

Programming for Justice: Access for All

**A Practitioner's Guide to a Human Rights-Based
Approach to Access to Justice**

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1. Woman in Dolakha, UNDP Nepal, 2003
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FOREWORD

The Hon Justice Michael Kirby AC CMG*

I like this book. It aims to help officials, aid agencies, civil society organizations and judges and lawyers to fulfil the true purposes of law.

The book has grown out of the fine objectives of the United Nations Development Programme (UNDP). I honour UNDP and the officers who work within it. Truly, they participate in an agency that takes seriously the fundamental purposes of the United Nations organization, declared in the Charter. From the start, the United Nations has been founded on the tripartite principles of attaining peace and security; upholding human rights and fundamental freedoms; and promoting economic equity and justice. The subjects of this book are important for the promotion of these objectives. Attaining them is essential to building a better, safer and more equitable world.

I have seen UNDP at work in the post-conflict situation in Cambodia; in the changeover to multi-party democracy in Malawi; and in a myriad of programmes in many other lands. The people of the world thirst for real justice and not just words and shibboleths. This book is aimed at responding to that thirst. It has taken a practical, simple and hands-on approach.

At the threshold there is a fundamental challenge in preparing a book such as this. It must be capable of being used in many lands, specially in the Asia-Pacific region. Yet the diversity of legal systems, the sharply differing institutions and rules of law, the disparate cultures, religions and values and the divergent traditions of the respective judiciaries and legal professions to whom the book is addressed make it difficult to state general rules. Hence, I like the fact that the book is based on the concept of lessons, not prescriptive rules.

For instance, in the opening of the book, reference is made to a hierarchy in which constitutional and international law are placed above the ordinary rules of national and local law and the common law. Yet in many countries, including within the Asia-Pacific region, international law remains a poor cousin of the established national legal systems. The dualist theory still tends to banish international law to the periphery of practical concerns. Even where there is a fundamental conflict between national (including constitutional) law and the international law of human rights, it may be the duty of local judges and lawyers to uphold the national law.

This problem arose recently in my own court in Australia. It appeared fairly clear that a federal law that required automatic detention of infant aliens who arrived or stayed in Australia without proper visas, was in conflict with international law, including provisions of the Convention on the Rights of the Child. Yet because the national law was held to be clear and within the constitutional powers of the Australian Federal Parliament, it was upheld. It had to be obeyed within Australia. The most that the court could do was to call attention to the disparity between Australian law and the country's international obligations under international law.

Nowadays, communications about such disparities can often be taken by those affected to regional or international human rights courts or other bodies. National courts will commonly try to avoid, or reduce, such disparities. The influence of international law upon national law is increasing all the time. Even in the sphere of constitutional law, the Supreme Court of the United States, in a legal culture traditionally isolationist, has been looking closely and beneficially at the international law of human rights to cast light on the meaning of the American Constitution. So this is an age of transition in the law. But the tension between the two worlds cannot be brushed aside by judges and lawyers. The rule of law means that judges and lawyers must uphold the governing law, once it is ascertained.

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I like the fact that this book inserts in its text practical examples from many countries to illustrate its themes. Thus, there are notes on pertinent developments in Bangladesh, Cambodia, Nepal, the Philippines, India, Timor Leste and Viet Nam. Concrete illustrations will help readers and users of this book to view their problems in context and to take heart from instances where the justice system has been improved.

I also like the fact that the book is strong on practical measures for translating the aspirations of international human rights law into practical means of assuring access to justice for all people. Thus, there are useful notes on expanding alternative dispute resolution; on promoting the use of information technology in court registries; on coordinating the initiatives of donor agencies; on helping in judicial training in ways that respect the independence of the judges from propaganda; on tackling corruption; on promoting public interest litigation; and on teaching people about their rights and how they can use the courts to repair violations and to promote the entitlements of the vulnerable.

There are also useful chapters on particular groups who need added help to turn the legal system into an instrument of justice. These include women; indigenous peoples; immigrants and displaced persons; people living with HIV and AIDS; and people with physical and mental disabilities. Yet these groups do not exhaust the classifications of human beings who often miss out in protection of their rights within the legal order. Other such groups include illiterate persons; religious minorities; injecting drug users; prisoners and detainees; homosexuals and other sexual minorities; and commercial sex workers.

The principle of "equal justice under law," carved into stone over many a courthouse, needs to be translated into action in our world. And we have to realize that gaining real access for all to the justice system is only the beginning of the attainment of justice. Thus, many people who, after a struggle, obtain access to courts, find indifference to their concerns; lack of sympathy for their vulnerability; antagonism to their claim of rights. Or they find that the law is completely out of date, with no reform mechanism to improve it and no real interest to repair its injustices and inefficiencies. Sadly, it is in such circumstances that corruption breeds; because corruption is all too often the solution that economics provides to remedy outdated, unjust and inefficient laws. We do not cure corruption only by imposing big punishments. We must tackle the inflexibilities of the justice system with precisely the same energy with which we endeavour to promote access to it.

I welcome the instruction of this book to its readers never to lose sight of the big picture; always to encourage participation of affected groups; to attend to minorities; and to promote institutional change. Sixty years ago, a great Australian Chief Justice, Sir John Latham, said that it was comparatively easy for legal systems to uphold the rights of majorities and the powerful. The real test comes when they are asked to protect the vulnerable, minorities and the weak. This remains true today. This practical book suggests ways in which judges and other actors can rise to the challenge. Doing so, they will bring to bear that happy blend of idealism and practicality that is the hallmark of a justice system worthy of that noble name.



*Michael Kirby
18 March 2005
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PREFACE

The linkages between human rights and development have been highlighted by a growing amount of literature over the past few years. However, handbooks that provide practical guidance on how to link the two are still rare. In this context this Practitioner's Guide, Programming for Justice: Access for All, provides an excellent and long overdue contribution in highlighting practical linkages between the different components of the justice sector and the normative framework of human rights. This Guidebook primarily addresses UNDP staff who have the responsibility of supporting programmes to secure the human rights of people afflicted by poverty and other disadvantages in developing countries. It would be useful also to their counterparts in governments and civil society organisations.

The Guide has been produced by UNDP's Asia-Pacific Rights and Justice Initiative. UNDP embarked on this endeavor in August 2002 to engage in systematic knowledge sharing with one of the intended end results to produce a handbook with practical suggestions for implementing access to justice programmes. Since then, facilitated by the Bangkok and Kathmandu SURFs, half a dozen regional workshops have been held, hundreds of projects have been screened and "deconstructed" to codify useful lessons and a multitude of ideas have been exchanged on the access to justice knowledge network. Meanwhile, the Initiative has continued to grow, with 16 UNDP country offices and more than 30 UNDP country office practitioners now involved in the Initiative, sharing their knowledge and experience with each other.

Two aspects of the Initiative need to be highlighted because they were instrumental in preparing this Guide:

First, a UNDP community of practice was at the heart of the undertaking, meaning that the generation, codification and dissemination of knowledge happened primarily through practitioners rather than theoreticians. We believe that the practical orientation and the focus on translating concepts into action are reflected in the structure and content of this guide.

Second, the Initiative applied a human rights-based approach to development by advocating (a) the use of relevant human rights standards as a roadmap for policy change; (b) the voice of disadvantaged people; (c) the establishment of a clear framework for accountability in development; and (c) the analysis of conflict risks and power inequalities in development efforts.

Drawing on experiences and lessons learned from different access to justice interventions within the Asia-Pacific and sometimes beyond, this Practitioner's Guide discusses a wide range of obstacles and capacity development strategies to enhance access to justice. The formal and informal systems of justice, legal aid and empowerment as well as specific obstacles facing disadvantaged groups and those in conflict situations in terms of their ability to access justice are all examined in the different sections of the Guide.

The various entry points suggested in the Guide should not be seen as prescriptive, since strategies will need to be tailored to specific development problems or obstacles. Instead, the Guide offers a methodology to assess problems in access to justice and design tailored responses.

The suggestions made in the Guide are already being pilot tested by UNDP, at both the country and regional levels. This exercise is being supported by the regional governance portfolio of programmes implemented by the Regional Center in Bangkok, in collaborative partnership with the Bureau for Development Policy. Donors, as well as national and regional institutional partners have all contributed to this product, and are expected to be critical actors in furthering this exercise. We welcome their continued involvement in the future and fruition of this initiative. As more lessons are learned from the application of the manual, we will update the Guide to ensure that it remains dynamic and applicable to a variety of development contexts.



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HOW TO USE THIS GUIDE

The overall aim of the Practitioner's Guide is to facilitate programming in access to justice. To this end the Guide takes the approach that the combination of a clear model in line with UNDP precepts, an assessment methodology and a mapping of highly distilled lessons will help the programmer to come to the strategic decisions.

This guide has been broken down into seven chapters. It is recommended to first read Chapters 1 and 2, while the other chapters can be consulted as and when needed.

Chapter 1 starts by describing the goals and scope of the justice sector in line with human development and human rights-based approaches. The core concept of the chapter is a model of access to justice that divides the scope of access to justice into three conceptual building blocks: (a) normative protection, (b) capacity to provide justice remedies, (c) capacity to demand justice remedies. These building blocks are later revisited in much greater detail in Chapters 3-5.

Chapter 2 provides a 10-step plan for practitioners to develop access to justice programmes. Hence, after scope and goals (the "what" access to justice comprises) has been clarified in the previous chapter, Chapter 2 is a "How-To" Guide to assess access to justice problems and to identify effective strategies.

Chapters 3-7 map typical obstacles in access to justice and strategies that can be applied to address such obstacles. These Chapters consist of a myriad of possible strategies and entry points. None of them is per se more or less valid or feasible than others, hence we have not prioritized them. Rather, their validity and feasibility needs to be assessed on a case by case basis (by means of the methodology outlined in Chapters 1 and 2). This is a reflection of the fact that there is of course no "one size fits all" solution to access to justice. It may be sufficient to skim the information on the various obstacles and strategies in the beginning; details can be referred to once a certain entry point is selected and a response to a development problem is designed.

The chapters have the following content:

Chapter 3 discusses capacity development strategies with regard to the normative frameworks that need to be in place to ensure that disadvantaged groups are protected and access to justice is ensured.

Chapter 4 examines the role and ability of institutions that are tasked with providing access to justice. This chapter is divided into five sections – The Ministry of Justice, The Court System, Informal Justice Systems, Oversight and Enforcement. Chapter 4 will rarely need to be read as a whole, and readers may want to go directly to the section most relevant to their work.

Chapter 5 explores legal empowerment, legal awareness and legal aid. It examines the different actors and types of interventions that can facilitate people's ability to demand a response and accountability from the justice system.

Chapter 6 focuses more specifically on the justice needs of disadvantaged groups. The first part of the chapter provides a general overview and highlights the main challenges to successful implementation of access to justice programmes focused on disadvantaged groups. It also suggests capacity development strategies that can be used in response to these challenges. The remaining sections discuss the specific impediments faced by particular disadvantaged groups.

Finally, **Chapter 7** focuses on the unique challenges faced by countries recovering from conflict.

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ACRONYMS AND ABBREVIATIONS

A2J	Access to Justice	IDP	Internally Displaced Person
ABA	American Bar Association	IDS	Institute for Development Studies, University of Sussex
ADB	Asian Development Bank	IDU	Injecting Drug Users
ADR	Alternative Dispute Resolution	ILO	International Labour Organization
AHRC	Asian Human Rights Commission	IOM	International Organization for Migration
AI	Amnesty International	IP	Indigenous Peoples
AIDS	Acquired Immunodeficiency Syndrome	IPO	Indigenous Peoples Organizations
AP-A2J	The Asia-Pacific Rights and Justice Initiative	LAWASIA	Law Association for Asia and the Pacific
BBC	British Broadcasting Corporation	M&E	Monitoring and Evaluation
CBO	Community-Based Organizations	MDG	Millennium Development Goals
CIDA	Canadian International Development Agency	MoJ	Ministry of Justice
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women	MRG	Minority Rights Group
CERD	Committee on the Elimination of Racial Discrimination	MSM	Men who have Sex with Men
CO	UNDP Country Office	NGO	Non-Governmental Organization
CSO	Civil Society Organization	NHRI	National Human Rights Institution
CSW	Commercial Sex Workers	NHRC	National Human Rights Commission
DCHR	Danish Centre for Human Rights	NSW	New South Wales
DFID	Department for International Development (UK)	OHCHR	Office of the High Commissioner for Human Rights
DG	Democratic Governance	PAR	Public Administration Reform
ESCAP	UN Economic and Social Commission for Asia and the Pacific	PLWHA	People Living With HIV/AIDS
ESCR	Economic, Social and Cultural Rights	PRI	Penal Reform International
GA	UN General Assembly	PVO	Private Voluntary Organizations
HDR	Human Development Report (UNDP)	RBA	Rights-Based Approach
HIV	Human Immunodeficiency Virus	RBP	Rights-Based Programming
HRBA	Human Rights-Based Approach	TAC	Treatment Action Campaign
HRBAP	Human Rights-Based Approach to Programming	TIJS	Traditional and Indigenous Justice Systems
HRW	Human Rights Watch	UN	United Nations
HURIST	Human Rights Strengthening Programme	UNAIDS	Joint United Nations Programme on HIV/AIDS
ICCPR	International Covenant on Civil and Political Rights	UNDP	United Nations Development Programme
ICERD	International Convention on the Elimination of all Forms of Racial Discrimination	UNESCO	United Nations Educational, Cultural and Scientific Organization
ICESCR	International Covenant on Civil and Political Rights	UNHCHR	United Nations High Commission for Human Rights
ICG	International Crisis Group	UNHCR	United Nations High Commissioner for Refugees
ICHRP	International Council on Human Rights Policy	UNICEF	United Nations Children's Fund
ICTJ	International Center for Transitional Justice	UNIFEM	United Nations Development Fund for Women
		UNMIK	United Nations Interim Administration Mission in Kosovo
		UNODC	United Nations Office on Drugs and Crime
		USAID	United States Agency for International Development

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