Towards Inclusive Governance

Promoting the Participation of Disadvantaged Groups in Asia-Pacific

UNDP Regional Centre in Bangkok

The analysis, opinions and policy recommendations contained in this publication do not necessarily reflect the views of UNDP.

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Foreword

This publication is the result of a collaborative effort among three regional programmes managed by the UNDP Regional Centres in Bangkok (RCB) and Colombo (RCC). The Centres are regional hubs for development knowledge and expertise, providing policy advisory, programming and capacity development services. Inclusive Governance represents a priority area of work for UNDP in this region, examining the extent to which governance institutions provide space to overcome the systematic exclusion of disadvantaged groups seeking to participate in decisions affecting them.

Lack of inclusive governance is widening the divide between rich and poor across Asia and the Pacific. Barriers to governance structures inclusive of disadvantaged and marginalized groups are preventing access by tens of millions in the region – women, indigenous peoples, people with disabilities, victims of natural disasters and others – to critical governance services, as well as preventing them from exercising their human rights and achieving higher levels of human development. Political inclusion of such groups is essential to overcome the deeply embedded social inequities and economic inequalities prevalent in the region.

Although national circumstances differ across the Asia-Pacific region, governments face a common challenge: to create an enabling governance environment that is not only aware of, and responsive to, the needs and interests of the most disadvantaged and marginalized – but that also is willing and able to provide sound, effective remedies to these groups' concerns.

This publication also examines the application of the principles of non-discrimination, participation, accountability and empowerment in governance arenas, and promotes the use of a human rights-based approach to programming on inclusive governance. Presenting lessons learnt in eight Asia-Pacific countries through ten case studies, a strong case is made for greater inclusion in governance as part of the agenda to deepen and consolidate democracy, ensure effective representation, and develop capacities to better respect, protect, and fulfil human rights.

We trust that this selection of case studies can contribute to a better understanding of issues of inclusion and exclusion experienced by disadvantaged groups in the region, and provide an insight into the strategies appropriate for participatory interaction between these groups and governance institutions.

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Funding programmes

Asia Regional Governance Programme

Asia Regional Governance Programme, a flagship programme covering the Asia region, focuses on operationalizing the link between democratic governance and the MDGs by advocating for more responsive representative government, improving access to justice by the poor and disadvantaged groups and promoting more effective partnerships for improved service delivery.

Regional Indigenous Peoples' Programme

The Regional Indigenous Peoples' Programme aims to support regional dialogue and cooperation on indigenous peoples' issues; developing regional public goods on critical issues and emerging trends; facilitating knowledge sharing and learning; and strengthening the human and institutional capacity of key partners for more equitable and participatory governance. UNDP's Policy of Engagement with Indigenous Peoples (2001) and the UN Declaration on the Rights of Indigenous Peoples (2007) provide the guiding principles.

Asia Pacific Gender Mainstreaming Programme

The Asia Pacific Gender Mainstreaming Programme is UNDP's regional programme aimed at engendering economic policies and furthering women's economic rights and promoting gender-responsive governance leading to greater gender equality and furthering women's empowerment. A rights perspective underpins the design and implementation of this programme. Its goal is the progressive realization of women's economic and political rights as guaranteed by major human rights treaties.

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Introduction
Inclusive governance for human development

Clarence Dias and R. Sudarshan[1]

What is inclusive governance?

To be inclusive is a core value of democratic governance, in terms of equal participation, equal treatment and equal rights before the law. This implies that all people – including the poor, women, ethnic and religious minorities, indigenous peoples and other disadvantaged groups – have the right to participate meaningfully in governance processes and influence decisions that affect them. It also means that governance institutions and policies are accessible, accountable and responsive to disadvantaged groups, protecting their interests and providing diverse populations with equal opportunities for public services such as justice, health and education.

The Asia-Pacific region, with almost 60 percent of the world's population and a wide range of socio-economic and political issues, presents a challenging context for the promotion of inclusive governance. While the region has made rapid economic progress, these gains have not been distributed equally or equitably, either between or within countries. Underlying structures of inequality remain deeply embedded in historical processes of discrimination and inequitable development. Indeed, many groups today still find themselves excluded – socially, politically and economically – and marginalized from national development and governance processes, with few opportunities for redress. This is especially so for indigenous peoples, who are an integral part of the culturally diverse mosaic of the Asia Pacific region.

Inclusive governance is critical to UNDP's mission, which is to support countries to accelerate progress on human development, an integrative concept that aims at real improvements in people's lives and in the choices and opportunities open to them. Central to the human development approach is the concept of human empowerment. This goes beyond economic development, in terms of income and gross domestic product, to encompass access to education and health care, freedom of expression, the rule of law, respect for diversity, protection from violence, and the preservation of the environment as essential dimensions of human development and well-being.

The three traditional branches of governance – legislature, executive and judiciary – along with civil society, the media and the private sector all have unique roles in promoting sustainable human development. Moreover, the diverse functions of these institutions offer multiple opportunities for policy and programming to promote inclusion of disadvantaged groups.

[1] The authors acknowledge the insights, inputs and advice received in drafting this paper. Special thanks are due to Mary O'Shea, Emilia Mugnai, Radhika Behuria, Marcia V. J. Kran, Chandra Roy and Kay Kirby Dorji.

UNDP has been at the forefront of developing the capacity for democratic governance as a primary means of eradicating poverty.[2] To help facilitate inclusive governance mechanisms, UNDP follows a human rights-based approach for its development cooperation and programmes,[3] which contributes to the overall concept of human development. UNDP's human rights-based approach to development programming – and thus, human development – is normatively based on international human rights standards as adopted by the Member States of the United Nations. It reaffirms three key elements of democratic governance: inclusion and participation, including political, economic, civil, social and cultural dimensions;[4] equality and non-discrimination, which are especially important for minority groups and indigenous peoples;[5] and transparency, accountability and access to effective remedies.[6] Inclusive governance encompasses the management of social, political and economic institutions for human development, and represents the essence of the rights-based approach.

Increasingly, governance programmes must tackle issues on many fronts: conceptual, methodological, institutional and strategic. Does international human rights law provide standards that enable the definition and implementation of inclusiveness? If so, how are such standards implemented at country level? How can inclusiveness actually be measured? In which governance institutions, and at what levels, has it been implemented in Asia and the Pacific? Does inclusion of civil society organizations enhance their ability to serve as effective vehicles for participation by disadvantaged groups, in particular women and indigenous peoples? How, when and where can development programming promote inclusiveness? Should it be reactive to requests and demands, or proactive, through affirmative action to redress historical exclusion?

Key issues in commissioned case studies

This publication presents lessons learnt on inclusive governance through 10 case studies of development policies and programmes, in eight Asia-Pacific countries (Afghanistan, Bangladesh, Cambodia, Fiji, India, Iran, Philippines and Sri Lanka). Overall, they address two key questions:

- Does inclusiveness in governance and development processes enhance the human rights of disadvantaged groups in actual terms?

[2] The future course of UNDP policy and programming for inclusive governance is set out in its Strategic Plan 2008-2011, which focuses on three areas of support to democratic governance: (1) Fostering inclusive participation; (2) Strengthening accountable and responsive governing institutions; and (3) Grounding democratic governance in international principles. The Strategic Plan states, "UNDP will assist in the identification of effective interventions strengthening participation by the poorest social sectors, as well as by women, youth, persons living with disabilities, and indigenous people."

[3] A 2003 inter-Agency United Nations workshop adopted a Statement of Common Understanding on a Human Rights-Based Approach to Programming. It declares that (1) All United Nations programmes of development cooperation, policies and technical assistance should further the realization of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments; (2) Human rights standards contained in, and principles derived from, the Universal Declaration of Human Rights and other international human rights instruments guide all development cooperation and programming in all sectors and in all phases of the programming process; and (3) Development cooperation contributes to the development of the capacities of duty bearers to meet their obligations and/or of rights holders to claim their rights.

[4] In the context of development, participation is affirmed as an interdependent means and end of development and must be "active, free and meaningful," according to the 1986 United Nations Declaration on the Right to Development.

[5] All key human rights instruments prohibit discrimination of any kind, defined in the Universal Declaration of Human Rights as including "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

[6] This element has been primarily developed under national constitutions and laws, which affirm freedom of information, the right to know, and the power to act upon such knowledge through exercising the right to an effective remedy from competent national tribunals.

- And does the awareness and assertion of human rights by disadvantaged groups ensure greater inclusion in governance processes and outcomes?

The case studies offer pertinent insights, documented here, that go a long way toward addressing the above questions. In various ways, they focus on inclusiveness issues faced by disadvantaged groups and indicate what types of strategies may be best suited for participatory interaction between these groups and governance institutions. And most importantly, they provide a foundation to advance the human rights-based approach to development programming.

Programming for inclusive governance: reflections on the case studies

All of the case studies underscore the need for assessing governance reform on the basis of the impact on the human development and human rights of disadvantaged groups. They demonstrate that, if exclusion from governance processes is to be prevented and eliminated in Asia and the Pacific, every category of human rights – economic, cultural, social, civil and political – must be effectively respected, protected and fulfilled for all. When exclusionary policies, laws, procedures and practices are compounded by lack of awareness, it results in enormous challenges to address human rights violations.

Many of the case studies address the question of *who* is excluded. An important finding is that women and indigenous peoples suffer most from exclusion and discrimination in governance processes across the region. In India, Iran, Bangladesh and Fiji, women face violations of their right to participation and inclusion. Likewise, indigenous peoples face such obstacles in Cambodia, Bangladesh and India. Two other groups also have been studied in relation to social, economic and political exclusion: persons with disabilities (Afghanistan), and victims of natural disasters (Sri Lanka).

In terms of *how* exclusion from governance processes happens, it tends to arise from two factors: law (Iran, Fiji) and culture (India, Iran, Afghanistan). Still others address the question of *why* exclude – often to subjugate and dominate through patriarchy (Iran, India), or to exploit, displace and plunder through forced or fraudulent land alienation (Bangladesh, Cambodia).

Human rights in struggles for inclusion

The case studies collected here go well beyond a general exhortation to link human rights to human development. They have the merit of focusing on specific human rights that are pertinent to particular contexts of exclusion, such as the rights to housing, family, education, health, land, property, and freedom of movement.

The rights to dissolution or termination of marriage, custody, housing in the matrimonial home, shelter in cases of domestic violence and once again – and importantly – land, property and inheritance rights, feature prominently in the case studies dealing with women.

In the case of indigenous peoples, the particular rights that are prominent are rights to land, forests and their produce, and mineral resources. Also important are the rights to preservation of socio-cultural distinctiveness of indigenous communities, rights to development, participation, protection from displacement and right to resettlement.

Central to the case studies involving indigenous peoples is their right of self-identification. And central to all of the cases is the criticality of rights to life, liberty and personal security.

Exclusion of women

Across the region, the case studies document obstacles to gender justice and women's inclusion in governance processes. These include new trends of violence against women; lack of awareness within traditional justice institutions, government bodies and NGOs regarding women's rights; and lack of awareness of pro-women constitutional, legal and customary rights, such as inheritance rights. Other obstacles may include limited or no representation of women at higher levels of decision making, and discriminatory faith-based and other traditional personal laws.

In particular, traditional justice institutions are a focus of impediments to access to justice for women. In many countries of the region, women, particularly disadvantaged women, prefer to seek remedies from these traditional institutions rather than access family courts. However, the lack of documentation and reporting before formal justice institutions of violence against women is compounded by inadequate orientation on gender issues within traditional justice institutions, as well as by lack of social support – medical, psycho-social counselling, or shelter – from state or NGO services.

Recommendations

The Iran case study in its examination of gender discrimination in the legal frameworks presents the experiences of women who are judges, attorneys, offenders and claimants in the process. In its analysis, it highlights the need for greater human rights education and a need for strengthening accountability systems which could contribute to creating an enabling environment for legal reform aimed at gender equity and justice.

The India case study on *Nari Adalats* (women's courts) presents an interesting analysis of how these courts can serve as venues of justice for women. However given the voluntary and informal nature of such courts, it presents several recommendations such as the need for more education on the formal legal and judicial systems, so as to engage with other forms of justice delivery for women.

Exclusion of indigenous peoples

Indigenous peoples in particular remain vulnerable and marginalized in their access to services, protection for their basic rights and their ability to determine the course of their own development. Increasingly, however, the emphasis is being placed on the cultural and social aspects of poverty, with attention paid to

indigenous rights as a result of solidarity and mobilization by indigenous peoples themselves. Complementing indigenous mobilization are evolving international, regional and national instruments and institutions to protect indigenous peoples' rights, which merit support under inclusive governance programming.[7] In this context the September 2007 adoption by the UN General Assembly of the Declaration on the Rights of Indigenous Peoples[8] provides a fresh impetus for increased attention and action.

In the Asia-Pacific region, most important to indigenous peoples is the right of self-determination and recognition of their identity as distinct peoples. Indigenous peoples' fight for inclusion also centres on the rights to land, forests and their produce, and mineral resources; livelihoods and socio-economic development; developmental infrastructure; and displacement, resettlement and freedom of movement (Bangladesh, Cambodia and India).

Recommendations

The Cambodia case study on conflict management involving traditional institutions of indigenous peoples underscores the trust placed by those people in those institutions, and their marginalization in the formal legal system. The study recommends reforms in both sets of dispute resolution institutions. It recommends that the formal legal system should recognize some of the existing roles of the traditional system.

The case study from the Chittagong Hill Tracts notes that the *Special Tribunal on Violence against Women and Children* is yet to be established. It recommends a series of changes needed, both in policies and attitudes. It contains proposals for law reforms, and strengthening access to public services and services.

Exclusion of persons living with disabilities

The Afghanistan case study also found that persons living with disabilities suffer multiple forms of discrimination and face economic, social and political exclusion, suggesting a twin-pronged approach to overcome this.

Recommendations

In addition to alleviating institutional discrimination, recommended by the case study, it also identifies structural entry points. These include providing physical assistance and removing barriers to communication, increasing representation of persons with disabilities, and reducing economic barriers through socio-economic empowerment programmes. Behavioural entry points encompass sensitization, advocacy, outreach and strengthening of organizations for people with disabilities, research and analysis, and networking.

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[7] At the international level, these include the United Nations Permanent Forum on Indigenous Issues and the Declaration on the Rights of Indigenous Peoples, adopted by the United Nations General Assembly in September 2007. In addition, in 2001 UNDP adopted a Policy of Engagement with Indigenous Peoples. The Policy is in direct response to the disproportionately vulnerable situations facing many indigenous peoples, and the need for constructive dialogue with indigenous peoples when devising development activities that affect them.

[8] A/RES/61/295.

Exclusion in law-making processes

Several case studies, including in Fiji and the Philippines, addressed historic exclusion and discrimination through the enactment of specific laws (the Family Act in Fiji[9] and Indigenous Peoples' Rights Act [IPRA][10] in the Philippines).

The Fiji case study, based on experience after enactment of the national Family Law, provides a step-by-step "manual" for campaign for law reform to secure inclusive governance, enhancing participation of disadvantaged groups and identifying strategic entry points of influence.

The Philippine case study, meanwhile, provides an engrossing account of how different groups, suffering from discrimination and exclusion under the Marcos dictatorship, tried to use participation in subsequent legislative processes to gain inclusion. In these efforts, crucial avenues of access included electoral processes, influencing the setting of the public agenda, and access to the legislature. These were buttressed by strategic thinking and action; confrontation, negotiation and compromise; and parallel informal interventions. Such findings have general salience for successful legislative policy and advocacy interventions.

Recommendations

The Philippines case study offers several pragmatic recommendations for those seeking inclusion in law-making processes aimed at disadvantaged groups, civil society support groups, the State, multilateral organizations such as UNDP, and research institutions that can play a positive role through policy support and advocacy.

Exclusion in judicial and dispute resolution processes

From different perspectives, several of the case studies focus on access to justice for groups excluded or discriminated against, notably women (Bangladesh, Fiji, India, Iran) and indigenous peoples (Bangladesh, India). These studies identify obstacles to access to justice for such groups and ways of overcoming them. Obstacles may be internal to the group, such as limited legal or activism knowledge, as well as language barriers. Others relate to economic constraints, leadership gaps, remoteness of communities, inter-ethnic competition, lack of media attention, and political instability.

Some of the case studies (Cambodia, Philippines) also explore the interface between the formal legal system and the customary or indigenous law system, examining both complementarity and prejudice. However, such interface may be minimal, as the Cambodia case study of traditional conflict management for indigenous peoples found.

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[9] Family Law Act (2003).

[10] Republic Act No. 8371 (1997).

Recommendations

The Cambodia case study recommends reforming both formal and traditional systems, given that indigenous peoples are marginalized in the formal legal system, while trusting and using indigenous institutions of conflict resolution.

Similarly, the study of *nari adalats* (women's courts) in Gujarat, India, notes that the dialectic of choosing between what is just and what is legally right is played out between the traditional and modern court systems. It stresses the importance of decentralized, local alternative dispute resolution systems in the realm of social justice. In addition, it recommends increased entitlements and constitutional rights for women, as well as strengthening of their abilities to participate in institutions of judicial governance.

Exclusion in conflict and post-disaster situations

Governance and the strengthening of key national institutions for political development have gained growing recognition as important tools in the prevention of and recovery from conflict. In particular, inclusive governance is crucial in four key areas: deeply rooted conflict; power inequalities and asymmetries; ethnic conflict and governance; and multi-centrism in a fragmented world. Two of the case study countries – Afghanistan and Sri Lanka – are categorized as post-conflict and face their own unique governance challenges, many of which fall in these key areas. Three additional countries – Iran, Bangladesh and Cambodia – have long emerged from conflict but are still finding it difficult to institutionalize inclusive governance.

At the same time, natural and man-made disasters are an unfortunate fact of life in the Asia-Pacific region. The Sri Lanka case study on tsunami recovery also has important findings and recommendations of wider relevance here. The study found, for example, that the failure to build inclusive governance into the tsunami recovery process in Sri Lanka has had serious implications on the conflict-affected, as well as certain ethnic groups and women. It likewise has contributed to skewing the delivery of recovery in favour of certain groups over others, and has contributed to deepening divides between identity groups in the country.

Recommendations

Key recommendations include development of post-disaster recovery interventions that are sensitive to existing identity-based vulnerabilities and dynamics; contextualizing "inclusive governance" against ground realities; and strengthening capacities for decentralized and localized governance processes in post-disaster recovery.

The way forward: toward more inclusive governance

Using a human rights-based approach to development programming, three steps have emerged that are essential in creating the enabling environment under which disadvantaged groups can better seek inclusiveness in governance and development processes. These are:

1. Establishing the human rights normative and legal framework through support for:

- Promoting ratification of international human rights treaties and removing reservations to such instruments
- Harmonizing national laws with international human rights treaties
- Reforming national laws to strengthen promotion and protection of human rights

2. Applying and enforcing the human rights normative and legal framework through support for:

- Creating and strengthening national human rights institutions, in accordance with the Paris Principles[11]
- Analyzing, reformulating and monitoring budgetary expenditures from the perspective of poor and disadvantaged groups
- Creating administrative remedies and making them accessible and effective
- Making judicial remedies available, affordable, accessible, timely and effective

3. Social mobilization around human rights law through support for:

- Raising awareness of human rights among rights holders[12]
- Educating and strengthening capacity of duty bearers on human rights
- Enhancing accountable and effective roles for independent media
- Advocating for human rights
- Supporting networking for human rights
- Building partnerships and coalitions to promote inclusive governance through applying a human rights-based approach to development programming

Beyond the enabling environment, however, a need exists for well-developed indicators that can help to monitor and evaluate real and substantive results of programmes intended to strengthen capacity for inclusiveness in governance institutions. These can add to the many indicators already available for measuring discrimination, exclusion, inclusion and formal participation.

Overall, the 10 case studies in this publication work toward defining a strategy for inclusiveness in governance. Returning to the two key questions above – Does inclusiveness in governance and development processes in fact enhance the human rights of disadvantaged groups? And does disadvantaged groups' awareness and assertion of human rights ensure greater inclusion in governance processes and outcomes? – these initiatives point to the need to take up the challenge of governance reforms for inclusion at the local, national, regional and international levels.

Such reforms are likely to take time, because they involve confronting privileged interests and changing traditions. But there are grounds for optimism across the Asia-Pacific region. Evidence of progress can be found on many fronts: more meaningful local elections, broader public consultations, stronger

[11] The United Nations Principles relating to the status and functioning of national institutions for protection and promotion of human rights (Paris Principles) incorporate a series of recommendations on the role, composition, status and functions of national human rights instruments.

[12] In a human rights-based approach, human rights determine the relationship between individuals and groups with valid claims (rights holders) and state and non-state actors with correlative obligations (duty bearers). It identifies rights holders and their entitlements and corresponding duty bearers and their obligations, and works toward strengthening the capacities of rights holders to make their claims and of duty bearers to meet their obligations.

commitments to providing citizens with good public services, and increased debate on governance as a whole. The end of discriminatory laws and regulations, together with fewer restrictions on civil society organizations and more freedom of the media, can provide further impetus for this trend. Together, commitment and action by governments and citizens alike can ensure a future for Asia and the Pacific that epitomizes the best of human development – freedom to choose, and full participation in the processes by which people govern themselves.

Participation of the disabled population in elections in Afghanistan

Shabnam Mallick

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AFGHANISTAN

ACRONYMS

ADU	Afghan Disabled Union
AIHRC	Afghanistan Independent Human Rights Commission
HRBA	Human rights-based approach
JEMB	Joint Electoral Management Body
MMD	Ministry of Martyrs and Disabled
NDC	National Disability Commission
NGO	Non-governmental organization
NPAD	National Programme for Action on Disability
UNDP	United Nations Development Programme
UNICEF	United Nations Children's Fund

1. OVERVIEW

Disability and extreme poverty are interdependent, resulting from ignorance, low expectations, prejudice and lack of opportunities.[1] An important priority for disability policy is capacity-building of disabled people's organizations. But how this should be approached remains an open question because of, among others, divergent definitions of equality, equity, mainstreaming and discriminatory practices among governments, donors and NGOs.

In the context of the participation and representation of disabled and marginalized people in democratic elections in post-Taliban Afghanistan, this study explores these issues through extensive desk review and survey research. The study has revealed important patterns of exclusion and discrimination and has found various obvious and non-obvious obstacles to inclusive governance faced by disabled and marginalized groups in Afghanistan. These include, among others, socially entrenched discriminatory practices that are aggravated by the impact of war; predictable and unpredictable reactions of people towards these obstacles; preference falsification; and gender-based discrimination. Better understanding of such aspects can enhance the participation, representation and empowerment of disabled people in Afghanistan. Programmatic entry points are identified for improving participation and representation. These include structural entry points (e.g. promoting institutional reform, improving physical access for all, reducing economic and communication barriers, etc.) and, among others, greater state intervention. Behavioural entry points are also considered as is the need to capitalize on human agency through sensitization, outreach, advocacy and empowerment measures.

2. ANALYSIS

Baseline

Available literature suggests that accurate statistics on rates of impairment are difficult to come by. Latest estimates place the number at about 4 percent of the population (approximately one million people). The Afghanistan Ministry of Labour and Social Affairs estimates the current number of disabled persons at about 300,000, but the actual number is likely to be significantly higher.[2] Disability is a highly subjective phenomenon, and many might not have wanted to be counted as such. The World Health Organization and United Nations estimate that the actual number of disabled persons in Afghanistan is closer to 2 million, which corresponds with interim figures available from the Afghanistan Ministry of Martyrs and Disabled.[3]

[1] See, for instance, Ann Elwan, 'Poverty and Disability', *A Survey of the Literature*, World Bank, 1999.

[2] Afghanistan Ministry of Labour and Social Affairs' estimates and interview with author/s.

[3] Qaseem Faizi, 'Statistic and Disability Planning: Afghanistan Database', Ministry of Martyrs and Disabled, Kabul, Afghanistan, 2003.

Generalized views and beliefs that classify all disabled people as weak, dependent, unable to work, unproductive and needing social protection, regardless of their real potential (all characteristics noted in Afghanistan), places them in a constantly vulnerable position. Many disabled people, therefore, have very low expectations and lack self-esteem and, hence, power. Years of exclusion and negative attitudes compound the situation to make it difficult for disabled individuals to realize their rights and capacity.

Disablist language is an accepted feature of life for disabled persons in Afghanistan and is a feature of ongoing oppression that is often overlooked, although it has profound effects. Disabled people reported that the main forms of discrimination they experience are verbal abuse and complete indifference; they also reported that they are spoken of in such a derogatory manner by their neighbours that they felt discouraged to socialize with them. This affects families as a whole and is quite a common experience for parents of disabled children.

Faced with constant verbal abuse and derogatory remarks, many disabled persons choose to withdraw from society. This, in turn, leads to a sense of fear and apprehension among disabled persons about life and has implications for the development of a disability movement and for the success of organizations representing disabled persons. Lacking self-confidence and awareness makes it unlikely that disabled persons will wish to be part of a movement for social change.

The ability to work and provide for your family is integral to defining the "self" in Afghanistan. It is such a strongly held social standard that to be perceived as being dependent in any way is shameful. As reflected in a survey conducted for this paper, the most widespread feeling disabled persons felt about themselves was shame.[4]

Unemployment rates amongst disabled people are as high as 80 percent.[5] Disability can substantially increase the risk of poverty; it is also often a symptom of poverty. The effects of poverty on disabled people are harsh, and they are always severely affected by conflict situations and natural disasters. They tend to occupy the most vulnerable social and economic positions in society, thereby making it difficult for them and their families to deal with unexpected events.

Background

This study comes at an opportune moment as the Government of Afghanistan and the international community are embarking on a human rights-based approach (HRBA) to disability issues in a systematic and concerted manner. The goal of HRBA is to promote an inclusive, dignified, barrier-free and rights-based society for persons with disabling impairment in Afghanistan. Accordingly, disabled Afghans are entitled to benefit from the full range of civil, political, socio-economic and cultural rights embodied in the Afghan Constitution and international human rights instruments.

National policy strives to create a barrier-free society for all, based on the principles of participation, integration and the equalization of opportunities, as defined by the United Nations in its World Programme of Action Concerning Disabled Persons; Standard Rules for the Equalization of Opportunities for Disabled Persons;

[4] Shabnam Mallick, et al, *Inclusive Governance of Marginalized Groups: Persons with Disabilities in Afghanistan*, (forthcoming).

[5] Afghanistan National Programme for Action on Disability's estimates and interview with the author(s).

The Biwako Millennium Framework for Action towards an Inclusive, Barrier-free and Rights-based Society for Persons with Disabilities in the Asia and Pacific Region; and the ongoing elaboration for the International Convention to Protect and Promote the Rights of Disabled Persons. In doing so, the Government of Afghanistan has enabled disabled persons to take charge of their lives by removing any barriers to their full participation in society.

The Government of Afghanistan has formulated a comprehensive National Policy on Disability, which treats disabled persons as individuals and members of society and deals with all aspects of their lives.[6] Some key areas that need special attention have been identified based on the perceived needs and priorities of disabled Afghans. These include supporting disabled people's organizations, especially supporting disabled women's groups; raising awareness to educate and change public attitudes towards disabled people; prevention, early intervention and rehabilitation, including health care and therapeutic aids; the development of guidelines for accessible environment and facilities, including access to information; education for all; accessible vocational training programmes and facilities; and an affirmative action plan to ensure that disabled people have equal employment opportunities, including sheltered employment. Furthermore, the inclusion of disabled persons in society requires physical and programmatic access to cultural and recreational activities, including sports, as well as access to social welfare, housing and transport. Training will be given to personnel involved in the planning and provision of services for disabled persons. The government in coordination with the National Disability Commission (NDC) will take the lead role in the collection and dissemination of information, as well as research into the needs of disabled people.

In implementing this National Policy on Disability, the Ministry of Martyrs and Disabled (MMD) will take the lead role for the coordination of national programmes. Designated ministries have been assigned special roles and responsibilities in implementing the policy. The MMD and related government agencies will work closely with national and international organizations, including disability organizations to realize this policy. The MMD and NDC will collaborate with other agencies, notably disabled persons' organizations, to monitor the implementation of this policy.

- Linkage is envisaged through the new three-year policy framework and action plan and also the Justice programme – Justice in the Community;

- Lessons learned from this study will reinforce nationally obtained lessons already embedded in NPAD's (National Programme for Action on Disability) work to ensure that it feeds into policy and programming;

- The findings of this study will try to further the advisory capacity of the Afghanistan Independent Human Rights Commission (AIHRC), the nodal body mandated with providing suggestions and corrective measures at every level of governance for the betterment of human rights in the country based on international human rights principles and standards;

[6] Ministry of Martyrs and Disabled, *The Comprehensive National Disability Policy*, Kabul, Afghanistan, 2003.

- The hope is that this study will be timely and relevant to the ongoing democratic transition and associated general elections in Afghanistan;
- It will also be in keeping with the Millennium Development Goals review currently under way in Afghanistan;
- The Joint Electoral Management Body (JEMB) to plan a review in the area.

It follows that for concerted attention to participation, representation and empowerment of disabled persons in Afghanistan, the types and patterns of exclusion and discrimination need to be adequately researched and understood, if we are to devise, fund, implement and supervise human rights-based programmes to address these issues.

Objectives

- Demographic focus: disabled women and men;
- Thematic focus: participation and representation.

3. LESSONS LEARNED

Research method and limitations

Measuring disability by statistical and ethnographic tools is fraught with difficulty. Part of the reason is that there is no clearly agreed definition of disability and because disability is a highly relative and subjective factor.

The Afghan government and international agencies, as well as some national NGOs, have carried out or are carrying out surveys. However, the results of these surveys are still of a provisional nature, or are based on small populations, anecdotal evidence or case studies. Their methodologies raise doubts on their reliability, validity and representativeness because of poor standardization and quality control as well as non-comparable estimates. Thus, little definitive information may be gleaned on underlying patterns and causality from available data beyond general inferences and broad estimates.

In Afghanistan, research is complicated by the insecurity prevailing in various parts of the country and the legacy of decades of conflict; because of this, any serious qualitative or quantitative research effort is compromised. Reaching marginalized sections of society, especially women, is a problem for researchers. This study and its findings, particularly the emphasis it places on women and gender-related questions, are thus inevitably affected by the above limitations and, as this study is still a work-in-progress, the results should be viewed as preliminary and non-prescriptive.

As part of this study, UNDP Afghanistan and its partner agencies investigated the propensity, prevalence and cause of various difficulties faced by persons with disabilities in voting and political participation. In doing so, the agencies applied the following methods: a literature review, expert

interviews and a 'quick and dirty' exploratory survey, followed by focus group discussions. The first survey questions were loosely structured and formulated to capture the maximum amount of relevant information, in the spirit of a casual and friendly dialogue. They were also intended to capture any area-based variation of the lived experiences of persons with disabilities and also situate their difficulties, if any, of voting and political participation within the broader context of daily living. Respondents were encouraged to enthusiastically answer all the questions as fully as possible. It was stressed that there were no 'right' or 'wrong' answers and that whatever they wished to say was equally valid.

The first translated survey results are now available, and plans are in hand to include more geographical regions, enhance the sample group's representativeness, and develop more investigative questions and refined analysis in subsequent versions of the survey.[7] We have tried to apply relevant theories to the survey results, in order to conclude the findings and make recommendations. The intention has been to arrive at preliminary hypotheses and then test these through focus groups, quasi-experimental designs and participatory approaches.

Inferences

Indeed, even the destructive effects of modern war, from which seemingly nothing can escape, are no match to the entrenched institutions of deteriorating social relations and mores. Socially embedded discriminatory practices and institutions continue to replicate themselves as fast as ever and, perhaps, in newer, subtler and more insidious ways as a result of constant warfare. The diminishing stock of social capital and exacerbated effects of social dislocation due to the war, if anything, make the task of alleviating the plight of the discriminated more intractable than before.

The survey provides a profile of social exclusion among disabled populations in Kandahar. Exclusionary practices in the various interstices of society have become systematized and entrenched, and work against the interests and goal of inclusive governance. The following is an account of common responses from interviewees to standard survey questions, and our attempt to categorize those responses in terms that may be relevant to deducing policy for inclusive governance of marginalized groups:

Irrational Reactions

Some of the survey respondents reacted irrationally to the question: "What, if any, are some of the difficulties in your area that trouble your right to vote and/or participate in politics?" Their replies: "I don't have any business with politics. I am a poor woman" or "I have no problem. I (am) even happy on death rather than my life (sic)."

Rational Reactions

In general, we find predictable and pragmatic responses to an entire range of concerns, from the dramatic to the mundane, among some extremely marginalized disabled Afghans. Rational concerns over security have weighed heavily on their decision not to vote. Security concerns, as variously reported by survey respondents, have ranged from general lawlessness, specific threats to murder or physical harm from malicious political interests, or even rumors of enemy attack. Other concerns are also reported as the main reasons for not voting, such as joblessness, cost of living or

[7] Shabnam Mallick, et al, ibid.

voting, burden of household chores, family responsibilities, limitations on movement and contempt or neglect from others, etc.

The picture that emerges of this marginalized group is one of extreme vulnerability, subsistence or below subsistence living, very limited coping capacity, no inclination for deferred gratification and, hence, very restrictive strategic agency or capacity for strategic choice.

Infrastructural and institutional issues

Infrastructure problems too have directly plagued participation and elicited the decision of self-exclusion among the disabled: bad roads, inaccessible polling stations, personal immobility and lack of good wheelchairs, bicycles, or suitable assistants to help when travelling to the poll. Moreover, survey respondents conducted for this present study have clearly and not-so-clearly reported different forms of neglect, indifference and other discriminatory practices when they come in contact with different public institutions and government service providers. Yet, there is clear and overwhelming interest among the respondents in a future of inclusive politics and improved governance in Afghanistan.

In another recent survey, conducted by the UNICEF-supported Afghan Disabled Union, most disabled respondents felt that the new constitution was unsatisfactory as it only contains a short paragraph about them. Given Afghanistan's fledgling institutions, it isn't entirely surprising that this dissatisfaction extends to the performance of line ministries. Indeed, only a minority of people appear to be satisfied with the government's performance and service delivery; the same people believe that the government should seek outside help, including from international agencies and disabled persons' organizations, in order to improve on all those scores.[8]

The rational irrational?

More challenging is the problem of decisions that seem individually rational but might well be collectively irrational. How can that which is in the rational interest of an individual be bad for society? In this respect, the literature on the discriminatory effects of preference formation and on poverty traps is instructive.

Ethnically segregated communities, for instance, are known to emerge where individuals possess 'mild' preferences to living in neighbourhoods with ethnic majorities, even if all individuals would ideally wish to live in integrated communities. Hence, apparently harmless and mild preferences of otherwise well-meaning individuals can lead to detrimental, exclusionary outcomes. Similarly, peer group effects that lead to poverty traps are sometimes known to appear rational to an individual who is a group member. But when all members behave similarly, it collectively proves detrimental to the group as a whole by entrapping its members in impoverished conditions. In other words, when the behaviour of one group member is dependent on the behaviour of others, it can lead to a self-reinforcing behaviour. Within a given behavioural configuration, however, each individual may be acting 'rationally'. But that does not mean that each configuration is equally desirable from the perspective of the members of the group, in the sense of avoiding a poverty trap.[9]

[8] Afghan Disabled Union, *Survey on the Problems of Barrierfree Access for People with Disabilities in the city of Kabul, Afghanistan*, 2004.

In the present study exploring barriers to inclusive governance of marginalized persons with disabilities in Afghanistan, the 'I don't have any business with politics. I am a poor woman' or 'I have no problem' type of responses fall into this category of individually rational but collectively detrimental responses. Non-voting or non-participation in politics for reasons related to disability or other physical impairments, as reported in the survey, may be other examples of self-denial and a non-engaging outlook to life that may ultimately be detrimental for the individual, as well as polity. Problems such as joblessness, higher cost of living and inflation, burden of daily subsistence or household chores, contempt or neglect from the government and non-government officials as well as the general public are predictable responses which, as have been reported in the survey, can lead counterintuitively to unpredictable and detrimental outcomes in the future. In short, the opportunity cost of not voting and not participating can be very high.

International affairs as barriers to local governance

In social science literature, little information is available to explain the embroiling effect of 'reputation' as succinctly as the above *cliché*. This is the plight of the international community in Afghanistan. The unpopularity of foreigners, including the American-led international coalition and international reconstruction efforts in Afghanistan, is reflected in repeated comments from interviewees. Many have suggested that they refuse to vote because the elections have been organized by foreigners. These sentiments are often transient and unique to Afghanistan and in places that are heavily reliant on international assistance; however, it does not mean that this problem is any less "development-relevant".

Gender-based discrimination

Disabled women are twice as likely to be victimized and discriminated against as their male counterpart. Our limited survey has revealed instances of this critical problem. While the data collected is gender-segregated, there was only a limited opportunity to probe and explore specific manifestations of gender-based discrimination, which would result in a more sophisticated understanding of contentious issues. Nevertheless, women interviewees have unambiguously and repeatedly mentioned that they have not been allowed to vote or participate in politics because they are women. The "women don't know anything…" syndrome is alive and thrives in Afghanistan, even among men who self-confessedly don't know much!

Available evidence suggests compelling differences between disabled women and men in gainful labour/economic activities and access to the economic sphere. This is perhaps indicative of formative discrimination of women, and disabled women in particular, that begins early in their own homes.[10] Sure enough, in Afghanistan, a survey of 350 people in Kabul city indicates that persons with disabilities are mainly involved in low-income occupations, such as cleaning, housekeeping, painting, selling wood, etc. Fifty-nine percent of men but only 10 percent of women had jobs before they became disabled, and 45 percent of persons with disabilities have lost their jobs because of their disabilities.[11]

[9] Steven Durlauf, *Groups, Social Influences and Inequality: A Memberships Theory Perspective on Poverty Traps*, 2002.

[10] Ann Elwan, *Poverty and Disability: A Survey of the Literature*, World Bank, 1999.

Women in Afghanistan are usually confined to their homes and have limited access to the public sphere. It is small wonder then that women with disabilities do not have access and thus do not reflect on issues that are related to access. Almost a third of the respondents of the ADU survey in Kabul, most of whom were of course women, reported that the question on accessibility did not apply to them.[12] The overall condition in rural areas is understood to be much worse.

Preference falsification or naïveté?

Another interesting revelation evident in our survey is a disparity between some of the problems and causes identified. This disparity, by implication, must impact the nature of remedies sought. For instance, and this is repeatedly evident, a problem reported by interviewees is the neglectful and contemptuous attitude shown towards them by society and the government. But when asked "What do you think are some of the specific causes behind those difficulties?" the same interviewees replied that economic conditions and joblessness were among the causes for the difficulties they experienced. This begs the question: will simply improving economic conditions and providing jobs *really* help alleviate the attitudinal hostility shown towards persons with disabilities and, in effect, end the discrimination they encounter in society?

Clearly, the causes and implied solutions are not germane to the problems. But why this disparity? It seems there can be two possible answers to this. The first one is simple. The respondents, in their *naïveté*, have misconstrued the problem and misidentified the underlying causes. But how can this be? How can so many people be so *naïve*? Doesn't such a conclusion go against the received wisdom of participatory research? After all, it is the victims who are expected to have a better insight to their plight rather than independent, outside observers.

This brings us to the other possible explanation. Could it be that there is something preventing the respondents from revealing their true wishes? The possibility of such a paradoxical situation is explained in behavioural economics by the insightful term "preference falsification".[13] What it means is that because of, among others, group pressures and fear of social sanction or reprisal, the policy preferences that people express in public often differ from those they hold privately. Thus, people rely on the prevailing climate of opinion when developing their personal belief systems that underpin their policy choices and preferences.

In the case of a person with disability from the marginalized sections in Afghanistan, the prevailing climate of opinion is one of contempt, ridicule and neglect towards the disabled. And because the victims of such practices have internalized discrimination all their lives, they tend to deemphasize the attitudinal hostility, which is real or at least the preeminent cause of problems, and, instead, emphasize other issues, such as economics. That is not to suggest that economic issues are not relevant. The point is that solutions premised on economic aspects alone or even primarily will fall short of solving the problems.

[11] Afghan Disabled Union, op. cit., 2004.

[12] Ibid.

[13] Timur Kuran, *Private Truths, Public Lies: The Social Consequences of Preference Falsification*, Harvard University Press.

4. RECOMMENDATIONS

One overarching and overwhelming sentiment or mandate that needs to be made clear at the outset is that there is no support for retreat of the State, despite calls for enhanced efforts by non-governmental and civil society organizations. Almost all interviewees suggested that the Afghan government should not be in competition with the non-state sector but rather complement existing efforts.

Structural entry points

These structural entry points should be devised, funded and implemented in a manner that:

- Alleviate institutional discrimination by affording gender sensitive legal protection, implementing institutional reform and capacity building, and implementing anti-discrimination laws already on the statute books to benefit persons with disabilities;

- Promote outreach to disadvantaged groups by means of effective and targeted dissemination of information and increasing awareness of their rights within the context of human rights-based approaches;

- Provide physical access for persons with disabilities to polling stations, voting material, means of transport to and from such places, including providing unhindered access to public facilities in general; introduce late opening hours for polling booths;

- Remove barriers to communication by providing signage and communication which is appropriate to people with disabilities, as well as providing access to professionals (interpreters, psychologists) to help them engage in the civic process;

- Increase representation of persons with disabilities and women with disabilities in politics, including the government, bureaucracy, election management and legal system;

- Lift the economic barriers that prevent disabled persons to participate socially, with special focus towards disabled women.

Behavioural entry points

Strategies that cater to the above structural factors alone may not be adequate to the task of ensuring functional inclusive governance of marginalized groups because many of the barriers are of a behavioural and attitudinal nature. While there is some circular causality between behavioural and structural factors, specific measures focusing on behavioural and attitudinal changes of human agency are necessary.

In addition to enhanced service delivery and tighter quality controls across the board, the following may be treated as pointers for improving "inclusive governance" programming for capacity-development of human agency:

- Sensitize disabled people, government and non-government officials, stakeholders and the general public through awareness campaigns of the rights of persons with disabilities;

- Advocate against the entrenched discriminatory practices and stereotypes held against persons with disabilities;

- Conduct outreach programmes that target marginalized persons with disabilities in order to instill confidence in them and allay their fears and mistrust against mainstream institutions;

- Increase local content in all development programmes and civic/election management teams, as well as making all programmes less Kabul-centric and reach out to the remotest corners, within the possibilities afforded by security conditions, in order to enhance the legitimacy of authorities;

- Formulate social and economic empowerment programmes that provide private incentives to constructive choices by beneficiaries, i.e. incentives that are manifestly stronger than the constraints that limit those choices (such as 'shame' and 'honour' based inhibitions, in addition to harder and more conventional constraints); utilize sociological and psychological perspectives, such as 'social multipliers', in addition to the formal logic and rigour of economics to plan and analyse such interactions and to capture a 'richer' causal picture of social change;

- Fund research and 'network analysis' studies of associational and membership group so as to open up the multiplicity of interactions that contribute to social networks, and leads to a more complex understanding of those kinds of networks that might facilitate trust and activism and those which do not;

- Build the capacity of disabled people's organizations active in inclusive governance programming, so that they may identify and reduce the barriers to collaboration and communicative action, thereby reducing the possibilities of value laden assumptions in communities that lead to stereotyping and unlawful decisions.

This study shows that there are still many gaps in our knowledge. Some of the gaps which need to be addressed by researchers should consist of:

- Probing the 'gendered paths' of apparently gender-neutral discrimination, such as institutional discrimination;

- Exploring poverty-related factors in the nexus between poverty and disability, or forming research questions that use gender, disability and poverty as dependent variables;

- Studying variance in discrimination based on regional, ethnic/racial differences and customs, and conducting research on household-based discrimination, its impact in the public sphere and attendant micro-macro links;

- Conducting basic research on validating measures and tools in the subject.

More innovative programming and emancipatory goals can only be reached through finer analysis of data and a systematic collection of statistical and empirical evidence; employing appropriate anthropological and participant-observation methods; sharper analysis of gender effects/ stereotypes/social-relational dimensions of marginalized groups and poverty/discrimination traps; stronger political and donor commitment; greater awareness of the opportunity costs in neglecting the disabled; and a human rights-based inclusive governance approach.

Access to justice for indigenous peoples: a case study of

Bangladesh

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BANGLADESH


Rajshahi
Sylhet
Dhaka
Khulna
Chittagong
Hill Tracts
Barisal

ACRONYMS

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CERD	Convention on the Elimination of Racial Discrimination
CHT	Chittagong Hill Tracts
CHTDB	Chittagong Hill Tracts Development Board
CHTDF	UNDP Chittagong Hill Tracts Development Facility
CHTRC	CHT Regional Council
CRC	Convention on the Rights of the Child
CSO	Civil society organization
DC	Deputy Commissioner
EBSATA	East Bengal State Acquisition and Tenancy Act
GO	Government officials
HDCs	Hill District Councils
ICCPR	The International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
MoCHTA	Ministry of CHT Affairs
NGO	Non-governmental organization
RC	Regional Council
RF	Reserved forests
SAARC	South Asian Association for Regional Cooperation
UNDP	United Nations Development Programme
UPDF	United People's Democratic Forum

1. OVERVIEW

Statement of the problem

The overall justice system in Bangladesh has long been seen to provide a deteriorating service to the population, in particular to indigenous peoples. Most approaches adopted to date to enhance access to justice have been inadequate in their outreach and largely insensitive to cultural distinctiveness of indigenous peoples and their situation of social disadvantage.

The population of indigenous peoples or Adivasis in Bangladesh stands at 1,772,788, according to the 2001 provisional census of Bangladesh. About 1,036,006 Adivasis live in the plains, in the northern border regions, and south-central and south-eastern coastal areas, while some 736,682 Hill peoples (Paharis) inhabit the Chittagong Hill Tracts (CHT) in the south-east.

Objective

This case study aims to identify the main problems regarding access to the formal and traditional justice systems for indigenous peoples as a particular disadvantaged group. An emphasis is on the rights and access to land and forests; life, liberty and personal security; gender justice; and to participation and representation.

The design and methods of the study follows an inclusive and participatory approach. This study involves representative voices of Adivasis from different peoples and communities from both the plains and the CHT. Field work and in depth focus group discussions took place among the Santal community in Rajshahi and Dinajpur, and among the Hill peoples (mainly Chakma, Marma, Tripura and a few members of the less numerous groups) in the CHT.

2. ANALYSIS OF KEY FINDINGS: OBSTACLES TO ACCESS TO JUSTICE

Right to property: land and forests

Given the overwhelming dependence on land and agriculture, access to and enjoyment of land are common problems in Bangladesh, irrespective of ethnicity. Land is also of particular social and cultural significance to the Adivasis. Specific difficulties are faced by Adivasis, who have, in many cases through operation of law and by force, been systematically dispossessed of their lands. Shifting demographics and the expansion of the Bengali cultural majority into areas traditionally inhabited by Adivasis, including some areas that have formally been designated as 'forests', have given continued impetus to forcible and violent dispossession.

Given the operation of different legal frameworks in each case, issues regarding rights to land and forests are discussed separately below for the CHT and the plains, respectively.

Land

Chittagong Hill Tracts

The applicable statutory laws in the CHT recognize the customary rights of Adivasis to land and resources to a considerable extent. The traditional rights of the Hill people, which are expressly recognized, include to 'occupy' homestead land (Rule 50, CHT Regulation) and to use timber, bamboo and other 'minor forest resources' for domestic purposes without obtaining prior permission from the DC (Forest Act, 1927; CHT Forest Transit Rules, 1973). Other such rights are indirectly acknowledged by the CHT Regulation, such as the right to engage in swidden (*jum*) cultivation (Rule 41, CHT Regulation) and to use forest resources for domestic purposes (Rule 41A, CHT Regulation). However, other customary rights, e.g. over hunting and the use of water resources, lack explicit legal recognition.

Under the CHT Regulation, the Deputy Commissioner (DC) was responsible for land administration and, unlike the practice in other regions, was obliged to consult with headmen before making any settlement (freehold grant) of land and providing permission for transfer of land ownership (Rule 34 of the CHT Regulation). In cases of leasehold grants of land above a specified amount, the National Board of Revenue (and now the Board of Land Administration) had residuary powers.

The protection scheme of Adivasi land rights, as provided by the CHT Regulation, came under severe assault over subsequent years through both legal and practical measures, with many Paharis[1] being dispossessed of their lands, including plough lands, and being compelled to give up traditional *jum* cultivation. The most severe acts of dispossession included the appropriation of forest lands by the colonial Forest Department, the commissioning of the Kaptai hydro-electric dam in 1960, the leasing of lands to non-Adivasis for commercial and residential purposes, and the Government's policy (from 19791982 in particular) of systematic resettlement of Bengalis from the plains in the CHT.

Significant changes in the legal framework facilitated the process of leasing lands and resettling people. In 1971, the CHT Regulation was amended to reduce the freehold grant to resident farmers from 25 acres to 10 acres, followed by another amendment in 1979, to further water down restrictions against the acquisition of land rights by non-residents.

These latest changes paved way for the Government of Bangladesh to settle some 200,000-400,000 landless Bengalis within the region. The settlers were provided with a parcel of land (which though treated as '*khas*' or government-owned land was in fact often traditional commons, homesteads, or individually or collectively-used farmlands of the Adivasis) and with an initial cash payment, cattle, housebuilding materials and regular 'rations'.

[1] Paharis or Hill people is the term used in Bangladesh to describe indigenous peoples living in the Chittagong Hill Tracts. It is used to distinguish them from people residing in the plains.

Despite the limited degree of recognition of Adivasi customary land rights under the CHT Regulation and subsequent legislation, major problems remain with regard to the enjoyment of these rights, particularly the practice of state authorities of disposing of Adivasis community lands (including forests, graveyards, cemeteries and individuallyheld homestead) as *khas* land, and distributing it as part of a scheme of land reform.

Customary land and resource rights are also often relegated to mere usufructs rather than full ownership rights. Rights over hunting, trapping and fishing are similarly ignored.

Plains

The special status of Adivasi-owned lands is expressly recognized in Section 97 of the East Bengal State Acquisition and Tenancy Act (EBSATA) of 1950, which prohibits the transfer of such land to 'non-aboriginals' without prior permission of the Revenue Officer (usually the DC). Based on this provision, a convention developed in colonial times, and observed by the DC's office in some of the northern districts (such as Dinajpur, Mymensingh and Rajshahi), required prior permission of a civil society organization for the sale of land by an Adivasi to a non-Adivasi.

These provisions are now regularly flouted, particularly in the cases of Adivasis who are constrained for economic reasons or threats of violence to sell their land. Cases of forcible dispossession are widely reported among the Rakhaines, Santals, Oraons and Garos), resulting from land grabbing by powerful members of the Bengali majority, or by major economic interests, including those involved in ongoing construction or development projects.

In addition, the abuse of the Vested Property Act, 1974 (earlier the Enemy Property Act 1965) has been a major cause for dispossession of Adivasi traditional lands in various parts of the plains. A land study, carried out in 1940, showed that the Garos, Hajong and Koch had owned 850 acres, but that by 1990 Hajongs owned no more land; the Garos only had about 50 acres left, and all the others had been dispossessed.

Plains Adivasis face different problems depending on where they live. In the south-east, around the mangrove forests of the Sunderbans where shrimp cultivation is widespread, many Adivasis are now being dispossessed of their lands and only receiving nominal compensation. In some areas, following illegal dispossession of government-owned wetlands by powerful interests, fishermen from the *Bagdi* community and the general public alike have no access to such areas, and are forced to pay tolls to enter the area. Many instances of land-grabbing are accompanied by false cases against the dispossessed, as well as physical intimidation and harassment, but few affected people are able to obtain legal redress.

The government has not only failed to recognize customary/prescriptive rights to land in the plains but has continued to consider them as *khas* lands and has been distributing plots of land as part of a scheme of land reform, which may or may not benefit Adivasis. In general, it fails to take action against breaches of the EBSATA of 1950 for the sale and transfer of Adivasi lands to 'non-aboriginals' (particularly when Adivasis are constrained through economic need or under threat of violence). The absence of a one-stop mechanism, such as the CHT Land Commission established under the 1997 Peace Accord, further inhibits addressing long-standing disputes in the plains.

Forests

The conflict between state and customary law is clearly manifested in the management of common property resources, and in particular with regard to forests. Prior to the colonial period, Adivasis mainly used the land for their homesteads, cultivation or other domestic uses, and for gathering and sale of forest produce.

Chittagong Hill Tracts

The Government of Bangladesh has used its powers under the Forest Act of 1927 to make a number of sudden declarations of particular areas as being reserved forests, resulting in arbitrary evictions of the forest dwellers and/or restrictions on their livelihoods of gathering food, fuel and water. In addition, even swidden commons used by Adivasis (*jum* areas regarded as 'unclassed state forests') outside the reserved forest areas are disputed, and the people of the area remain in apprehension of occupation or eviction.

Plains

Adivasi forest dwellers have also been severely affected by the Forest Act of 1927 (as amended in 2000), which in effect criminalizes their livelihoods and deprives them of their enjoyment and use of what they had treated as their common lands, following the declaration of an area as 'reserved forest'. Thus, in 1982, about 59,648 acres of land within the Attia Forest in the Districts of Dhaka and Tangail were designated as reserved forests, even though Adivasis had lived there for years, and the area had long ceased to be a forest as it no longer had any trees or other permanent vegetation. No legal challenges to this decision were admitted.

Adivasis in the plains have also faced threats from the acquisition of their lands for project developments, which threaten their habitat. For example, the government has reclaimed lands for the purposes of developing an eco-park at Kulaura under Moulvibazar, which poses a specific threat to the livelihood and security of the Khasi community in that area.

Right to life, liberty and personal security

Life, liberty and security

The threats to life, liberty, security and the unwillingness of law enforcement agencies to intervene are common concerns for many Bangladeshis. The sense of feeling threatened, particularly among the Adivasis, is heightened in the light of the record of impunity enjoyed by the perpetrators of even the most egregious acts of violence.

Land conflicts have spawned violence against individuals or communities in both the plains and the CHT. Such violence perpetrated against Adivasi women has been used systematically to intimidate and harass the population. Some of the common practices used to facilitate the removal of Adivasis from their lands include arbitrary powers of declaration of certain areas as 'reserved forests' and the consequent criminalization of forest dwellers, or the treatment of certain areas as *khas* land or 'vested property', and the consequent eviction of the existing inhabitants. Laws such as the Forest Act or the Vested Property Act have been used extensively in certain areas within the plains for this purpose. False cases to harass individuals have also been brought under the Forests Act in the CHT, as in Madhupur in the plains. Powers of arrest (and earlier, detention) are frequently misused by the police – reports indicate that powerful interests bent on harassing Adivasis (and others) are deploying laws, such as the Suppression of Violence against Women and Children (Special

Provisions) Act, as well as the Speedy Trial Act, both of which have draconian bail provisions to ensure the arrest and incarceration of individuals.

During the conflict in the CHT, violence was not confined to purely military targets or 'armed' forces on both sides but spread to 'non-combatant' Adivasi and non-Adivasi civilian populations. While many instances of killing of Bengali settlers by the Shanti Bahini were reported during these years, the Hill people were undoubtedly the victims of more widespread and pervasive human rights violations perpetrated by the security forces, often acting in complicity with sections of the Bengali Settlers. There is little public information on the investigation or prosecution of those responsible for at least 11 major massacres of Hill people since 1980. During the conflict period, political activists and others were frequently held in 'preventive detention', pursuant to the Special Powers Act. From the early 1990s, systematic legal support began to be provided to Pahari detainees in such cases. Today, 10 years after the Peace Accord, the Paharis' situation with respect to enjoyment of their most fundamental rights remains very bleak. Failures on the part of successive Governments to implement the terms laid down in the Peace Accord and subsequent legislation have been largely to blame. Human rights defenders and others continue to face harassment and arrest through abuse of laws and being implicated in false cases.

In the plains too, Adivasi households are often subjected to false cases. For example, members of the Mandi community claimed that since the Forest Department has acquired land in Madhupur, it has been involved in illegal felling of trees, in many cases compelling them to do so and then implicating them in criminal cases under the Forest Act. The legal indemnity for Forest Officers against prosecution (under the Forests (Amendment) Act, 2000) inhibits accountability for such acts of harassment.

Anti-Adivasi bias within law enforcement agencies

Adivasis appear to strongly perceive and experience institutional bias, racism and corruption within law enforcement agencies. They consider that the agencies systematically favour non-Adivasi parties, either by instituting false criminal cases against them, or refusing to accept complaints from Adivasis. Law enforcement agencies are also reported to act in complicity with powerful interests, intent on the forcible occupation of Adivasi land. For example, our informants report that the police accept patently false cases against the inhabitants of reserved forests, including against disabled and infirm people! In the CHT, there is a perception of state inaction in cases of organized violence against Adivasis in the post-Accord period. The absence of a multi-ethnic police force and of the failure to devolve law and order to the hill district councils (HDCs) exacerbates this perception, and perhaps even the reality.

Gender justice

Gender issues

The issue of gender has been largely deprioritized within Adivasi rights organizations until relatively recently. A significant exception is in the context of violence, occupation and oppression by powerful political and economic interests, or by security forces – whether in the plains or the CHT – which have drawn attention to acts of violence against women, and the failure to provide redress. However, the pervasiveness of gender discrimination and violence against women within and outside Adivasi communities remains largely unacknowledged by the community as a whole, and unaddressed by justice institutions.

In the plains, a common position among (largely male) Adivasi activists is that existing Adivasi laws on marriage, divorce, guardianship and custody and adoption fully protect women's rights and that women are adequately represented in religious or social events, in contrast to the absence of women's central role in such gatherings in Bengali society. However, female Adivasis informants pointed to many gender-discriminatory aspects of such laws and customary practices.

In the CHT, despite inclusion of the gender question, it was a lower priority in the Hill people's political agenda for autonomy. However, both men and women activists agreed that the struggle for autonomy had catalysed an understanding both of the need for gender equality and its absence in traditional Chakma society where women enjoy relatively more mobility and freedom than in mainstream Bengali culture.

At the same time, the policies, strategies and programmes adopted by national women's organizations, with significant exceptions, rarely appear to take the specific needs and concerns of Adivasi women into account.

The issues of gender justice that plague indigenous communities generally are:

- Lack of awareness regarding women's or child rights issues within traditional justice institutions, government bodies and even NGOs, particularly with regard to questions of child custody or welfare issues in cases of divorce and separation;

- New trends of violence against women, hitherto unknown among Adivasis, though common among Bengalis, such as dowry-related violence in the plains, and in the CHT, cases of kidnapping/abduction being filed to harass couples who marry without parental approval;

- Lack of awareness of constitutional, legal and customary rights prevents many Adivasi women from seeking redress when unjustly treated;

- Limited or no representation of Adivasi women at higher levels of decision making within the formal, regional and traditional systems prevents their playing a role in development, reform or implementation of the law;

- Religion-based and other traditional personal laws continue to apply to determine rights within the family for all persons, including Adivasis in the plains and perpetuate gender-discrimination with regard to rights to marriage and dissolution;

- Lack of recognition in formal state laws of customary traditions, including of women's existing inheritance rights (e.g. among matrilineal communities such as the Garos and Khasis in the plains), results in deprivation of property rights;

- While able to do so, plains Adivasi women rarely access the Family Courts, as they are perceived as insensitive or do not understand Adivasi rights and customs, and instead seek remedies before their traditional justice institutions;

- Lack of documentation and reporting of violence against women before formal justice institutions (in cases of 'insider/outsider' violence), due to the fear of, and lack of confidence in, law enforcement agencies;

- The non-existence of a Special Tribunal on Violence against Women and Children in the CHT and the consequent need to access the distantly located Divisional Commissioner's Court in Chittagong;

- Lack of support in the form of medical, psycho-social counselling or shelter from any state or NGO-led services exacerbated in the CHT by intelligence agency surveillances, amounting to harassment of organizations providing such services;

- Adivasi women face real marginalization and exclusion from decision-making in many of the traditional justice institutions. In the process of traditional dispute resolution, women's participation is highly restricted even where they are a party in a case. In some cases concerning premarital or extramarital relations or sexual crimes, some of the physical punishments which are meted out may disproportionately impact on women: for example, sentencing the woman concerned to carry 100 buckets of water to the top of the hill to water a tree, or to stay alone in the monastery or temple (Pagoda or Kyang) for 10 to 15 days for the salvation of her soul;

- Inadequate training and orientation of traditional institutions on women's rights and gender issues;

- In some cases, women are allowed to participate in the traditional dispute resolution process, with those responsible for decision-making hearing her side of the story before any settlement is reached. But in general, gender bias is pervasive within the community justice system.

Right to participation and representation

Adivasis lack effective participation in, or representation at, various levels of elected office – the Union Parishad level, the Paurashavas and City Corporations and Parliament – as well as in the executive arm of the government, with only a handful of persons serving in these institutions. The only exceptions can be found within the CHT, where Adivasis overwhelmingly occupy traditional institutions of the Headman, Karbari and Circle Chiefs, and in the Hill District Councils and Regional Council.

Participation in the formal justice system

There is one Adivasi Judge, and there are some five lawyers (all men) in the Supreme Court. There are also reportedly very low levels of representation within the lower judiciary and the Magistracy. Judges and other officials are usually not familiar with, and therefore do not take cognizance of, Adivasi traditions in resolving disputes.

Language is also a barrier. Adivasis may face a problem in terms of understanding their rights or accessing remedies before the police or formal justice institutions (such as the Courts or the DC), in the absence of proper translation facilities. In many cases, dispossession of Adivasis from their land has been facilitated through exploitation of their ignorance of land laws, or through manipulation of language (one often cited instance among the Santal is of agreeing to sell "bar bigha" (two bighas in Santali), which is later claimed by the usually non-Adivasis purchaser to be 'baro bigha' (twelve bighas in Bengali)). Women are particularly affected, as they may remain silent about violence before a male translator or without any support.

The expense of seeking justice in court is a significant barrier for most Adivasis. The existing official legal aid scheme does not target Adivasis, or take any special measures to address them, and is not aware of the extent to which it provides services to Adivasis communities. Although some NGOs reach out to Adivasi communities to provide training and orientation on rights awareness, or to provide legal aid and assistance, very few appear to consult with Adivasi groups to identify priority issues or concerns, and tend to be largely reactive and *adhoc* in their responses.

Participation in the traditional justice system

Some of the pitfalls of participation in the traditional justice systems are the following:

- Risk of traditional justice institutions failing to recognize or mediate acts of violence against women (in 'insider/insider' cases);
- Risk of traditional justice institutions imposing penalties, which do not conform to fundamental human rights norms and victimize the more vulnerable members of the community, e.g. women;
- Absence of state support for training and capacity-building of traditional justice institutions.

Social, cultural, religious and economic participation

An increasing loss of language skills and cultural identity has occurred among many Adivasis, due to the dominance of Bengali culture and increasing Bengalicization of society. Many young Adivasis are abandoning their traditional languages and culture.

Chittagong Hill Tracts

Adivasi communities discourage conversion to other religions and may punish such individual actions by the threat of or actual expulsion from the community (one respondent cited the case of a Brahmin who converted to Christianity but ultimately returned to his faith/community after having been excluded for a time). Instances of conversion of minorities to Islam or Christianity have also been alleged.

Plains

In the plains, there are traces of an inherent racism in the majority community towards many Adivasis, perhaps as a form of residual caste consciousness due to the historical influence of Hinduism dominant in the plains. Often, this results in the segregation of Adivasis from other students in schools or prohibitions on their entry to restaurants (as reported in North Bengal).

Cultural and religious discrimination is often apparent in acts such as the theft of idols/images from places of worship reported in Rakhaine areas or restrictions on religious practices (e.g. prohibition on singing *kirtons* (religious songs) or ringing temple bells).

In the plains, traces of anti-Adivasi racism in the majority community, possibly due to residual caste consciousness arising from the historical influence of Hinduism dominant in the plains, results in, in some areas, the segregation of Adivasis from other students or prohibitions on their entry to restaurants and other public places.

Given limited representation at the highest levels within the Government and agencies such as the Chittagong Hill Tracts Development Board (CHTDB), there is limited input by Adivasis into the formation of economic and development policies or the allocation of resources.

Restrictions on Adivasil-ed NGO operations, by both the NGO Affairs Bureau and the security agencies (especially in the CHT), create unnecessary barriers for Adivasis to work for their own economic benefit.

3. KEY LESSONS LEARNED FROM APPLYING PARTICIPATORY APPROACHES

Research processes and tools used

The methods used for researching the topic were the following:

- Desk work: reviewing literature and existing reports;
- Focus group discussions with local Adivasis groups and individuals;
- Consultation meetings;
- Interviews with duty bearers: Officials in national, regional and local NGOs as well as legal aid organizations, professionals, academics and lawyers.

Effective participatory processes

Effective participatory processes were ensured by using effective contact points. The UNDP office facilitated meetings with the Government of Bangladesh, while the UNDP Chittagong Hill Tracts Development Facility helped to facilitate those regionally. The quality of the research data was enhanced by using local resource persons like the Chakma Chief, Raja Devasish Roy. His inclusion as the team advisor helped to legitimize the research among the local population. The researchers too had a background of both scholarly work and activism in the CHT and in the plains. This profile enabled them to use their professional

connections, e.g. lawyers, academics, NGO workers, in the data gathering process. Furthermore, the activist background as researchers helped in the meetings with human rights activists and defenders, which, in the light of the delicate situation reigning in the CHT, was especially helpful. Very marginalized and little-known Adivasis, such as Mundas and Bunos, were also involved in consultations due to prior connections of some of the researchers with these groups.

Challenges to the participatory processes

The sensitive nature of the topic, especially given the political context of the CHT, created many challenges in the process of data gathering. Some of these were as follows:

- Reticence of government officials to discuss questions openly, especially in Dinajpur where the local administration was under the influence of the local MP who happened to be a minister, and also the sister of the then incumbent prime minister;
- An intransigent and evasive attitude of government officials towards Adivasis;
- In many cases, total ignorance of Adivasi issues among highly placed government officials;
- Male dominance among Adivasi leaders inhibited women from talking of their own problems in a free and fair way. Hence in focus group discussions, special effort was needed to get women to talk of their own problems in a free and fair way;
- Vested interest groups within the government and local officials who were involved with power politics at the regional level often tried to impose their views on the researchers.

Principles of gathering data and ensuring sustainable participation

Some lessons can be learned regarding principles of data gathering and ensuring sustainable participation. These are:

- Ensure acceptability of researchers to various sections of duty-bearers and claim holders;
- Create separate forums to discuss problems of most disadvantaged sections of Adivasis society, as they tend to get submerged by dominant community concerns, e.g. gender and problems of extremely marginalized Adivasis. In Rajshahi, we had to ask the men to leave the women's group, saying that we have some "girlish" things to discuss!
- Gain the trust of claimholders by following up on certain actions, even during the period of research, as so many disadvantaged people tend to think that research is all words and no action. This is where principles of action-research come into play;
- An inadequate sense of responsibility was felt among duty-bearers to Adivasi claims. The above-mentioned action research method often helped duty-bearers to be reminded of their responsibility;

Linkages to human rights standards were articulated only to those with exposure to such debates in the national and international forums. Human rights standards were often blatantly refuted or misinterpreted within political circles, e.g. deliberately misusing the terminology of indigenous (who is an Adivasi and who is not) to generate a politics of insider vs. outsider and deny indigenous people their inherent and customary rights to land.

4. RECOMMENDATIONS

In order to ensure access to justice for Adivasis, it is essential that a common ground is developed for discourse and exchange between Adivasi organizations and existing institutions of justice delivery at both the state and non-state levels.

The key points of any such discussion must include the adoption of commitments, by both state and non-state actors:

- To end racial, religious and gender discrimination in both law and practice;
- To undertake necessary legal and policy reforms;
- To enable collaboration among Adivasi organizations, individuals and mainstream justice delivery organizations;
- To strengthen community-based organizations among Adivasis so that they are able to participate fully in political, economic and social development, and also to deliver access to justice;
- To establish a clear division of responsibilities and chains of command between different administrative authorities to ensure accountability for purposes of good governance.

Improvement of the existing legal framework

Recognition of parallel legal systems

The formal legal system should recognize, to the extent that they conform with human rights norms, the decisions of the traditional dispute resolution bodies operating within most Adivasi communities (particularly in the plains).

Recognition of prescriptive and customary rights to land and forests

- For the concerned communities, preservation of certain areas as common property for community forests, communal grasslands and grazing lands, and *jum* cultivation or other agricultural cultivation;
- Establishment of an elected body for the preservation and management of such common property;
- Preservation of water bodies as common property for use by Adivasis, rather than allocating/leasing/licensing them to any individual or corporate body as private property;
- Recognition of customary rights of inhabitants of reserved forests.

Compilation of existing laws and customs

Review and dissemination of existing compilations and analysis of Adivasi laws and practice in easy-to-understand and accessible formats. In the CHT, recognition and partial codification/documentation may be possible through the HDCs and/or the CHTRC;

Implementation of existing laws

- Ensuring application and effective implementation of section 28 of the Forest Act within the CHT by assignment of rights by the government to inhabitants of reserved forests or, alternatively, by ensuring that the majority of income from the sale of forest produce is given to village forest communities, through agreement (following precedents established in India, for example);

- Cancellation of declarations of RF made before the CHT Peace Accord under section 20 of the Forest Act or otherwise under process of reservation, and placing these lands within the jurisdiction of the HDCs or having the disputes resolved through the Land Commission.

Amendment/Repeal of existing laws

- If necessary, reform of existing laws could be brought about through constitutional challenges, if the legislature appears unresponsive. For example, the question of whether the pre-constitutional Forest Act is in violation of rights to life/livelihood, property or movement, could arguably be raised by a constitutional challenge before the Supreme Court;

- In addition, dialogues on processes of law reform within the communities could be initiated, for example, on the elimination of gender discrimination in family laws and inheritance laws (as pioneered within the Bawm and Khyang peoples in the CHT) and on child rights and other relevant human rights issues.

Resolving conflict of laws

- Non-implementation of certain existing laws, and non-availability of these laws to the public at large, means many conflicting applications of the existing law are ongoing. There is a need to recognize and remove existing conflicts of laws.

Ratification of and incorporation into domestic law of international instruments

- Immediate steps to incorporate into national law the provisions of treaties already ratified by Bangladesh (ICCPR, ICESCR, CERD, CEDAW, CAT CRC and ILO Conventions No. 107 and No. 111) and to expedite ratification of other key international treaties on human rights and environment (including ILO Convention No. 169, the Rome Statute on the International Criminal Court and the Optional Protocol to the ICCPR);

- Existing declarations or reservations to treaties already ratified by Bangladesh (e.g. ICCPR, ICESCR, CEDAW, CAT and CRC) should be reviewed and withdrawn.

Process of law reforms

- Existing laws applicable to Adivasi communities should be reviewed and analysed, in order to make necessary amendments and ensure their consistency to the possible extent with traditional culture and values of Adivasi communities, and also with basic human rights principles;

- As part of this process of review and analysis, action-research should be carried out on a pilot basis in several key areas to map the diversity of problems faced by Adivasis located across the country as well as their suggestions for legal changes needed. Ensure that consultations are held with a diverse cross section of persons within the community, particularly Adivasi women and children, in order to incorporate their perspectives.

Formal justice system

Streamlining of functions of different institutions

- To ensure more expeditious access to justice in the CHT, the powers of the DC and Commissioner (and the executive branch of

the government) need to be limited and replaced, as appropriate, by those of civil and criminal courts under the Supreme Court of Bangladesh. This must take into consideration the particular features of justice dispensation in the traditional institutions in the area. As the first step, the CHT Regulation (Amendment) Act of 2003 should be brought into force, and the appropriate judicial officers and ancillary administrative personnel appointed;

- In the CHT, build institutional linkages between central, regional and local institutions with regard to dispute settlement processes and with respect to development planning which may impact on access to justice issues.

Making the CHT land Commission effective

Ensuring that the CHT Land Commission's operation incorporates amendments to the Land Commission Act as advised by the Regional Council.

Setting up a land commission for the plains

Providing a one-stop service for addressing all land disputes and eliminating the protracted delays and multiple levels which any litigant in a land case is subject to in the current system.

Addressing land acquisition of Adivasi lands

- Putting in place systems for identifying such land and ensuring that it is protected from compulsory acquisition;

- Imposing restrictions on the transfer of rural lands to individuals/organizations not associated with local people or Adivasis or Hill peoples;

- Providing legal, strategic and organizational support for ensuring preservation of land and forest rights of Adivasis;

- For the concerned communities, preserving certain areas (including water bodies) as common property for community forests, grazing lands, communal grasslands and *jum* cultivation or other agricultural cultivation;

- Establishing an elected body for preservation and management of such common property (at the *mauza* level in the CHT);

- In the CHT, cancelling all leases granted to non-residents (in particular influential persons, administrative officials); establishing local committees to scrutinize such leases, and amount of land so leased; then developing legal strategies to address these problems, with collective participation in the process. The DCs could be instructed to initiate *suo moto* processes to cancel such leases;

- Following best practice from elsewhere, in applying section 28 of the Forest Act within the CHT to 'village forest communities/ forest dwellers' within Reserved Forests where tens of thousands of indigenous peoples live. Similar processes could also be initiated in the plains in greater Sylhet, greater Mymensingh, etc.;

- Cancelling declarations of reserve forest made under the Forest Act before the Accord, or otherwise under the process of reservation, and placing these lands within the jurisdiction of the HDCs, or having the disputes resolved by the Land Commission;

- False cases (including under Forests Act or Violence against Women Act) should be withdrawn to prevent further harassment;

- In tea gardens, considering leasing out to Adivasis and other workers the unused company lands where tea is not cultivable and lands where tea could be cultivated but is not being cultivated.

Reduction of delays in the courts

- In the plains, circulars or notifications to direct the cases involving the rights of Adivasis are dealt with on a priority basis (particularly on land and forest cases);

- Case management programmes to prioritize areas with high Adivasi populations to ensure speedier disposal of existing caseloads.

Affirmative action

- Following best practice from the colonial period of appointment of 'Special Officers for Aboriginals' and/or 'Welfare Officers' in Adivasi areas to advise the DC. In doing so, recruiting only Adivasis from the relevant area to such posts will enable effective communication and response to Adivasis' needs in any area;

- Translation facilities should be made available in courts (including new courts to be established within the CHT) in cases involving Adivasis who are unable to communicate fully or effectively in the language of the court, as well as in police stations.

Elimination of bias within the system

- Cases involving Adivasis as victims/survivors should be investigated promptly, impartially and independently wherever possible, to allow for speedy provision of remedies. The pattern of inaction in such cases breeds resentment and distrust in the legal process, which further prevent the possibility of ensuring access to justice for Adivasis;

- Awareness-raising programmes should be undertaken among judicial officers, court officers, police, prison officials and government legal aid staff, to develop greater sensitivity regarding the issues and concerns faced by Adivasis, including those from vulnerable or marginalized communities facing intersecting discriminations;

- Similar awareness-raising programmes are required for NGOs who are working with formal legal system, for example in providing legal services.

Registration of Adivasi marriages

Providing for registration of Adivasi marriages, with Adivasis themselves being responsible for undertaking and maintaining registration processes.

Medical care in cases of violence

Medical examinations in cases of alleged violence against women should be held at the Upazilla level without any delay or obstacles. Currently, regulations that require a medical board to be established prior to an examination of the victim/survivor lead to delays and the risk of losing vital evidence.

Traditional or informal justice systems

Compilation of traditions and customs

Compile and then partially codify or document existing customs of Adivasis from the ground level. The compiled list should be given to the Land Commission and elsewhere (for example, the libraries of various Bar Associations and judges' libraries in the Supreme Court and lower courts). Full codification may not be appropriate because it may affect the participatory manner of customary law-making and render flexible rules into rigid and static practices that may not be responsive to changing social needs.

Recognition by the formal legal system

- Ensuring some level of recognition in the traditional dispute resolution methods by the formal legal system, especially in the plains, where indigenous chiefs and headmen are not formally recognized;

- Invoking criminal laws against those engaged in traditional dispute resolution who impose penalties or sanctions on the disputants which contravene fundamental rights.

Affirmative action

Increasing involvement of wider sections of the community in traditional dispute resolution bodies (for example, by ensuring that more women are appointed as Headmen and Karbaris or that women and individuals from 'low castes' have more voice in the process).

Elimination of bias within the system

- Training members of the traditional dispute resolution bodies in constitutional rights, human rights standards (including women's rights and children's rights, in particular) and statutory laws to ensure that customary dispute resolution processes and outcomes are in conformity with the constitutional and legal framework, and respect fundamental human rights;

- Also consider how to avoid losing discretion and flexibility inherent to the customary system (consider the risks of a full formal codification);

- Also consider the risk of bringing in a more adversarial process, which would prevent effective dispute resolution that is generally more rehabilitative and participatory than processes that are oriented around incarceration and other punitive or monetary sanctions;

- Provide a platform for dialogue and discussion on various community problems and issues with government officials. There is a need to build up the capacity of individuals and representative organizations of each community to this end. The CHT Regional Council (RC) could start playing a role in this regard.

Building linkages between formal and traditional justice systems

- Reform of Land Commission, by ensuring representation and participation of all communities in the CHT, removing provision regarding its Chairman's overriding decisions, putting limitations on its geographical jurisdiction and ensuring its effective operation, among others;

- Consider including Karbaris and Headmen in the Standing Committees of the Union Parishads, particularly on the Standing Committee on Law and Order issues.

Enhancing capacity to provide justice

Implementation of the Peace Accord 1997

The Implementation Committee for the Peace Accord should be reconstituted, or a Parliamentary Committee (ensuring the representation of indigenous peoples) established, in order to address and continue the implementation of the Peace Accord.

Reform and activation of the Land Commission

- The Land Commission should be activated (subject to the proposed amendments);
- In the meantime, forcible land settlement in the CHT must be stopped;
- In the interim period, internally displaced people among the Adivasis should be provided food aid, healthcare, education and other supports from governmental and other sources.

Conduct of land survey

A land survey should be held within the CHT and in other areas, with participation by a significant number of the Adivasi populations to ensure an accurate demarcation and ownership of land – including community land. The land survey should be conducted only after a settlement of existing land disputes as affirmed in the Accord. It is suggested that any such survey should be held in the presence of independent monitors (for example, lawyers of the Bangladesh Bar Council) to ensure that records are properly drawn up and provided to the owner(s) concerned.

Reorganization of MoCHTA

- Holding meetings of the Advisory Committee of MoCHTA (including MPs, RC, HDC chairpersons, chiefs and three non-tribal advisers);
- Increasing the number of Adivasis represented on the staff of MoCHTA will increase its credibility among the Adivasi population of the CHT;
- Restructuring the work of MoCHTA to include more consultations with the CHT, RC, HDCs, and the traditional institutions on issues of access to justice will further enhance the ministry's capacity to act on such issues.

Enhancing representation of Adivasis in the justice system and civl administration

- The current quota for indigenous peoples in the judicial service and administrative service should be maintained and filled, as should the quotas with respect to the civil service and the police;
- Quotas or affirmative action policies should be put in place amongst NGOs working in the area of human rights, women's rights or legal services to ensure that Adivasis are more closely involved in identifying and responding to rights violations involving their own communities and in designing responses to those violations;
- Inclusion of Adivasi individuals or other individuals versed in Adivasi issues in the Public Service Commission.

Training of government officials/NGOs

- Training programmes should be set up for government officials (judges, police, civil servants) and NGOs to increase awareness and understanding of the issues that concern Adivasi communities, including the Adivasi traditions, customs and culture. Such training should be mandatory for all those posted to areas with high density of Adivasi populations, including the CHT;

- Orientation could be provided before officers are dispatched to Adivasi settlements (e.g. for UNOs, Police, DCs, Magistrates, Judges) and, if possible, for MPs and UP chairpersons and members if they are not Adivasis;

- The curriculum for training of magistrates/ judges (in JATI) and other officers could include information on Adivasi laws and practices, and on priority problems faced by Adivasi men, women and children in their access to justice.

Public consultation with Adivasi communities

- NGOs, particularly legal services and human/women's rights organizations, should hold broad-based consultations among and within different sectors of the Adivasi communities. These consultations will help to identify more clearly their needs and concerns, in particular those of vulnerable or marginalized groups experiencing intersecting discrimination (on grounds of race and gender/age/disability, etc.), and to design interventions accordingly;

- Similarly, consultations with potentially affected Adivasi communities must be held prior to undertaking any development projects, such as eco-parks or mines, etc. These projects should not be established without the prior, informed consent of the communities concerned.

Monitoring and evaluation

- The Government Legal Aid Committees, as well as NGOs, should develop closer monitoring and evaluation of their own interventions, to ensure a more effective impact, and also incorporate the lessons learned into the regular review of programmes;

- The Bar Council could strengthen and coordinate the human rights cells of the various Bar Associations across the country and encourage them to work in close conjunction with key NGOs and GOs, in order to prioritise investigation, fact-finding and legal support in cases involving Adivasis (prioritizing the areas of family, land and criminal law).

Enhancing capacity to demand justice

Empowerment strategies

- Awareness-raising programmes should be held by and among Adivasis regarding their constitutionally guaranteed and statutory rights to life, liberty and personal security; equality and non-discrimination; property (in relation to land, family and criminal justice in particular); and available remedies before formal and non-formal institutions of justice;

- Human rights education programmes could be included at school and college level as well in institutions of higher education, preferably in Adivasi languages;

- Mobilization programmes should be held by and among Adivasis to enable them to demand enforcement of their constitutionally guaranteed fundamental rights and statutory rights.

Strengthening organizational capacity

- Skills-building – specialized skills in investigation and documentation as well as in media and communications could be developed within existing Adivasi organizations in order to enhance their capacity to identify human rights violations and to demand appropriate remedies;

- Creating paralegals and mediators – capacity building among Adivasi activists and organizations, particularly the training of Adivasis as lawyers, paralegals and shalishkars, in order to facilitate more effective access to formal legal system and non-formal legal system;

- Monitoring – Monitoring cells could be developed within Adivasi organizations and communities across the country to investigate, document and report on human rights violations, and/or to make referrals to appropriate bodies to invoke appropriate legal remedies;

- Networking – Adivasi organizations/ communities could develop closer links with a wider and more broad-based set of issue-based networks and organizations (such as on violence against women, children's rights, or environmental matters), as well as human rights and legal services organizations in order to provide them with some 'coverage' in addressing sensitive matters, and also to enable them to draw on the strengths and abilities of the latter while developing their own capacity;

- Strengthen networking among Adivasis at leadership levels across South Asia/SAARC (e.g. parliamentarians) and international levels to focus demands on policy/law reform changes.

Partnerships with NGOs/CSOs

Networking with and among Adivasi organizations

- NGOs (including development organizations, human rights organizations, women's rights organizations and legal services groups) need to move away from a firefighting mode – of responding only to headlines of human rights violations – and instead engage in activities directly with Adivasi communities, through their organizations on a regular basis;

- NGOs and CSOs also need to develop more effective linkages on the ground with Adivasi communities to ensure more regular communications and followups in cases that require their intervention or support;

- In developing such networks, consider whether a more formal network should be established or whether it is preferable to develop or strengthen existing working relations to enable more responsive and speedy interaction, particularly in the context of a sensitive security environment;

- In developing the networks, special emphasis should be placed on giving priorities to the most marginalized and disadvantaged Adivasi communities;

- A particular effort needs to be made to facilitate opportunities for women to raise their concerns within existing Adivasi organizations or, alternatively, to organize autonomously and articulate their concerns.

Awareness-raising among NGOs/CSOs

- Awareness-raising programmes should be undertaken by and among NGOs/CSOs on the key terms of the Peace Accord of 1997 in order to develop a more effective means for implementation and to otherwise help facilitate the process of implementation;

- Awareness-raising programmes and consultations need to be engaged among NGOs in order to build a wider understanding of key Adivasi issues and concerns, to strategically prepare appropriate responses, and to build these into the NGO's programme activities.

Incorporating Adivasi concerns into existing access to justice initiatives

In designing and developing access to justice-related programmes, NGOs should work more proactively to reflect and incorporate Adivasi concerns (for example, including information on Adivasi family laws in a training on family laws or on specific problems affecting Adivasi children).

Developing greater diversity within NGOs

Currently, many NGOs have limited or no representation of Adivasis within their organizations; they also have little awareness of such lack of representation. Consequently, they should consider adopting internal policies for recruitment on the basis of affirmative action, particularly the recruitment of women, at decision-making levels.

Role of international community

UN agencies/Specialized agencies

- The ILO Office in Bangladesh should review its obligations to address the rights of indigenous peoples, pursuant to ILO Convention No. 169, ILO Convention No. 107 and ILO Convention No. 111; disseminate information about the Conventions; and undertake appropriate strategies and programmes to help implement them;

- The UNDP Regional Centres for Asia Pacific and the ILO Regional Office for Asia and the Pacific could discuss a common framework to address such issues;

- Support initiatives to build the capacity of RC and HDCs in framing regulations for their own operations, as well as for addressing relations with the traditional justice systems;

- Strengthen and build the capacity of traditional dispute resolution bodies (such as the Karbaris and Headmen) and ensure that their activities are carried out in conformity with human rights standards;

- Support action research on the role and functions of traditional justice institutions and establish closer linkages with formal justice institutions;

- Enable provision of support services through local NGOs to enhance access to justice, including legal advice, psycho-social counselling, medical services and shelters for victims of violence;

- Support compilation of customary laws of Adivasis in the plains and in the CHT.

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Indigenous traditional legal systems and conflict resolution in Ratanakiri and Mondulkiri Provinces, Cambodia

Maria Backstrom and Jeremy Ironside

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CAMBODIA


Oddar Meanchey
Banteay Meanchey
Siem Reap
Preah Vihear
Stoeung Treng
Ratanakiri
Krong Pailin
Battambang
Kampong Thom
Kratie
Mondulkiri
Pursat
Kampong Chhnang
Kampong Cham
Koh Kong
Phnom Penh
Kampong Speu
Kandal
Prey Veng
Svay Rieng
Takeo
Kampot
Krong Preah Sihanou
Krong Kep

ACRONYMS

DKCC	District/Khan Cadastral Commissions
DRC	Dispute Resolution Committee
HA	Highlander's Association
ICCPR	International Covenant on Civil and Political Rights
IYDP	Indigenous Youth Development Project
MoI	Ministry of Interior
MoJ	Ministry of Justice
OLMUPCC	Office of Land Management, Urban Planning, Construction and Cadastre

1. OVERVIEW

This paper presents a summary of the findings of a participatory action-research case study into indigenous traditional legal systems in Ratanakiri and Mondulkiri Provinces.[1] The research took place in March and April 2006. The two main objectives of the case study were:

- To describe traditional justice systems and practices, and develop recommendations for policy-makers on amendments to legal provisions and institutional arrangements, which would ensure that indigenous peoples have improved access to justice through both their customary legal practices and the formal justice system;[2]

- To describe some of the difficulties that indigenous peoples face in finding just resolutions to their problems outside their village and suggest some possible solutions.

The indigenous peoples of Cambodia are a marginalized group with poor access to justice through the formal legal system.[3] A major factor causing this marginalization is the almost total absence of formal legal services and institutions where indigenous peoples might be able to have their cases fairly adjudicated. Social protest is often the last resort when individuals and community members have been unable to seek just redress from the courts regarding their land disputes. 'Protesters' are often jailed for long periods, without appropriate hearings, legal procedures or legal representation.

Rapid and uncontrolled development processes in indigenous areas (which have traditionally been rich in natural resources) are also a marginalizing factor. With improved infrastructure throughout the country, there has been a rapid increase in migration to remote regions. This has resulted in large-scale alienation of indigenous community land and increasing numbers of conflicts over land and natural resources. Wealthy and powerful people, both inside and outside the government, and especially outsiders to the region, are better able to take advantage of the opportunities afforded by expanding markets and improved transport. Highland villagers, on the other hand, find themselves without their land or the necessary capital, resources and knowledge to take advantage of new opportunities.

This summary will discuss some of the main policy issues that need to be dealt with as part of a reform process to enhance access to justice for indigenous peoples. It will also describe the participatory research process and summarize the main recommendations.

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[1] See Backstrom, M. Ironside, J. Paterson, G. Padwe, J. and Baird, I.G., 'A Case Study of Indigenous Traditional Legal Systems and Conflict Resolution in Ratanakiri and Mondulkiri Provinces, Cambodia.' UNDP/Ministry of Justice, Legal and Judicial Reform Programme. 2006.

[2] In this abstract, the words 'informal', 'traditional' and 'customary' are used interchangeably.

[3] See also Yrigoyen Fajardo, Raquel Z., Kong Rady and Phan Sin, *Pathways to Justice: Access to Justice with a Focus on Poor, Women, and Indigenous Peoples*, UNDP Cambodia/Ministry of Justice, Royal Government of Cambodia, Phnom Penh, 2005.

2. KEY FINDINGS AND MAIN POLICY ISSUES

Key findings

Indigenous communities overwhelmingly trust, use and support their customary laws and the conflict-resolution processes within their community

This is perhaps the main finding from the village consultations, with community members clearly stating that they wish to be able to continue to use and rely on customary laws and conflict-resolution processes. The vast majority of the indigenous people who were interviewed see the traditional system as fairer, more pro-poor and easier for local people to access than the formal justice system.

The research findings demonstrated that the concept of justice for indigenous communities extends much further than simply punishing the offender. It also includes other important elements such as compensating the victim, restoring harmony in the community and reconciling the two parties. To achieve these other aspects of justice requires the wide and active participation of community members in the conflict-resolution process. The result of such a process is that indigenous community members have a strong and clear sense of right and wrong. From this perspective, the decisions indigenous community members see coming out of the courts do not conform to any moral code they use, implement and know. As villagers from Reu Hon Village put it, in the courts:

"What is wrong is right, and what is right is wrong."

Some problems with traditional systems raised included the at times unfair and overly heavy fines and, more recently, cases in which more powerful people pay off the adjudicators. Women also complained that sometimes their suggestions and input are not given the same weight as suggestions/input from men. However, women in general supported their traditional justice systems as the proceedings are carried out in their local languages, and they are supported by their families. Indigenous youth also generally support their system but some see traditional systems as not being able to deal with modern-day conflicts, especially those involving outsiders.

Indigenous groups are marginalized in the formal legal system

As a result of the above, indigenous communities make only very limited use of the formal legal system (e.g. provincial level courts) and, when necessary, seek assistance with conflicts which cannot be resolved internally at the village, commune and district government level. The results showed that 170 out of 257 cases dealt with by the traditional authorities in 10 villages in the recent past had been resolved by traditional adjudicators. Eighty-seven of those cases were taken to the government-appointed village chief for further assistance, 30 were taken to the Commune Council, 19 to the Communal Police, nine to the district level, and only six were taken to the courts.

Indigenous community members are intimidated and marginalized in court. They are often unfamiliar with both written and spoken Khmer and with Khmer legal systems and terminology. They are fearful of high-ranking officials and police and do not have the support of their friends and family, which is a key part of traditional legal processes. There is also little or no legal defence offered to indigenous peoples, and there are no

trained indigenous lawyers working on behalf of their own people. Because the formal system often requires the use of money (both for legal fees and bribes), indigenous peoples are unable to obtain 'justice' from a court. The court system is often used by powerful interests to silence individuals and further disenfranchise them.

A dysfunctional formal legal system

As described above, 'new' disputes are not being addressed by the formal system. "There is the law, but no one obeys the laws" (Kanat Thoum villagers). As the traditional authorities lack the authority to deal with new disputes, there are no forums for aggrieved parties to have their case heard. In particular, the Land Law and other laws are not being implemented or followed. This lack of access to justice is creating a very dangerous situation, with increasing numbers of conflicts and threats of violence each year. In the absence of justice, communities are disintegrating, and powerless individuals find themselves without land and unable to call upon traditional forms of mutual aid. The result is the increasing impoverishment of the already poor.

Traditional law allows indigenous cultures to maintain their integrity and cope with change

Indigenous communities make it clear that the preservation of their culture and traditions is premised on the maintenance of community solidarity. Traditional law plays a much wider role in these societies as it is a most important method of preserving community harmony and solidarity, and makes it possible for communities to adapt gradually to changing circumstances.

Although the traditional legal system is still widely used in many aspects of indigenous culture, it is clear that it is facing several challenges to its continued existence. Change is taking place in indigenous communities at a more rapid pace than at any time in the past, and this is undoubtedly a source of problems for traditional systems. However, traditional justice systems have always adapted to changing circumstances, and the adaptability of these systems is such that they still manage to maintain a strong moral code and are able to deal with many new and complex conflicts, even in the face of rapid change and in communities that have been seriously impacted by land loss, etc.

There is a lack of interface between the formal and the traditional legal systems

There are several examples of good cooperation on conflict resolution between traditional legal systems and local government at the commune and district level. Community members by and large see the commune and district levels as the 'formal' legal system because government officials are involved in adjudicating cases and use national laws to do so. However, decisions, fines and punishments at the commune and district levels are just as much, or more, founded on traditional legal concepts and norms as they are on the application of national laws. In addition, some cases – such as criminal matters – cannot be handled by commune and district officials as they do not have a legal mandate to do so.

There are very few examples, however, of cooperation between the traditional legal systems and the formal judicial system, and some of the villages that were surveyed had never had a conflict go to the provincial court. Tension exists between the police and the traditional legal systems as the police sometimes perceive the traditional systems as being in competition with them, particularly in their informal conflict-resolution capacity; this may be related to the police practice of extracting fines from violators and not sharing the money with the victim.

The formal and traditional legal systems address different rights, responsibilities and conflicts

Traditional systems address issues within the community or, more rarely, between two villages. The traditional system focuses on such areas as inheritance, theft, marriage and other local concerns.[4]

A judge in Ratanakiri's provincial centre commented that court cases between outsiders and indigenous peoples are mainly about land, and that cases where both parties are indigenous are mainly related to divorce and assault/domestic violence. Most common cases between Khmer are divorces and contract disputes over loans.

The system chosen (traditional or formal) to resolve a dispute depends on who the community members trust and seek help from in a conflict, and whether the traditional authority is able and has the authority to deal with the conflict.

Foremost among the new problems which traditional authorities have to deal with is an increasing number of disputes with more powerful people – usually outsiders – over the control of a village's land and forests. Disputes with neighbouring villages over village boundaries and ancestral land claims are becoming increasingly difficult to resolve because of these new pressures from outside. Increasing numbers of outsiders are now living in indigenous villages, as reflected in a comment made by a villager in Reach village:

In the past outsiders who came to live in the village had to agree to follow the traditional law. Now there is an influx of outsiders who don't respect village law. If there is a conflict, they don't agree, respect, listen to the traditional resolution. They depend on the national law and the courts.

The effectiveness and authority of traditional legal systems are, however, affected by a lack of any status or recognition under Cambodian law. Community members who have money can sometimes bypass traditional systems and achieve the decision they want by paying off commune and district authorities, as well as court officials.

Policy discussion

In terms of policy-level recommendations to improve the poor levels of access to justice of marginalized indigenous communities, this research has identified two key aspects which need to be dealt with:

- The role of traditional law within the formal legal system should be acknowledged;
- Reform of the formal legal system is essential.

Acknowledging traditional law within the formal legal system

The principles of equality before the law and non-discrimination are enshrined in the Cambodian constitution and international human rights instruments and may be drawn on to enhance the role of traditional law within the formal Cambodian legal system.[5] These established principles give the Cambodian government the legal authority to pass/amend legislation to achieve these ends, which local and other authorities then have to implement.

Historical analysis carried out as part of the case study shows that the French colonial authorities both recognized and encouraged 'tribal' customary

[4] There is, however, also a strong tradition of dealing with all types of criminal and civil offences, including serious crimes.

law in special courts as a way to control local populations. This analysis constitutes a warning on the perils of pulling informal or non-state systems into the sphere of state regulation. As the *Pathways to Justice* report indicates, and the case study shows, it is their very independence from political state structures that gives these traditional legal processes their legitimacy in the eyes of community members. In contrast, the fact that village chiefs, commune councils and the courts draw their legitimacy from state authority, and that state representatives often adjudicate unjustly, makes this path for legal recourse unappealing to villagers. Balancing the independence of the traditional justice system while at the same time recognizing it as part of Cambodia's legal structure is a key policy question/dilemma.

Pilot activities may be able to answer some of these questions, but even these should be approached and planned with care and with the close cooperation of communities, their representatives and indigenous advisors. This is important work, and a key principle must be not to harm the existing structures and processes which are delivering justice to these groups. Top-down, well-intentioned but unwise interventions could cause more problems than they solve.

Policy to enhance the formal role of traditional authorities has to acknowledge and allow for the fact that, like all justice systems, the traditional system needs to evolve and adapt to changing circumstances. As has been shown, an inherent part of these systems is their ability to incorporate aspects of other justice systems from former (and present) regimes.[6] The Brao, Kreung and Kavet, for example, typically cite legal precedent from different regimes when deciding on cases, indicating that their legal system is grounded in the concept of following precedent and changing with the times. One of the recommendations from communities is that there should be a codification of their laws by the indigenous communities themselves. If this were done, it would be possible to understand the diverse influences and the way this body of law has adapted and evolved. It would also reveal the variations across communities and ethnic groups, as traditional law is by nature adaptive, learned by experience and transmitted orally from generation to generation.

A further key point with implications for poverty reduction is that the work of the traditional authorities directly benefits not only the communities themselves, but also wider Cambodian society by bringing justice to the most vulnerable, as well as maintaining community law and order. Indigenous elders are dealing with the consequences of social disintegration brought about by new development pressures in their communities. To avoid the disintegration of indigenous cultures and societies in the face of this change, and the ensuing widespread social consequences, communities and their elders need to be supported, and their work in maintaining social order needs to be recognized. It could be argued that maintaining and supporting these systems is the key to the development of indigenous peoples and poverty reduction for the foreseeable future.

Reform of the formal system

A further policy issue is that justice reform also needs to focus on the reform of the formal system. While the indigenous system may 'work better'

[5] Article 31 of the Cambodian Constitution and article 26 of the International Covenant on Civil and Political Rights (ICCPR).

[6] See Appendix 2 of the corresponding full case study (on included CDROM).

than the formal one, it does not follow that traditional justice systems can substitute or repair a broken 'formal' system. As has been pointed out before, the two systems often deal with different rights, responsibilities and conflicts.

A policy assumption that needs to be addressed is that bolstering alternative/traditional dispute mechanisms will "fix" the problems of the highlanders. As this research shows, many of the problems faced by indigenous peoples come from outside their communities. Justice in this sense is not something that can operate, be delivered or exist in a vacuum. Indigenous communities, of course, need the authority to implement their traditional laws and to manage their traditional areas. However, this authority must be supported by an environment in which laws are implemented and people are punished for their crimes. If not, impunity, corruption and the abuse of power and money will continue to be the *de facto* law of the country and will eventually infect and poison traditional systems as well.

Policy should also focus on enhancing the participation of indigenous groups and any policies affecting them should only be pursued with their informed consent. This goes beyond simply consulting indigenous peoples to involving them in decision-making in the development process. The right to self-determination (or participation rights) forms the basis upon which indigenous peoples share power within the state and gives them the right to choose how they will be governed.

Given the size of Cambodia's indigenous population and the process of decentralization that is underway, the commune councils still represents the best opportunity for self-determination (or participation) in communes where minority groups are in a majority, even if they are not to be found in highland indigenous customary structures. These participation rights should be further explored with the indigenous groups.

3. METHODOLOGY OF THE STUDY

The fieldwork was primarily focused on reviewing and cataloguing customary practices in conflict resolution in indigenous communities in Ratanakiri and, to a lesser extent, Mondulkiri provinces. Interviews were also conducted with state officials in Ratanakiri province.

An important objective of this study was to provide a basis for ongoing dialogue, consultation and followup research with both the intended beneficiary indigenous communities and with local government representatives. The field work was structured to provide a starting point for this dialogue. Another important component of the field work was capacity-building for indigenous peoples' representatives (e.g. women, youth and elders) in order to allow them to conduct the field work themselves. The action-research approach made it possible for resource persons among the indigenous peoples in the target communities to familiarize themselves with the policy discussion on improving access to justice and to involve them in any future consultations and pilot activities.

Partner organizations

This research process involved a partnership between the study team and two indigenous groups:

1. The Highlander's Association (HA), a local grassroots organization in Ratanakiri Province representing the interests of the province's indigenous people. Active since 2001, this association has considerable experience in conducting consultations with indigenous communities and engaging participation in the formulation of legal instruments to implement the 2001 Land Law.
2. The Indigenous Youth Development Project (IYDP) was created in 2000 to provide opportunities for educated indigenous youth to contribute to the development of their own communities. The IYDP programme has used action research as one of its capacity-building and awareness-raising tools since its inception.

Human resources

A total of 14 elders (from the HA elders council) and 14 youth (including four women) from IYDP were selected as research assistants. These were divided into eight research teams, each with one or two elders and one or two youth. This model has been found to work well for community development in indigenous villages in Ratanakiri, as it makes it possible for educated and literate youth to work in close cooperation with elders who lack the necessary literacy skills but who have both legitimacy and a knowledge of customary practices. As far as possible, research assistants were chosen who could speak the same language as the target community to which they were assigned. The elders were able to build trust with community members, explained the objectives of the study and facilitated group sessions. The youth research assistants guided the process using a semi-structured interview format and documented the results. The fieldwork took a total of three to four days in each target village. Evenings were used for larger group meetings and focus-group discussions, and individual interviews were held during the day. The research team trained the research assistants prior to the fieldwork and monitored the process.

Study sites

Fifteen villages within the HA network were chosen as study sites in Ratanakiri. Three villages were later chosen in Mondolkiri. The villages were selected to represent the range of ethnic groups in all nine districts of Ratanakiri, in addition to two districts of Mondulkiri. Stable communities and those facing serious social disruption (such as immigration and land loss) were included in the study in order to compare the range of responses.

On average, at least 40 members participated in each target village. Over 600 indigenous community representatives (at least 30 percent women) were consulted during the course of the fieldwork and verification workshops.

Village-level research was also conducted in a Jarai village in Andong Meas district and some Brao villages in Ta Veang district. Brao people living in the provincial capital of Ban Lung were interviewed to determine the extent to which traditional justice systems are still used there.

Process and research content

The research format was developed in consultation with a group of elders from the HA Advisory Council. This was further adjusted and adapted at a trial consultation organized by the HA, where the research teams tested the methodology on over 55 participants divided into five ethnic/language groups. Based on the experience of this trial (which already generated a lot of information), the research teams were trained for three days. Each research team went to two study sites in Ratanakiri. Based on their experiences in Ratanakiri, a team later travelled to Mondulkiri Province and conducted research in three Phnong (Bunong) ethnic villages. This was useful for comparison with the groups in Ratanakiri.

Verification of the field data and findings in Ratanakiri was carried out over the course of two workshops. These workshops were conducted primarily in local languages, with facilitators from the HA and IYDP youth assisting with translation and documentation. Local authorities from village, commune and district levels also participated.

Because the marginalized indigenous groups are the rights-holders of policies to improve access to justice, understanding their situation and their justice reform needs helped in understanding the likely impacts of any proposed policy. An historical perspective/analysis was also undertaken to understand the changes that traditional legal systems are experiencing in order to develop appropriate policy recommendations.

During the village-level research, mixed groups of elders (both women and men) were consulted, as well as disaggregated groups of women and youth. This was done to ensure participation from all groups in the community, even the most marginalized groups, and to understand important differences between them. Some of the questions that were raised included:

- what are the differences in access to traditional conflict-resolution processes within communities?
- what are the differences in perspectives on the traditional authority's conflict-resolution effectiveness?
- what are the differences in the various power bases existing within the community?

Some of the topics of discussion included:

- Customary law;
- Identifying traditional authorities and their role (past and present);

- Identifying the process of conflict-resolution and adjudication for different kinds of cases;
- Analysis of the case load in the village over the preceding years or decades;
- Documentation of specific cases of interest;
- Identifying changes which have taken place in the customary system;
- Perception of the customary system by specific
- groups (women, youth, local authorities);
- Identifying the strengths and weaknesses of formal and customary justice systems;
- Identifying interfaces with the formal justice system and local authorities;
- Community recommendations.

Interviewing state officials was also important as any measures to improve access to justice for indigenous peoples will to a certain extent be implemented by non-indigenous state officials. Commune, district and provincial officials, heads of the provincial Office of Land Management, Urban Planning, Construction and Cadastre (OLMUPCC), the provincial Department of Rural Development, police and military police were also interviewed. An interview was also conducted at the national level with H.E. Suong Leang Hay, the Deputy Director of the Project Management Unit, and some of his colleagues at the Council for Legal and Judicial Reform; one of the issues discussed during this meeting was the possibility of recognizing traditional conflict resolution in the overall judicial reform programme.

Lessons learned

It was important that the claim holders themselves were involved at an early stage of the research. This allowed the research to be designed according to the issues and problems that need to be addressed from the rights-holders' perspective.

It was also found that this type of research cannot be rushed and that understanding the problems from the claim holders' perspective was very important. Significant time and effort were required to understand the living conditions of marginalized groups in the early part of the research process in order to develop appropriate policy recommendations. The group of researchers who undertook this case study had many years of experience in working with indigenous groups in north-eastern Cambodia. They were therefore able to make use of existing information and practical experience. This was necessary with the short timeframe that was allocated for the case study to be able to move quickly to an indepth investigation of critical issues.

The following are guidelines for the research process:

- Develop a broad understanding of the living conditions and customary practices of marginalized groups from both primary and secondary research to allow for an indepth investigation of critical issues and the identification of policy issues to be addressed;

- Ensure participation of all groups in the community, even the most marginal, to understand important differences and variations in opinions between them;

- To achieve this broad participation from all groups in the community, the consultations should be carried out in a local language;

- Ensure capacity-building for indigenous peoples' representatives (e.g. women, youth and elders) to allow them to conduct the fieldwork.

The following is an overview of the sequence of field work process:

- Research topics were identified, and the research format was developed, in consultation with a group of elders from the HA advisory Council;
- The research villages were chosen based on existing partnerships and to maximize comparability between and within language groups;
- Secondary data was collected and analysed (when available);
- Key informants were interviewed to gain a better understanding of the topics and the research sites;
- A semi-structured list of interview questions was developed in consultation with key informants;
- The interview questions and the elder/youth research teams were piloted at a trial consultation with members of the different ethnic target groups;
- The semi-structured interview questions were re-evaluated and finalized;
- Based on the feedback about the methodology, the research teams were trained for three days;
- Each research team began in villages that they were already familiar with;
- Field data and findings were verified at two workshops conducted primarily in local languages with facilitators from the HA assisted by IYDP researchers.

4. RECOMMENDATIONS

Emphasis should be placed on initiating and supporting a process in which indigenous peoples themselves are engaged in documenting/ codifying their own justice system and conflict-resolution processes. As discussed, flexibility is one of the advantages of the traditional system, and utmost care must be taken not to sacrifice this. The aim is to strengthen what already exists and develop the capacity to address external problems. Consultations need to include a dialogue on dealing cooperatively with tricky issues, such as the application of village-based restitution/penalties for more serious criminal offences and how to integrate the traditional into the formal system. It must be emphasized that this is a process that may take several years. It is not possible to come up with a list of instant recommendations to be implemented. Some suggestions include:

1. Create a facility within the Ministry of Justice (two to three people), authorized to liaise with other relevant institutions (e.g. the Ministry of the Interior and the Department of Ethnic Minorities in the Ministry of Rural Development). This facility would permit a regular dialogue with designated representatives of indigenous peoples on ongoing research and documentation of indigenous customary

law/systems, as well as on initiatives to create an interface between customary and formal systems. It would also be responsible for training commune, district and court officials on how to operate on the interface between two legal systems;

2. Support an ongoing process of consultation, research and documentation with indigenous peoples communities (in a number of provinces). This should be led by indigenous organizations/networks and feed into national-level consultations (as in point 1 above). The objective would be to build agreement on how traditional systems can best be recognized by the formal system and how the interface between the two could function. The present study is a starting point for more indepth action/reflection research and analysis;

3. In the meantime, it is strongly recommended to allow traditional authorities to continue providing the valuable social function role they are currently playing, including allowing the constructive interface already taking place between traditional and local authorities at the commune and district levels, concurrently with the dialogue mentioned in points 1 and 2 above;

4. Enhance indigenous peoples' participation (self-determination) as a basis on which the groups can share power with the state. This goes beyond simply consulting indigenous peoples and involves including them in the development decision-making process. Given the size of the indigenous population in Cambodia and the current decentralization process, this can best be accommodated under the commune councils, where the indigenous groups are in a majority. The new Organic Law on the structure, roles and duties of the sub-national levels of government should consider the participation rights of indigenous populations and accommodate specific needs in indigenous areas;

5. Explore opportunities for the traditional authorities to play a more formal conflict-resolution role in the commune councils with delegation of power from the Ministry of Justice (MoJ) and Ministry of the Interior (MoI). The Ministries can delegate power to the commune councils under article 44 of the Law on the Administration of Communes (KhumSangkat). Opportunities should be explored by the MoJ and the MoI on which roles can be delegated to the traditional authorities and the commune councils in both criminal and civil disputes/ conflicts. It is important, however, to ensure that traditional adjudicators are not overly reliant on commune council members and that the more formal role that traditional authorities would take on under the commune councils would be worked out in consultation with indigenous representatives;

6. Develop the role of the Dispute Resolution Committee (DRC) which can be set up under Article 27 of the Subdecree on the Decentralization of Powers, Roles and Duties to Commune/Sangkat Councils. The DRC in highland areas could be developed into an important instrument in the formal interface between the traditional system and the formal system with a legal mandate to facilitate and conciliate civil disputes;

7. The government should invest traditional authorities with the formal authority to deal with illicit land sales and conflicts, and to mediate boundary disputes, including ancestral

land claims. The role of the traditional authorities to manage their communal property under the 2001 Land Law must be interpreted to include an authority to manage land conflicts on their lands, and this role should be further defined and strengthened. Guidelines also need to be formulated as a matter of urgent priority for these land dispute resolutions (following existing laws). These also need to be constructed in such a way that the traditional authorities remain accountable to the whole community. The role of the traditional institutions should also include the authority to formally recognize village boundaries that have been decided with the agreement of village elders of neighbouring villages;

8. Traditional conflict-resolution processes should also be recognized within existing government structures (e.g. Cadastral Commission, Provincial Land Allocation Committee, etc.). Where such processes already exist, as where local elder trustees function as *ad hoc* members of the District/Khan Cadastral Commissions (DKCC) under Article 5 of the Subdecree on the Organization and Functioning of the Cadastral Commission, they should be strengthened and utilized;

9. Traditional conflict-resolution processes should further be formally recognized in the Procedures for Registration of Indigenous Immovable Property. As this legislation is currently under development, there is an excellent opening to explore opportunities for merging traditional and national laws on conflict-resolution in relation to the immovable properties of indigenous communities;

10. Measurement and demarcation of communal land. Under Article 25 of the 2001 Land Law, the traditional authority is given a specific role in the measurement and demarcation of immovable properties of indigenous communities. This role should for the time being be further defined under existing legal procedures for registering immovable properties and later further developed in the Procedures for Registration of Indigenous Immovable Property;

11. There needs to be some geographical or social delineation where traditional justice systems might apply. For example, in communities where indigenous peoples are in the majority, the traditional system should apply and be respected. In villages where lowland immigrants make up a significant percentage of the total population, some kind of hybrid system would need to be set up. The lowland sector of the community, for example, could develop their own representation in the traditional system (their own elders, mediators, etc);

12. In communities where indigenous peoples have become a minority, they should still have the right to practice their traditional justice system within their own group (if they wish), as well as enjoy representation in the conflict-resolution process of the wider community;

13. Improve the formal legal system and enhance the official role of traditional authorities. The fight against corruption in the formal legal system should be continued in order to protect and preserve the cultures of indigenous

peoples and traditional systems. It should also create an environment where the traditional system can function as a separate but integrated system in Cambodia. The government has an obligation to do this under the Cambodian constitution and international instruments. Points 8 to 14 should be implemented to enhance the official role of the traditional authorities under the formal legal system;

14. Ultimately, it is the traditional legal system that needs recognition, not the traditional authorities. Certain individuals should not be vested with authority, but the authority should be vested within communities so that they are able to follow their present practices in choosing different adjudicators and go-betweens depending on the circumstances. Traditional authorities are chosen by community members based on their performance and integrity, not based on their position; if they are seen to be biased or corrupt, they should be excluded by community members. The system works because the community has ownership and takes responsibility for it – not an outside authority. This is an important element in the checks and balances system.


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An analysis of influencing family law: A case study of legislative advocacy and campaigning in Fiji

Pacific Regional Rights Resource Team and Fiji Women's Rights Movement

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FIJI

ACRONYMS

ADB	Asian Development Bank
AG	Attorney General
APWLD	Asia Pacific Forum on Women, Law and Development
CEDAW	United Nations Convention on the Elimination of all Forms of Discrimination against Women
CRC	United Nations Convention on the Rights of the Child
DAWN	Development Alternatives with Women for a New Era
DFID	UK Department for International Development
FLA	Family Law Act
FLRC	Fiji Law Reform Commission
FWRM	Fiji Women's Rights Movement
HRBA	Human rights-based approach
IWRAW	International Women's Rights Action Watch (IWRAW)
MP	Member of Parliament
MWC	Ministry of Women and Culture
NGO	Non-governmental organization
OAG	Office of the Attorney General
RRRT	Pacific Regional Rights Resource Team
UN	United Nations
UNDP	United Nations Development Programme
UNESCAP	United Nations Economic and Social Commission for Asia and the Pacific

1. OVERVIEW

Women and, by extension, their children – the rights-holders in this case study – have faced systemic discrimination against them under Fiji family law. Fiji family law was previously based on nine pieces of legislation issued between 1892 and 1973. The main legislation, the Matrimonial Causes Act, was based on the 1953 British legislation word for word and was imposed on Fiji when it was still a British colony. The legislation, common law and legal practices were discriminatory against women, legitimizing violence against them and were based on rigid concepts of women's roles within the family. Reform of the family law was seen as a priority by the Fiji Women's Rights Movement (FWRM); in 1996, the government decided to reform this law, in large part through the sterling work carried out by the FWRM.

FWRM was the national NGO partner organization, and the Office of the Attorney General (OAG), the Fiji Law Reform Commission (FLRC) and the Ministry of Women and Culture (MWC) were the government partners in the specific family law project of the Pacific Regional Rights Resource Team (RRRT). This case study will document that it is partly through these strategic alliances that women were able to be included in governance processes leading to the successful passing of new law affecting them.

This study describes the process taken by the two organizations, from 1991 to 2003, to achieve the successful passage of the Family Law Act in October 2003. It outlines the strategies used, mitigating factors that enabled change and the lessons learned from the struggle to empower the lives of Fiji women through legislative change. In particular, it attempts to record the ways in which the rights-holders were able to, through the FWRM, influence and shape the final law passed, so that it better reflected the needs and aspirations of Fiji women, particularly disadvantaged women.

The resulting law, which is based on a no-fault principle of divorce, utilizes a non-adversarial counselling system and a specialist Family Division of the Court which prioritizes children's needs and parental support. It removes all forms of discrimination against women and grants them rights to enforceable custody and financial support for them and their children. It legitimates and requires recognition and implementation of the UN major human rights conventions affecting family law.[1] From early results, it appears that the new Fiji Family Law Act will substantially reduce the costly use of lawyers and legal aid.

[1] United Nations Convention on the Rights of the Child (CRC) and United Nations Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).

2. ANALYSIS OF KEY FINDINGS

Advocacy in support of the Family Law Act project was successful and demonstrated a positive interaction between various governance institutions and women's groups. This project is a sound example of inclusive governance for disadvantaged women's groups.

The capacities of the rights-holders to advocate and mobilize for inclusive governance

Well researched, informed and mandated women's groups with tenacity

It is critical that the group initiating change is regarded by both governance institutions and other women's groups as being experts. The group must also have the political skills to inform and mobilize the community. It must also have the mandate of those whom they purport to represent, in this case, disadvantaged women. FWRM spent over seven years sponsoring research which culminated in a seminal book, *Law for Pacific Women: a legal rights handbook* written by a FWRM member.[2] The research for this book provided the information on which the campaign was based. The research not only outlined circumstances affecting Pacific women, but it also gave credibility to the FWRM members conducting the research. FWRM's initial mobilization as an NGO was partially based on complaints from women about family law. In addition, FWRM and lawyers from the Fiji Women's Crisis Centre had represented poor women in court and witnessed first-hand the discrimination experienced by women. The process of initiating change began in the early 1990s and culminated with the new law being passed in 2003. FWRM's tenacity in sustaining this long project through three *coup d'états* and a hostile political climate is also a critical factor of success.

Education of all major stakeholders on the need for reform, especially major opinion shapers

With technical assistance and funding from The Asia Foundation, the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) and the UK Department for International Development (DFID), FWRM conducted legal literacy workshops throughout Fiji. Carried out mostly in the vernacular, family laws were explained, injustices discussed, case studies documented, and the reform process outlined. Once women began to understand their legal rights, FWRM felt justified in mounting a family law reform campaign.

Major opinion-shapers were targeted, particularly of the OAG, FLRC and MWC. This targeted campaign led to the appointment of the FWRM member and RRRT lawyer, who had conducted the research, as the government appointed Commissioner for Family Law Reform. This provided a rare opportunity in which critical law reform affecting women was led by a feminist human rights expert, rather than a conservative lawyer unwilling to push for advanced reform. By this time, it had become clear that radical reform was required and not band-aid change.

Media skills

Strategic use of the media in the family law campaign and the communication skills of the lobbyists were crucial. FWRM and the Commissioner mainly resorted to using low-cost radio talk shows, press releases and letters to the editor to

[2] P. Imrana Jalal.

communicate information. Journalists who also happened to be FWRM members were able to help by maximizing the coverage. Regional networks and media coverage offered solidarity and changed public opinion about the Fiji Family Law Bill.

The independent technical expert assisted both the government and the NGO

The FLRC appointed Commissioner who led the family law reform process was not only an acknowledged regional expert in family law, but was also a lawyer with RRRT and a FWRM Board member. This unique strategic positioning enabled RRRT as a donor and technical adviser to play a role in bringing together government and NGOs for access to justice. Having a Family Law Commissioner independent from political or government organizations made it possible to guide the process and promote the cause despite changes in governments and Attorneys General over a period of time.[3]

Sound partnership between women's NGO and expert technical advisors

FWRM has been RRRT's Fiji national NGO partner for some 10 years. RRRT has provided funding, training and capacity building to FWRM. The partnership was a tried and tested one, based on trust and accountability, enabling a sound and credible partnership to meet the challenges. FWRM with RRRT technical support vigorously led the legislative campaign, creating unique collaborative links with the government, media and civil society. Results included changes to the law reform methods as well as improved lobbying skills for FWRM and its staff. Documentation of this process has helped organizations to review their campaigning techniques, and a legislative lobbying resource book is currently being written.

Community consultations state-wide; the process must be a meaningful one

The consultation process must be a meaningful one. The community must understand the law and its impact to be able to make appropriate submissions. Women's groups were generally well informed because of the prior work done by FWRM. In the family law consultations (funded by DFID as the state did not have funds) the Commissioner and the FLRC made presentations about the law, the impact of the law and the reforms proposed. They then received a meaningful response. Some women's groups also sent written submissions after the consultations. In some consultations, "votes' were taken to gauge support for a proposed law, particularly controversial proposals, such as whether or not the new divorce law should be based on the "no-fault" concept.

Being politically strategic

FWRM realized that a campaign on 'family issues' rather than 'women's rights' would have a stronger public appeal. FWRM and RRRT found that in the first part of the campaign, grassroots support and participation were important. But in the final stages, one or two well-trained lobbyists – informed, empowered, ethical and sincere women with good family connections and leadership qualities – could maneuver quickly and effectively.

FWRM was forced to constantly reaffirm its position and strategy.[4] Every tactic required soul searching to ensure that equity for women would not be

[3] The government has since abandoned the practice of appointing Commissioners as the Attorney General because it felt law reform became too tied to the personality of the Commissioner.

[4] Notes and writings of Jalal noted questions and answers such as: Should the bill recognize *de facto* marriages? (The Constitution says that you cannot discriminate on the grounds of marital status.) Should a provision to ensure gay people's rights to claim custody of their children be included? Should FWRM's stance be based on equity for women or more popular notions of family and children's rights? (Be strategic: don't jeopardize the bill by celebrating the women's issues. The bill provides equity, so don't cater to anti-women prejudices by using feminist logic.) What should be the approach to those with opposite viewpoints and how much fraternizing should there be? (Politics is the art of negotiating, and to negotiate you have to engage with those with opposing values and viewpoints.)

diluted or sacrificed to traditional, religious or racist viewpoints.

Links and donor support

RRRT played a unique bridging role among NGOs, government and the judiciary for the benefit of improved legislative policies and laws. For NGOs to implement long-term projects, such as this type of legislative lobbying, new arrangements were needed. UNDP/RRRT's association with FWRM became a model for governance programmes. The two organizations developed a partnership, with RRRT providing management and technical support to FWRM staff in exchange for FWRM's implementation of training, projects and services at the national and community level.[5] Donors provided strong but flexible core funding.

The campaign benefited from NGOs' extensive regional and international women's networks. For example, the Asia-Pacific Forum on Women, Law and Development (APWLD) and International Women's Rights Action Watch (IWRAW)-Asia Pacific provided technical, financial and logistical support when FWRM presented its CEDAW Alternative Report.

Sustained campaigning and campaigning style

FWRM's campaigning style was to try and engage in positive rather than negative lobbying. They were helped in this by RRRT and its constructive dialogue approach. The powerful Methodist church was opposed to the proposed law, and it was critical to counter the opposition with rational and logical responses.

It is also crucial in any law reform campaign to be prepared to accept that the entire process is generally a long one. If the proposed law is one that will change the fundamental nature of family relationships and personal beliefs, then the road is even longer.

The capacity of duty-bearers to increase participation of disadvantaged groups

Political and legal environment must be conducive to engagement between disadvantaged groups and governance institutions

The political and legal environment is crucial to inclusive governance. If the conditions of democracy are not present, disadvantaged groups are unable to require accountability from the state because it means that citizens are not allowed to challenge existing policies, law and practices. The new 1997 *post-coup d'etat* democratic Constitution had a strong Bill of Rights guaranteeing fundamental rights and freedoms, including free speech and equal rights. FWRM based its legal campaign on equal rights, the ratification of CEDAW and the injustice to women.

Partnerships between state and civil society support inclusive governance

The partnership referred to is that of the OAG, the FLRC and the MWC for government; FWRM as lead NGO; and RRRT as technical support to both. It is important to note that although the partnership between RRRT and the AOG and FLRC was a formal one, with a formal appointment of a Commissioner and specific terms of reference, the "partnership" between FWRM and the various governance institutions was not a "formal" one at any stage. It was an implicit recognition of mutual support. The Government of Fiji was not, at that stage, and is still not, ready to formally recognize the added value of working "with" NGOs.

[5] Two FWRM salaries are covered by RRRT.

The passing of this law gained the unanimous explicit support of all Members of Parliament, in both upper and lower houses across party lines. This was a historic and unprecedented event in Fiji's legislative history.

Recognition of expert civil society groups representing women by the state

Government and the judiciary noted FWRM's staff credentials (lawyers and experienced community development officers). Setting the stage for the campaign, FWRM had built public credibility and specialty knowledge through provision of legal aid counselling and legal literacy workshops. It had done its homework and knew when to listen, how to counter arguments and when to stand firm.

Recognizing and working with the champions of change within governance institutions

Analysis of power relationships is a key principle of political lobbying. Family law advocates from within Parliament and senate were identified and approached for support. They gave valuable insights into tactics being used to delay or compromise the bill. This information was then shared between the lobbyists and FWRM board members so that appropriate actions could be developed. Persuasion and friendly dialogues are as critical in such a campaign as accountability under a legal framework.

Different personalities and attitudes played an important part in the lobbying. The three different Attorney Generals in place over the course of the project had different ideas on questions such as *de facto* marital relationships: one wanted it included, another was adamant that it not be included, while another was neutral on the issue but felt a review in 10 years should be conducted.

Women's legislators/MPs

Women's training and ability to get elected and appointed to the Fiji Parliament played an important role in providing key support for the proposed law within parties. However, not all women parliamentarians supported changes. Significantly, both parties had indicated passing of new laws as part of their 2001 campaign platforms. However, after much controversial posturing by politicians, when the vote came, the Family Law Act was passed unanimously.

Ministry of Women and Culture working within government

An active and strong women's ministry/department working within government can be a considerable advantage. In this case, the MWC worked from within to create support for change. A woman at the head of an organization lobbying for a gender equity law may not be the best person to do so; as the representative of the executive powers of government, the Attorney General had more power and influence.

Consistent donor support

In the early 1990s, donors reflected the World Bank priority of improved governance, which in turn led to initiatives for justice, leadership and poverty alleviation. FWRM strategically requested funds for "community information dissemination and support for legislative change to the Family Law" rather than for "political lobbying", which might have been perceived as too political.

Donor funding to FWRM provided staff as well as the administration the core funding essential to encourage long-term commitments for legislative change. Ongoing commitment, despite Fiji's political upheavals, was shown by two major donors, Oxfam New Zealand and the Asian Development Bank (ADB), who were flexible in applying their funds to FWRM.

Challenges and barriers to participation of disadvantaged groups

Lack of information at community level

Community empowerment is often limited by misunderstanding of laws and reliance on expensive legal interpretation. Legal literacy is an extremely important tool for empowering women. Any information should be written simply by using as many culturally appropriate illustrations and case studies as possible. Leaflets translated into vernacular and vernacular radio were also useful tools to reach beyond the urban centres. Legal jargon should not be used as it is difficult to understand and translate.

The need to negotiate and compromise to achieve results

The influence of the AG who speaks for the Prime Minister and the Cabinet is often misunderstood or underestimated. This became clear with the issue of *de facto* relationships. The Commissioner's mandate was to reflect community input. Only one community consultation argued for giving full legal recognition to *de facto* relationships. Most consultations and submissions had not emphatically stated that they were against recognition of *de facto* relationships. Even though in early discussion papers the Commissioner had recommended legal recognition of *de facto* relationships, the Commissioner was forced to compromise with the AG. Hence, to achieve the much-needed overhaul of family laws, *de facto* relationships were removed from the final recommendations. Children of *de facto* relationships were protected under the Act by a provision for 'ex-nuptial' children. As a compromise, the AG recommended that within 10 years the family law, and especially the issues relating to *de facto* relationships, be reviewed.

Language, educational and other barriers to accessing information

FWRM used surveys to give them feedback on their campaign and took this feedback into account when reviewing its tactics. In August 2002, FWRM thought that its approach should change once discussions stalled in the Parliamentary Sector Committee. It decided to conduct a small opinion survey to help gauge public support and reactions to the huge objections from the Church. Two hundred Fijians were interviewed. Through FWRM's informal survey, it discovered that many were confused about what the law contained and how it would affect the institution of the family; so, FWRM altered its media approach to use of the vernacular.

Religious and cultural biases

The most significant and obvious challenge to the proposed law was culture and custom, pitting culture against human rights and custom against equality for women. Race, religion, class and sexuality were all used to oppose changes to the family laws. The concept of women's empowerment and gender equality in Fiji were considered, like democracy, "a foreign flower"[6] FLRC, RRRT and FWRM responded to the forces against the change with a strategic campaign based on persuasive dialogue and engagement funded by extra funds from flexible donors. This required both group meetings and one-on-one meetings, the former with potential powerful allies from within state institutions and the Christian churches.

[6] Adi Finau Tabaukacoro, an indigenous chief and staunch nationalist supporter of indigenous rights, first used this term in a letter to the *Fiji Times* after the 1987 coup.

Entry points for women to influence decision-making

Important strategic partnerships

RRRT brokered and nurtured the extremely important government and NGO relationship, which ultimately led to the passing of the Bill with unanimous support of all parties in Parliament. The latter was a historic and unprecedented event in Fiji's legislative history.

Individual champions of change from within governance institutions

The AG was the most critical figure in this campaign, and access to him was critical. A powerful minister or other Member of Parliament can be an important ally and champion for the change. Such persons should be identified early in a campaign, and such strategic relationships nurtured.

Building strategic coalitions and alliances

Apart from the woman-headed teachers' and nurses' unions, unions have played a minimal role in legislative lobbying for four reform issues affecting women.[7] Only recently have the teachers and nurses unions integrated with women's NGOs on various campaigns; yet, they have much to offer with their organizing and advocacy strengths. Although community groups had a limited role in the final stages of political lobbying led by FWRM and RRRT, their early involvement was important.

The qualities of those identified as leading the change

The Commissioner provided leadership in the campaign and received the support of all campaign partners, including civil society and governance institutions. A HRBA does not formally recognize the cult of the personality in creating change. However, sound leadership is important, and those with leadership must be people who are experts in the relevant area.

[7] The four issues initiated by the Law Reform Commission at approximately the same time were family law, domestic violence, sexual offences and environmental management.

3. KEY LESSONS LEARNED IN APPLYING A HRBA

Key lessons learned in a applying a HRBA to the campaign

1. Participation and accountability

FWRM, and later RRRT and the FLRC, worked hard during the long build-up over 12 years, until the actual final stages of the campaign with women's groups and its partners, to ensure women's participation in law-making and the formulation of legal policy. This was through public consultations, seminars and workshops in both urban and rural areas. This enabled early access to policies and legislative frameworks for large groups of women. The Fiji Family Law Act has been heralded by the government and civil society alike as being the only properly consulted law in Fiji's legislative history and "representing law making at its best".[8]

However, during the parliamentary stages in the final two years, fewer women were involved. They were mainly FWRM and RRRT staffers and few knowledgeable supporters.

With its small population, news travels quickly in Fiji and can be passed informally through taxi drivers and meetings in the supermarket, in the street or at restaurants. Information is exchanged both informally (through extended family, community and church networks) and formally, through extensive media coverage. Therefore, the time and resources needed to hold formal meetings, develop solidarity on tactics and keep sister organizations advised of detailed developments is time consuming, costly and may not be necessary. In addition, frank, sensitive, potentially libelous analysis and decisions on legislative lobbying actions with a larger group, even by e-mail, would require careful thought and time to present the situation carefully. Thus, for FWRM, political techniques included the use of a small committed group trusted by campaign affiliates. It may be that advocacy in small, developing island countries is of a different nature to techniques and tactics used in larger Asian and African countries or those more economically developed nations.

2. Non-discrimination and empowerment

The family law campaign empowered disadvantaged women and their communities through capacity-building. This occurred during the first 10 years of the campaign through training and mass media education. As stated in earlier sections, the legislation was based on removing discrimination against women in formal legislation, common law, judicial practices and legal practices. CEDAW and s.38 of the Constitution required all forms of discrimination against women to be removed. The main beneficiaries of the new law would be disadvantaged and poor women. Gender and class analysis were both integral to the family law campaign, not just an "add on".

At the grassroots level, women felt disconnected to the final lobbying process. They did not feel comfortable with the act of lobbying and needed training in examining and recognizing their contribution. However, some women were encouraged to attend Parliament during debates. The MPs could see women observers in Parliament carefully taking notes and knew that FWRM was tracking their debate. Earlier strategies during the 2001 elections included a FWRM political survey, with results of party positions on women's rights published.

[8] Comments made by the Attorney General during the parliamentary debate on the Family Law Bill in October 2003.

3. Linkages to human rights standards

Both FWRM and RRRT organizations adopted an explicit rights-based approach connected to the international human rights normative framework. The new law explicitly recognizes CEDAW, CRC and the Hague Conventions on Private International law as the guiding ethos and basis of interpretation for courts and the administration of justice. It explicitly encourages the protection and realization of human rights. The FLRC and the campaigners used human rights conventions as a set of standards and common language during the consultative process, in the family law report and right up until the final stages to argue the justice of the new law.

The December 2001 Fiji report to the UN CEDAW committee also presented a strategic opportunity to use the international accountability mechanism to push for domestic change. FWRM (with RRRT's technical support) led the NGO delegation to present an alternative parallel report that highlighted how the political crisis in May 2000 had interrupted the law reform process. After hearing the NGO report, the CEDAW committee highlighted the need for the proposed law to be passed in its concluding comments. This enabled the women's ministry and FWRM to help put the proposed law back on the legislative agenda.

Key lessons learned in a applying a HRBA to the research

The case study exercise unravelled and captured important historical information through extensive interviews, review of media reports, production of an accurate timeline and research to compare the process used for the Family Law Act with other pieces of similar legislation in Fiji and Vanuatu.

The study examined the roles of both the rights-holders (women and children represented through key lobby groups) and duty-bearers (Government of Fiji) by analysing past records, reports and media coverage. In addition, interviews were held with key players to revisit the roles and strategies of groups at the time that the Family Law Act was being publicly debated.

After reviewing collected information, primary research with key actors was undertaken. The methodology included semi-structured interviews with key government officials, religious leaders, representatives of women's organizations, advocacy groups and the judiciary. Interviews explored the obstacles faced by both rights-holders and duty-bearers in the implementation of a more equitable family law for Fiji. Two focus groups, one in a rural setting and the other which drew together national NGOs, helped identify lessons learned. Unfortunately, due to changes in key donor staff, little information could be found to substantiate donor decision making and involvement.

4. RECOMMENDATIONS

More training on campaigning and lobbying skills

Laws affect everyone, yet many do not understand how or why they should contribute and participate in complex legislative change. Building capacity within civil society about law reform is important for community trainers, government officers and non-governmental organizations to:

- Increase their awareness about legislative and political processes for law reform;
- Develop and use appropriate training materials to improve lobbying skills targeting legislative processes;
- Help civil society effectively strategize for changes to legislative frameworks;
- Help to develop a responsible media which understand political processes, gender issues and the importance of law reform.

Simplifying legal terms and skills in the lobbying process

Legal literacy is an extremely important tool for empowering women. Any article should be written simply by using as many culturally appropriate illustrations and case studies as possible. Leaflets translated into vernacular and vernacular radio were also useful tools to reach beyond the urban centres. Legal jargon should not be used as it is difficult to understand and translate

Keeping your partners and constituents informed and involved

Recognizing and valuing all contributions, however small, can lead to greater empowerment of those who feel overwhelmed and confused by legislative and national parliamentary lobbying.

Being prepared to accept backlash from supporters and partners

Political negotiations are always subject to criticism. Even though individual NGOs could and did submit written comments, some were angered that FWRM did not push further on the issue of *de facto* relationships and argued that FWRM had "sold out" on women. When conflict by NGOs over compromises or strategies emerges, it is important for the NGO community to find ways to accommodate each other's differences

Ongoing monitoring of new law

Enactment of law is not the only step in attaining justice and equity for women. Ongoing research and education are particularly needed in the first decade after implementation of the Family Law Act.

The post-lobbying phase of reflection (initiated through this case study) was valued by NGOs. Documenting lessons learned from the campaign provides an improved understanding of the impact of legislation on women and children, of political and parliamentary systems and of ways to maximize NGO contributions in law reform. Lessons learned can be applied now to other legislative reform.

Monitoring the use of new procedures and revisions needed for the Family Law Act is essential, as there is bound to be areas in need of modification. Ongoing participatory research and critical analysis of the political processes and legislative frameworks, including their need for reform, are critical to support the campaign.

NGO drafting of legislation

Preparing draft bills containing equity reforms can be useful to provide a legal framework and raise NGO consciousness, but the political lobbying process is a more important tool in getting legislation changed. Both FWRM (for sexual assault) and the Fiji Women's Crisis Centre (for domestic violence) have provided the government and the OAG with reviews and draft-revised legislation.

Counting the cost of outdated laws

Implementation costs for new reforms are not normally used in legislative lobbying. Some, including the new Judge of the Family Division, suggested that a careful financial impact analysis should have been conducted prior to acceptance of the law. Others say that the overhaul of court practices was long overdue; that the cost factors were less important; and that costs are always used to argue against pro-women or human rights reform. Courts were inefficient and the costs to establish and maintain a new system would be entirely justified with the improved outcomes from the family court.

Private sector involvement in lobbying for legislative change

Private enterprise (apart from law firms) is often not involved in the legislative change process. Also, NGOs do not have a history of partnership with private enterprise; so, it is not surprising that private donors for the family law lobbying were not approached. However, NGOs promoting legislation such as domestic violence and sexual assault could encourage donations by the private sector but might need technical assistance from the donors to help sharpen their fund-raising skills.

Passing laws is not enough

The role of a champion or "commissioner" within the government has been sorely lacking, with the current Fiji domestic violence law reform, even though community consultation has informed government reports. This highlights the acute need for organizations to continually monitor law reform processes and identify key support person/s within the governing body who will act as a liaison, give information to active NGOs and promote the cause from within.[10]

Flexible donor funding

Core flexible funding is essential to help NGOs in their training and legislative lobbying campaigns. The public exposure and debate during the debate probably contributed to the government's ensuring that the Act was implemented. However, Asian feminists have noted that: "Each legal or policy victory of the women's movement could often evaporate on the ground as the struggle for implementation and enforcement begins."[11]

[10] When the environment bill was being proposed, NGOs were not as well organized and had no individual (or group) to champion or mobilize public opinion and push the bill through Parliament. As a result, the legislation was dramatically altered. Currently (2006), the Parliamentary Act has yet to come into force.

[11] Dhanraj, Misra and Batliwala, *The Future of Women's Rights*, Association for Women's Rights in Development (AWID), 2004.

5. CONCLUSION

In Fiji, women are building on their legislative lobbying experience and mounting campaigns for changes to legislation on domestic violence, sexual offences, employment relations and the charitable trust state framework. FWRM is bringing young women into the movement to carry on the issues and provide "a human shield of activists"[12] who understand the issues, monitor achievements and look to new legislative issues.

[12] Term taken from an interview with Gigi Franciso, Regional Coordinator of Development Alternatives with Women for a New Era (DAWN)17.