners in their own language provides them with an awareness of their rights and knowledge of how to claim those rights.

■ **Non-custodial measures may be more effective than imprisonment.** For example, Australia has begun implementing ‘circle sentencing’, a restorative and rehabilitative approach to sentencing based on traditional practices in certain areas for cases involving members from the Aboriginal community.

■ **Pay attention to technical details.** Technical details such as limited capacity to maintain proper records may keep many indigenous people within prisons. By maintaining clear records and ensuring that minority prisoners receive legal aid, it may help to reduce the number of prisoners that overstay their prison sentence.

Enhance accountability

One way accountability can be ensured is by encouraging the establishment of quasi-judicial institutions such as an Indigenous Peoples’ Commission or Equal Opportunity Commission. These commissions could play a role in monitoring the activities of the State and holding it accountable to the international treaties it is party to and to national legislation. They can investigate human rights violations by the State and serve as a means through which minority groups and indigenous peoples can file complaints against the State and can advocate for changes to improve the situation for minority groups (see National Human Rights Institutions in Chapter 4).

6.5 MIGRANTS, REFUGEES AND INTERNALLY DISPLACED PEOPLE

All over the Asia-Pacific region people are moving across borders – through both legal and illegal means. They may be smuggled across in boats by human traffickers, pay large sums of money to employment agencies promising them a future in foreign lands, forcefully trafficked to be sold as sex workers, or as victims of conflict who have been forced to leave their homes. They find themselves in situations where they are exploited and have no way of addressing their grievances. Along with being in new and unfamiliar environments, migrants, refugees and the internally displaced¹² face many constraints – from racial/ethnic/religious discrimination at the community and policy levels, to exploitation by those seeking to make a profit at their expense, to lacking access to health and education facilities because of their irregular status or because they are poor. Migrants and internally displaced people may have to endure inhumane living and working conditions, physical and sexual abuse and degrading treatment. As the disadvantages faced by both migrants (legal and irregular) and internally displaced people are similar this section addresses their concerns together.

Key Issues Concerning Indigenous Peoples Include:

- **Cultural Integrity** – Right to their own language, culture, religion, traditional practices and freedom from outside cultures being imposed or being forced to assimilate.
- **Land and natural resources** – Right to own land (individually or collectively) that has traditionally been theirs and right to access all resources within that land. For indigenous peoples, land is more than possession of property. It signifies a deep cultural connection and intangible value placed on the land. Land is very much linked to survival and survival of the community and traditions. Control over the management and conservation of land and resources that are part of indigenous property should be placed in their power. Additionally, the State should allow for varying definitions of property and recognize indigenous ways of defining property rights.
- **Participation** – Right to participate within their traditional structures as well as the choice to participate in the State system, especially in all issues that concern indigenous peoples. Participation goes beyond merely consulting indigenous peoples, and implies decision-making power is vested in the indigenous peoples. Any policies affecting indigenous peoples should only be pursued with their informed consent.
- **Indigenous knowledge** – Safeguard indigenous knowledge of the natural world, their customs and practices. Intellectual property rights issues over indigenous music, stories, scientific knowledge, etc. may be a serious concern as non-indigenous people may gather this knowledge and accrue the benefits from it, while indigenous communities themselves may not receive anything in return.
- **Self-determination and self governance** – As a part of their right to self-determination indigenous peoples seek devolution of power from the central government and a recognition by the State of the traditional governance and judicial institutions within indigenous communities.
- **Collective rights** – Respect collective rights of indigenous peoples as a group along with individuals. Indigenous peoples seek to be recognized as a people and not just as individuals. Even within the community, often priority is given to the welfare of the group over that of the individual. This also is relevant for issues of land, where land is often collectively owned. For example, communal land rights over forests and grazing lands should be respected.

International Human Rights Instruments

The International Convention on Protection of Rights of the Migrant Workers and Members of Their Families was developed within the framework of prior International Labour Organization conventions concerning forced labour and migration for employment.¹³ It entered into force in July 2003, however many States have yet to sign it. The Convention establishes norms and lays out basic principles concerning the treatment of migrant workers and members of their families. It also reiterates the fact that migrants are guaranteed their fundamental human rights and member States need to ensure that these are not violated. In particular, Part IV of the Convention (Articles 64-71) encourages States to promote policies and laws that protect the rights of migrants and clearly outlines the responsibilities of different parties including the responsibility of the State to provide adequate information and appropriate services (see also ILO Convention No. 97 on Migration for Employment and ILO Convention No. 143 on Migrant Workers - Supplementary Provisions).

Designing Innovative Approaches Tailored to Enhance Access to Justice

In Kosovo, efforts were made to promote a professional, independent, impartial and multi-ethnic judiciary and prosecution service. A multi-ethnic judiciary, especially at the local level, can help in taking action against ethnic bias and to build trust between different communities. For example, the Judicial Integration Section (JIS) was, "tasked with increasing minority participation in the judiciary and prosecution service, ensuring access to justice for minorities and tracking the treatment of minorities by the justice system."

Other ways in which the JIS addressed obstacles facing ethnic minority communities included:

- Shuttle services to and from the community to courts in order to overcome restrictions on freedom of movement.
- Court liaison officers to facilitate access to courts by providing advice and outreaching to different ethnic groups.
- Oversight bodies to monitor investigations, court processes and judges to ensure impartiality.
- Victim assistance units to provide comprehensive assistance including legal services, shelter services, psycho-social support, medical assistance, education, income generation and compensation.

United Nations Interim Administration Mission in Kosovo (UNMIK)

The Guiding Principles on Internal Displacement seek to protect the rights of internally displaced people.¹⁴ They were developed over several years, pursuant to the 1992 mandate by the Commission on Human Rights. The principles address the specific needs of internally displaced people worldwide and establish the duty of international authorities to provide protection and humanitarian assistance to these individuals. They serve as an international standard to guide governments and international humanitarian and development agencies in providing assistance and protection to internally displaced people, ensuring that they enjoy the same rights and freedoms as other persons in their country. It also details the responsibility of the State to prevent displacement, protect internally displaced people during displacement and rehabilitate them, including compensating for loss and lack of access to property.

Challenges

Legal and institutional discrimination

Legal and institutional discrimination of migrants (particularly irregular migrants) and internally displaced people exist at many levels. Xenophobia may be deeply rooted in the countries that receive migrants (including within the police, legal system and judiciary), which may manifest itself in the stringent immigration policies or lack of protection for migrants. Even where international protections for migrants exist, States receiving migrants are reluctant to sign on to treaties or conventions. Similarly, though there are Guiding Principles for Internally Displaced People, governments may not have the capacity to provide adequate protection or services to them or may even be hostile towards them.

The Human Cost of Migration

"More than 800,000 Filipinos leave home each year to work overseas. Up to 7,000 Nepali women and girls are trafficked to India each year, mostly for sex work, and 4,500 a year from Bangladesh, also mainly for sex work. Sri Lanka is a major labour exporter with close to a million migrant workers, 70 per cent of whom are women....The human costs the workers face is real — hardship in coping in alien lands, discrimination, rules that work against reproductive health, the difficulties of re-integration and the breakdown of traditional family structures."

From 'On the Asian Migration Trail', IPS New, 2002
<http://www.ipsnews.net/migration/project.html>

¹² Internally Displaced Persons (IDPs) are defined in the UN Guiding Principles on Internal Displacement as "...persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border."

¹³ UNHCHR. [http://www.unhchr.ch/html/menu3/b/m_mwctoc.htm].

¹⁴ UNHCHR. [<http://www.unhchr.ch/html/menu2/7/b/principles.htm>].

Negative social attitudes towards migrant and internally displaced people

Local populations often don't understand the benefits migrants can bring in terms of the economy and enriching the diversity of the community. They see migrants as a liability and they often become scapegoats during economic downturns – and are blamed for taking away jobs and for increasing criminality. Anti-terrorism policies may also heighten tensions between migrants and local communities making it more difficult for migrants to live and work within the community. Internally displaced people are also subject to negative perceptions from local populations who may be hostile towards them as they may see them competing for jobs or humanitarian aid.

Conflict-induced and Development-induced Displacement

“The two forms of internal displacement of critical concern in Asia are conflict-induced displacement and development-induced displacement. Indeed, the two are often linked. Forced displacement caused by development policies and projects often produces internal conflicts and violence within societies, especially over land and resources, directly leading to conflict-induced displacement. Violations of human rights, whether civil, political, economic, social or cultural, often accompany both kinds of displacement.”

Summary Report, Regional Conference on Internal Displacement, Bangkok Thailand, Feb 22-24, 2000

Economic constraints

Migrants and internally displaced people are among the most vulnerable members of society. They tend to live in the poorest neighbourhoods and do not have adequate support systems. Due to their economic vulnerability, they may have to take any work that is available including that which is abusive or exploitative. Despite abuses committed against them, they may refrain from using the formal justice system because of the fear of being deported or because the costs associated with lawyers and court processes may be too great for them. For example, immigration lawyers may be unaffordable for those working without the necessary papers even though they may be the ones who need them the most.

Inability/lack of political will to provide services

Governments are often unable to provide the necessary legal services to migrants and internally displaced persons, and in times of conflict, often do not consider it a priority to address the legal needs of their internally displaced populations. Even after

conflict, the police and the judiciary may not have the capacity to properly investigate and address issues of property rights, gender-based violence or other kinds of human rights violations against the internally displaced. Migrants also need specialized services to deal with immigration concerns. However, government agencies are often constrained by limited resources – both human and financial. Also migrants and internally displaced people may be reluctant to seek out the formal system to voice grievances or to receive services because of the fear of being caught, deported, or blacklisted.

Basic Human Rights for Migrants and Internally Displaced Peoples

As the International Convention on Protection of Rights of the Migrant Worker and the Guiding Principles on Internal Displacement note, these instruments merely reaffirm that migrants and internally displaced people are entitled to the same basic human rights guaranteed to all. Though States may have different policies regarding immigration, they still need to adhere to overall human rights standards and follow their guidelines in developing laws and policies related to migrants and internally displaced peoples.

Capacity Development Strategies

Support for legal reforms to eliminate discrimination

To address discrimination against migrants and internally displaced people, it is first necessary to ensure that the laws in place follow international human rights standards and norms. After reviewing the laws, efforts can be made to repeal discriminatory laws and ensure that laws are put in place that guarantee and protect the rights of migrants and internally displaced people. For example, governments can be encouraged to adopt international conventions and treaties protecting migrant workers as well as incorporate the Guiding Principles into their policies regarding internally displaced people.

Capacity development of law enforcement personnel and agencies

Police, judges and lawyers can be sensitized to be more aware of the rights of migrants and internally displaced people. Law enforcement personnel and agencies should also be sensitized to avoid discriminatory attitudes and actions (e.g., racial profiling). This can be done through workshops and training programmes that encourage them to think through the consequences of their actions. For example, in Europe, the European Commission has set up a programme called NGOs and Police

Against Prejudice (NAPAP), which seeks to educate police about migrant issues by encouraging members of minority ethnic groups to take part in the training courses, as well as encouraging local immigrant groups to run day courses for the police, promoting social integration of immigrants within the community, and making police more aware of the problems that arise in a multicultural society.¹⁵

Support and strengthen community dispute resolution mechanisms

Migrant and internally displaced communities may have their own dispute resolution mechanisms that they prefer to use rather than pursuing formal legal mechanisms. Decentralized non-formal justice systems can be encouraged, especially within the community, as long as they don't contradict the justice system already existing in the country and conform to human rights standards. In addition, specific courts can be set up that are more accessible for migrant and internally displaced populations.

Support for civil society organizations that work with migrant and internally displaced populations

As migrants and internally displaced people can be hard to reach populations, civil society organizations (CSOs) can be useful in providing assistance to these populations, especially when they need to navigate their way through the justice system. They may already have a presence in migrant communities and in camps for internally displaced people and may be trusted by the population there. Specifically, they can provide pro bono services, raise awareness and disseminate information about the rights of migrant and internally displaced people, set up help desks that specially cater to the needs of migrant or internally displaced populations, and work to organize these populations so that they are better able to claim their rights from the State. In addition, CSOs can also conduct public education programmes for communities and government personnel on tolerance and respecting diversity as well as counter negative myths and stereotypes (see Chapter 4: Civil Society Oversight and Chapter 5).

6.6 PEOPLE LIVING WITH HIV/AIDS

In Asia alone, 5.2 million men, 2 million women and 168,000 children are living with HIV.¹⁶ However, HIV/AIDS is not just a public health issue, it is also a human rights issue. Therefore, HIV/AIDS should also be addressed within a human rights framework. This means recognizing the vulnerability of people living with HIV/AIDS (PLWHA) and the additional measures that need to be taken to ensure that their

needs are addressed and their rights are protected. Unless measures are taken to protect them, PLWHA are likely to face discrimination, be stigmatized, and be denied access to the same opportunities and rights as everyone else. For example, hospitals may refuse to admit them or they may be mistreated by hospital staff, they may face discrimination in hiring practices, they may be reluctant to go to courts for fear of being publicly labelled and stigmatized. Further, when implementing prevention measures that seek to reduce the spread of HIV/AIDS, policy makers should ensure that they do not violate the rights of PLWHA. Below are some obstacles faced by PLWHA and some capacity building measures that can help in addressing these obstacles.

International Human Rights Instruments

The UN General Assembly adopted a resolution in 2001 that declared the commitment of States to undertake a coordinated effort to address the problem of discrimination against PLWHA which is also detrimental to social and economic development and compromises human dignity and enjoyment of human rights. The Declaration of Commitment on HIV/AIDS recognizes that HIV/AIDS particularly affects people in developing countries and that those from disadvantaged groups are even more vulnerable to its effects.¹⁷ In particular, paragraphs 58-61 of the Declaration make specific references to HIV/AIDS and human rights.

The International Guidelines on HIV/AIDS and Human Rights is also a useful document that is relevant when working on programming for access to justice for PLWHA.¹⁸ The Guidelines explains the kinds of obligations applicable to duty bearers (especially governments) to which capacity building strategies could be directed.

“By 2003, enact, strengthen or enforce as appropriate legislation, regulations and other measures to eliminate all forms of discrimination against, and to ensure the full enjoyment of all human rights and fundamental freedoms by people living with HIV/AIDS and members of vulnerable groups; in particular to ensure their access to, inter alia education, inheritance, employment, health care, social and health services, prevention, support, treatment, information and legal protection, while respecting their privacy and confidentiality; and develop strategies to combat stigma and social exclusion connected with the epidemic;”

*Paragraph 58,
The Declaration of Commitment on HIV/AIDS
Adopted by General Assembly resolution
S-26/2 of 27 June 2001*

¹⁵ López, Asbel. 1999. "Police Against Racism." *UNESCO Courier*. [http://www.unesco.org/courier/1999_12/uk/ethique/txt1.htm].

¹⁶ *The global statistics on HIV/AIDS is even more alarming. In 2003, there were 3 million deaths from AIDS and 40 million people living with HIV worldwide. See [www.unaids.org] for global statistics and [http://www.youandaids.org] for statistics in Asia.*

Challenges

Legal and institutional discrimination

National laws may discriminate against people living with HIV/AIDS. Moreover, there may not be adequate laws in place to protect PLWHA. Policies such as mandatory blood testing before marriage or before being offered employment violate basic rights (see above). Further, when governments implement hastily and ill thought out laws that seek to prevent the spread of HIV, they may have an adverse effect, by actually increasing the spread of the disease by driving high-risk activities underground.

Fear of consequence of institutional bias

HIV high-risk groups such as commercial sex workers (CSWs), injecting drug users (IDUs) and men who have sex with men (MSM), may be reluctant to use the formal justice system when their rights are violated for fear that they will be penalized for their activities. In addition, fear of discrimination by lawyers, judges and other court officials on the basis of their HIV status may prevent PLWHA from seeking remedies from the formal systems. There also may be an inherent bias against PLWHA on trial, thereby influencing the opinion of the judge or jury. Long court processes constitute another institutional barrier for PLWHA in many Asian countries, as sufferers may not be able to attend court proceedings because of their illness, or they may not live to the end of their trial, as the lack of access to proper treatment means many have a greatly reduced life span.

Targeted Violence Against People Living with HIV/AIDS

Police and powerful criminals in Bangladesh target abuse at commercial sex workers, men who have sex with men and injecting drug users – all who are at a high risk of HIV infection. Human Rights Watch has recorded cases of abduction, beatings, rape, gang rape, and extortion on the part of the police force. Victims of such types of violence are unable to make official complaints, as their complaints are not taken seriously. They are ostracized from society and have little support when they face such abuses. These types of human rights violations not only expose the corruption of the law enforcement system, but can also serve as a setback in the fight against HIV/AIDS.

Human Rights Watch, 2003

Negative social attitudes

Negative social attitudes towards PLWHA pervade all sections of society and the justice system is no

exception.¹⁹ PLWHA may be stereotyped and marginalized because of their HIV status. Law enforcement personnel, judges, lawyers, doctors, and so on may be biased against PLWHA, placing them at an unfair disadvantage when seeking assistance from the justice system. These attitudes may prevent PLWHA from receiving adequate care and support, especially when they need it the most.

The stigma faced by PLWHA exists in many variations. The stigmatization they feel may be further amplified if they are also a member of another marginalized group. Members of other disadvantaged groups can also discriminate against PLWHA, even if they are part of that group (e.g., if a woman is also HIV positive, she may not receive the support of other women who are not HIV positive). In addition, PLWHA may also be stigmatized and discriminated against even when they do not belong to other stigmatized groups, e.g., the assumption that all men who have AIDS are MSMs or that all women who are HIV positive are commercial sex workers exacerbates discriminatory attitudes towards them.

Lack of technical capacity to provide remedies

Legal aid services that are aware of and well versed on the issues facing PLWHA should be established. Support for NGOs conducting outreach programmes to communities that are vulnerable to HIV/AIDS need to be encouraged. Laws, once reformed, also need to be publicized. Further, the lack of adequate facilities for PLWHA needs to be addressed -- not only do PLWHA suffer from outright discrimination, but they are often not provided with the facilities they require within the judicial system. One area in particular that needs to develop greater sensitivity to PLWHA is the prison system. When people from high risk groups are arrested, e.g., injecting drug users or commercial sex workers, the limited prevention measures taken in prisons may increase HIV infection within prisons, through sharing of needles or through unprotected sex.

Economic constraints

The cost of going through official legal channels often serves as a deterrent for PLWHA in accessing justice, especially when they are already facing high medical costs for their treatment or are unable to work due to discrimination or physical weakness or illness as a result of AIDS.

Capacity Development Strategies

Support for legal reforms to eliminate discrimination

Widespread legal reform should be encouraged in order to protect PLWHA. Non-discrimination and equality before the law are basic protections that should be available to PLWHA. Laws should follow

¹⁷ UN. [<http://www.un.org/ga/aids/coverage/FinalDeclarationHIVAIDS.html>].

¹⁸ See <http://www.ohchr.org/english/issues/hiv/guidelines.htm>

¹⁹ See Bharat, S., Aggeleton, P, Tyrer, P. August 2001. 'India: HIV and AIDS-related Discrimination, Stigmatization and Denial', UNAIDS, Geneva, Switzerland. The report examines the types of discrimination faced by PLWHA and includes recommendations.

international guidelines that establish minimum standards for policies relating to PLWHA. These policies should be publicized so that the general public is aware of them and the consequences of discriminatory practices against PLWHA. Confidentiality of PLWHA also needs to be protected and adequate measures taken when these rights are violated. Partnership strategies with CSOs and other organizations working on HIV/AIDS, such as UNAIDS, should be promoted.²⁰

Capacity development for law enforcement personnel and agencies

Along with establishing non-discriminatory policies and laws, it is just as important that once these policies are in place they are enforced. Law enforcement personnel and other employees of the judicial system need to be educated about HIV/AIDS and internal policies need to be in place that do not discriminate against PLWHA. In addition, prison systems need to be evaluated to ensure that they protect the rights of PLWHA, i.e. protection of confidentiality, HIV/AIDS education, and access to condoms, clean syringes and treatment. Further, prisoners with HIV/AIDS should not be stigmatized or isolated, while at the same time measures must be taken to protect other prisoners from infection (also see section on Prisons in Chapter 4).

Higher Risk of HIV Infection within Prisons

Problems in the justice system can actually increase people's vulnerability to HIV/AIDS. In Thailand, studies suggest HIV prevalence is 20% among IDUs who have never been in jail, 38% among those who have been in jail but do not report injecting drugs while in jail and 49% among those who injected while incarcerated (AIDS in Asia: Face the Facts). The sharp increase in HIV prevalence among those who have been in prison points to the urgent need for prison systems to develop clear policies on HIV/AIDS including measures to prevent the spread of HIV/AIDS among prisoners.

Establish a complaint body

A complaints body, such as a Commission on HIV/AIDS, could be set up as an oversight mechanism to protect the rights of PLWHA. Further, in addition to monitoring laws to ensure they do not discriminate against PLWHA and working to mainstream HIV/AIDS prevention into government policies, the Commission could also work as a complaints body. This would provide PLWHA with a means through which they could file complaints, which could be faster and less costly than going through a court process. It could also allow them to file complaints anonymously, which would protect their privacy. HIV/AIDS Commissions

could work in conjunction with the National Human Rights Commission to lobby the Government to protect the human rights of PLWHA (also see National Human Rights Institutions in Chapter 4).

Encourage involvement of PLWHA in the justice system

PLWHA should be encouraged to overcome the stigma associated with HIV/AIDS and to become actively involved in promoting the rights of PLWHA including access to justice. For example, they could work with police and law enforcement officials to ensure that sufficient training and education about HIV transmission and prevention as well as on the rights of PLWHA is provided to police officers on a regular basis. Other areas of involvement could include participation in National HIV/AIDS Commissions to promote issues and concerns related to them. They could also become involved in promoting legal aid and raising legal awareness for other PLWHA as well as the community in general, and they could participate in informal systems and be trained as mediators so that community mediation boards become more inclusive.

Reforms to Protect the Rights of PLWHA

National Human Rights Institutions, NGOs and government agencies working on HIV/AIDS need to lobby for the recognition of HIV/AIDS as not just a medical problem, but as a development problem that has a human rights dimension as well. PLWHA often have their rights violated and organizations should work to reform the legal framework to protect PLWHA from stigma and abuse (i.e. anti-discrimination policies and legislations), investigate complaints of discrimination (in order to enforce the law), as well as educate and advocate for the rights of PLWHA.

In India, for example, the National Human Rights Commission organized a conference on National Human Rights and AIDS in 2000 and produced a report with recommendations and action points in order to address HIV/AIDS and human rights. More recently, the National AIDS Control Organization has begun working with a Member of Parliament to develop comprehensive laws that protect the rights of PLWHA and those vulnerable to infection. The process involves, 1) comparative research of other countries' HIV/AIDS policies, 2) drafting legislation based on the research, 3) undertaking consultation with stakeholders about the legislation, and 4) submitting the legislation to Parliament.

To bring about legislative changes and to ensure that laws that have been reformed are enforced, it is necessary to build coalitions across organizations (recognizing the cross cutting nature of HIV/AIDS) and to work towards building political will to implement changes.

²⁰ Also see UNAIDS site on HIV/AIDS, human rights and law. [http://www.unaids.org/en/in+focus/hiv_aids_human_rights/unaid+activities+hr.asp]. In particular, see 'Handbook for Legislators on HIV/AIDS, Law and Human.

Treatment Action Campaign (TAC), access to justice, and the right to health

The experiences of the Treatment Action Campaign (TAC) in South Africa provide vivid illustrations of how access to justice strategies can save lives in the context of promoting the right to health and fighting the HIV/AIDS pandemic.

In response to continued pressure by civil society groups and to the rising AIDS crisis, the government of South Africa amended the Medicines and Related Substances Control Act 1965 in an attempt to reduce the price of publicly available drugs, and encourage pharmacists to provide cheaper generic drugs. The Pharmaceutical Manufacturers Association (PMA) and 39 drug companies challenged these amendments, arguing that they violated the WTO's intellectual property rights agreements. TAC then intervened, counter-claiming that the legislation was valid and necessary in light of the government's positive duty to fulfill the right to health. With the public pressure following TAC's intervention, the PMA and the drug companies withdrew their case. An indirect result was that the price of anti-retroviral medicine fell from about 4,000 rand a month to 1,000 rand a month.

TAC also moved on to try to compel the national and provincial governments to provide antiretroviral drugs to pregnant women to prevent the transmission of HIV from mothers to their children. The government appealed to the Constitutional Court, after TAC secured a successful decision. The Constitutional Court acknowledged that it was impossible to provide antiretrovirals to all HIV sufferers immediately, but that the government must make reasonable steps to fulfill constitutional socio-economic rights on a progressive basis. It found that the state policy of not making antiretroviral available at hospitals and clinics was unreasonable. The court ordered the government to take reasonable steps to rectify the situation and to provide testing and counseling services at the hospitals and clinics in question.

Of course, obtaining successful judgements and negotiated settlements is one thing; ensuring and monitoring implementation is another. Successful litigation strategies can never be seen as purely 'legal.' TAC's experiences show how legal literacy, social mobilisation, working with the media, political campaigning and strategic litigation can together help to overcome bureaucratic and political obstacles to human rights realisation, with potentially dramatic results.

6.7 PEOPLE WITH DISABILITIES

People with disabilities include those with intellectual, physical, sensory (hearing, vision, and/or speech), psychiatric/mental illness, or acquired disabilities. People with disabilities are often marginalized and socially excluded. They tend to be older²¹, poorer, less educated and have less employment opportunities than those without disabilities. In countries like Viet Nam, Laos, Cambodia, and Afghanistan, many people are disabled as a direct result of conflict – either as a result of combat wounds or due to landmines. Access to justice for people with disabilities often means overcoming obstacles of discrimination, communication, and physical access. They are at a higher risk of becoming victims of crime and exploitation, they may be unknowingly used by others for criminal purposes, they may be denied opportunities because of their difference, and they may lack access to facilities and resources they need, including courts and other legal institutions.

International Human Rights Instruments

Several international instruments have been formulated to address the rights of people with disabilities, which go beyond just providing social services and rehabilitation. On December 20, 1971, in resolution 2856 (XXVI), the UN General Assembly

proclaimed the Declaration on the Rights of Mentally Retarded Persons.²² This was followed by UN General Assembly Resolution 3447 (XXX) on December 9, 1975 with the proclamation of the Declaration on the Rights of Disabled Persons.²³ Both these Declarations affirm the commitment of member states of the UN General Assembly to protect and promote the rights of people with disabilities and provide the appropriate legal framework and policy measures to ensure that they are guaranteed rights equal to that of non-disabled people.²⁴ The Overview of International Legal Frameworks for Disability Legislation lists a number of additional international human rights instruments relevant to people with disabilities.²⁵

Challenges

Absence of adequate laws and policies to protect people with disabilities

As with other disadvantaged groups, people with disabilities need laws that protect their rights. They are some of the most vulnerable members of society and without specific guarantees of their rights, their needs may be overlooked and they may not have any means of protecting themselves when faced with discriminatory practices.

²¹ *The elderly are more vulnerable to disease that can result in range of mental and physical disabilities.*

²² UNHCHR. [http://www.unhchr.ch/html/menu3/b/m_mental.htm].

²³ UNHCHR. [<http://www.unhchr.ch/html/menu3/b/72.htm>].

²⁴ *Exceptions for people with mental disabilities can be found on paragraph 7 of the Declaration on the Rights of Mentally Retarded Persons. PGeneral Assembly resolution 2856 (XXVI) of 20 December 1971.*

²⁵ UN. [<http://www.un.org/esa/socdev/enable/disovlf.htm>].

Discrimination and exclusion

People with disabilities are often negatively stereotyped and marginalized by the rest of society. They are isolated and often made to feel their participation in activities, programmes or public life is not welcome. Law enforcement officials and other employees of the justice system may also have discriminatory attitudes towards people with disabilities, which may serve as a disincentive to using official channels. Also, because of the negative public perception and the social attitudes others have towards people with disabilities, 'issues of prejudice, low self esteem, fear of discrimination and retribution and communication problems' are exacerbated and often crimes committed against them go unreported.²⁶

"Disabled persons shall be able to avail themselves of qualified legal aid when such aid proves indispensable for the protection of their persons and property. If judicial proceedings are instituted against them, the legal procedure applied shall take their physical and mental condition fully into account."

Paragraph 11, Declaration on the Rights of Disabled Persons, Proclaimed by General Assembly resolution 3447 (XXX) of 9 December 1975

Lack of adequate facilities

The lack of physical access to buildings, public transport, etc. is one of the major obstacles for people with disabilities, preventing them from being able to access the justice system. Infrastructure barriers, like the lack of wheelchair ramps or lifts, mean that it is difficult for people with disabilities to even access the court premises and processes. Even if laws are in place calling for all public buildings to be accessible for people with disabilities, it is necessary to facilitate and enforce implementation of these laws. This includes providing funds to make these buildings accessible.

Barriers in communication

For people with disabilities, especially those with psychiatric, mental, speech, or hearing disabilities, communication with legal practitioners can be very difficult. Legal practitioners may not be able to understand or communicate with their clients, as they may not have the adequate interpretation facilities. "Hidden" disabilities such as mental, psychological, and intellectual handicaps may go undetected by legal practitioners, presenting a danger of misrepresentation and inappropriate sentencing. In such cases, it is important to include

psychologists or social workers so that when people with disabilities talk to prosecutors they do not implicate themselves unknowingly. Mechanisms should be put in place to conduct proper assessments, especially for people with mental disabilities. For people with hearing or vision-related disabilities participating fully in court proceedings can be very difficult unless interpreters are provided. Further, the formality and adversarial nature of court proceedings may intimidate and hinder people with disabilities from communicating their complaints. This can be compounded by the lack of experience people with disabilities have participating in public life.

Lack of awareness/information

People with disabilities often suffer from a lack of awareness of their rights and appropriate procedures to demand justice when their rights have been violated. They may not be aware of the options available to them and, if they suffer from psychiatric disabilities, they may not understand or may not be able to make a decision even when their rights are explained to them. They may also be used in criminal activities without being aware of it. In some cases, they may be dependent on family members or be housed in an institution and they may not know who they should get in touch with or how when their rights are violated.

Capacity Development Strategies

Legal reform

To facilitate the ability of people with disabilities to access justice, it is necessary to prioritize the concerns of people with disabilities. Laws need to be instituted that guarantee their basic rights and include special considerations for their needs so that inappropriate sentencing can be avoided.

Types of legal and institutional reform include:

- **Ensuring unimpeded access to public facilities.**
- **Requiring signage and communication that is sensitive to the needs of people with disabilities.**
- **Instituting anti-discrimination laws.**
- **Providing access to professionals such as interpreters and psychologists at all points in the judicial process.**

As a first step, consultations with people with disabilities about their needs and concerns is one way that the State can get the information

²⁶ Schetzer, Louis and Judith Henderson. August 2003. "Access to Justice and Legal Needs: A project to identify legal needs, pathways and barriers for disadvantaged people in NSW. Stage 1, Public Consultations" Law and Justice Foundation of NSW, Sydney, Australia. [<http://www.lawfoundation.net.au/publications/reports/a2jln/1C/summary.pdf>].

necessary to create relevant laws and programmes addressing their concerns. It is essential that these laws are not only created, but also effectively monitored and implemented.

Simplify court procedures

Court procedures can be confusing in general, but they are even more intimidating and complicated for people with disabilities (especially mental disabilities). The language used in courts should be as simple as possible and legal advisors must learn to communicate in a way that can be understood by their clients. If necessary, interpreters and social workers should be present to make the client comfortable and facilitate the process. Legal personnel need to be trained to be sensitive to the needs of people with disabilities, avoid discriminatory practices and attitudes, and be aware of the issues they face in order to refer them to appropriate agencies and services. In addition, court delays should be avoided and systems need to be put in place that will expedite the court process. This is a crucial issue for people with disabilities as they often need extra support and care, which the State may not be able to provide for an extended period of time.

Offer a range of services for people with disabilities

Along with legal support for people with disabilities, it is necessary to ensure that other services are available to them as well. Psycho-social assistance for people with disabilities who are victims of crime, medical psychiatric care for those in need, and economic support for those who are homeless or have no way of supporting themselves are also issues that need to be taken into consideration when addressing the problems of people with disabilities. Facilities for people with disabilities should also be provided for people in prisons and alternative institutions for people with mental disabilities. It should also be recognized that the disadvantages faced by people with disabilities are often compounded by the fact that they face many other obstacles simultaneously. People with disabilities are often poor, can be women, internally displaced persons, HIV positive, and so on, and in such cases, overcoming these other obstacles is even more challenging. It is necessary then, for State and non-State actors, to support people with disabilities and assist in protecting their basic rights so that they are able to access the justice system when they need it.

Asia and Pacific Decade of Disabled Persons

The Asia and Pacific Decade of Disabled Persons which was originally intended to end in 2002 has been extended for another decade (2003-2012) to ensure that the momentum and progress of the previous decade will be built upon. The Biwako Millennium Framework for Action towards an Inclusive, Barrier-free and Rights-based Society for Persons with Disabilities in Asia and the Pacific (BMF) that emerged out of the 1st Decade of the Disabled Person includes specific strategies that nations need to adopt, including those promoting rights-based legislation for disabled people. The strategies include:

- Reviewing and adopting non-discrimination policies
- Encouraging national human rights institutions to protect the rights of people with disabilities
- Actively involving persons with disabilities in policy formulation
- Promoting the ratification of international human rights treaties
- Calling for governments to support the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities
- Consulting and including the persons with disabilities in drafting laws and procedures that affect them

*Focus on Ability, Celebrate Diversity:
Highlights of the Asian and Pacific Decade of Disabled Persons, 1993-2002
Social Policy Paper No. 13, 2003
ST/ESCAP/2291*

