

A FRAMEWORK FOR STRENGTHENING ACCESS TO JUSTICE IN INDONESIA

There is a close correlation between peace, justice and prosperity... (I)mprovement of the justice aspect will facilitate the achievement of prosperity and peace.¹

Section 1: Introduction - A National Strategy on Access to Justice

Consolidating current Government of Indonesia policy on access to justice into a clear and coherent National Strategy with a concrete action plan will (i) build stronger justice institutions; (ii) reduce poverty and empower communities to take control of their own lives; and in turn, (iii) enhance national security.

A National Strategy on Access to Justice will complement ongoing efforts to reform the justice institutions of state. Although strengthening the formal justice sector is critical to promote access to justice, these efforts will not be optimized if the population is unaware of their rights, or unable to access justice institutions due to physical, financial or intangible barriers. These efforts also need to take into consideration the fact that most disputes are settled through non-formal mechanisms.

In other words, comprehensive justice sector reform requires a dual track strategy which links top-down institutional reform (*supply*) and bottom-up access to, and demand for, better justice (*demand*). Such a strategy will bring justice closer to the people. It will help to address the low trust and inequities that many, in particular the poor, feel define the delivery of justice in Indonesia. A National Access to Justice Strategy would provide a strong framework for “achieving social justice for all the people of Indonesia,” one of the key aspirations outlined in the 1945 Constitution.

This briefing note is intended to assist the Working Group members in defining the scope of the National Strategy. The note is structured as follows:

- Section 1: Introduction
- Section 2: Definition of Access to Justice
- Section 3: Legal Framework
- Section 4: Rationale for a National Access to Justice Strategy
- Section 5: Proposed Scope of the Strategy
- Section 6: Implications and Challenges

Section 2: Definition of Access to Justice

This note proposes the following definition of access to justice:

Access by people, in particular from poor and disadvantaged groups to fair, effective and accountable mechanisms for the protection of rights, control of abuse of power and resolution of conflicts. This includes the ability of people to seek and obtain a remedy through formal and

¹ Presidential Regulation No.7/2005 on the National Medium-Term Development Plan (2004-09), Ch 9.

informal justice systems, and the ability to seek and exercise influence on law-making and law-implementing processes and institutions.²

The definition is broad and holistic, encompassing the legal framework, institutions and legal culture. Key aspects of this definition are examined in detail below in section 5.

Section 3: Legal Framework for a National Access to Justice Strategy

There is a strong legal basis under Indonesian law for the development of a National Strategy on Access to Justice. This includes:

- 1945 Constitution – Article 28D(1) states “each person has the right to the recognition, the security, the protection and the certainty of just laws and equal treatment before the law.”
- Law 12/2005 enshrines the International Covenant on Civil and Political Rights into Indonesian law, providing legal protection for the right to a fair trial, equal treatment before the courts, right to legal assistance; right to appeal; etc.
- UU7/1984 enshrines the International Convention on the Elimination of All Forms of Discrimination Against Women, guaranteeing legal protections and freedom from discrimination for women.
- Presidential Regulation No.7/2005 on the National Medium-Term Development Plan (2004-09) emphasizes the key role that access to justice plays in meeting the economic and social development needs of the nation, highlighting the creation of a “just and democratic Indonesia” as one of three national development agendas.

Section 4: Rationale for Developing a National Access to Justice Strategy

There are three main rationales for consolidating government policy and law on access to justice into a clear and coherent national strategy:

1. *Institutional Reform*: institutional reform needs to be responsive to community demands. A national strategy will help to support the channelling of public demand for better justice that responds to the needs of all Indonesians, covering formal and informal institutions of justice.
2. *Justice & Poverty*: increased access to justice will complement Government efforts to reduce poverty and empower communities
3. *Justice & Security*: increasing the effectiveness of and confidence in the justice system can reduce conflict and improve human security.

4.1 Institutional Reform: Linking Supply and Demand

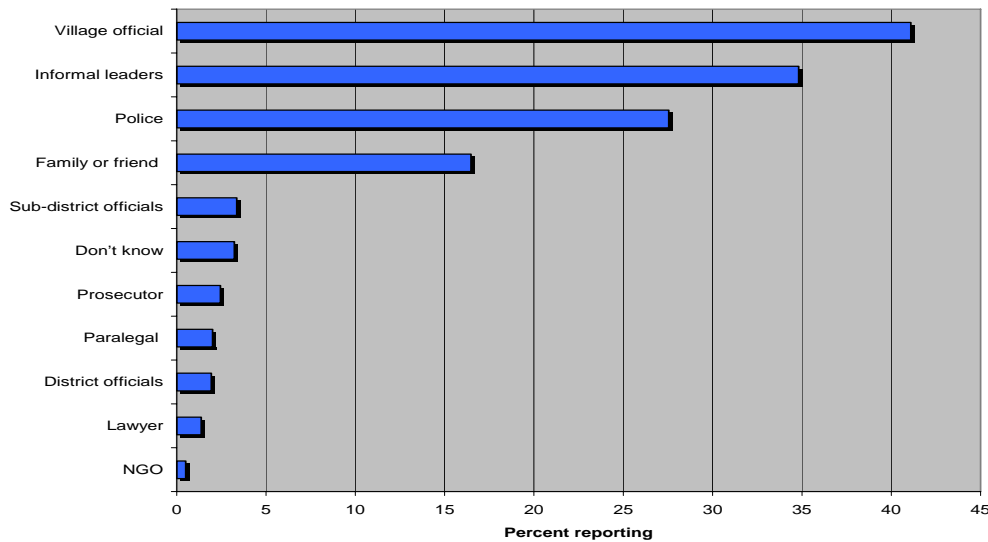
There has been much focus in recent years on reform of the formal justice sector institutions (Supreme Court, Attorney-General’s Office and National Police). Institutional reform of this nature alone will not be sufficient to lift public confidence in and access to the justice sector as it focuses only on the *supply side* dynamics of justice sector reform. In order to be

² Partly based on Bedner (2004), ‘Towards Meaningful Rule of Law Research: An Elementary Approach’, MS Unpublished, VVI, Leiden; and UNDP (n.d.), ‘Access to Justice Practitioner Guide’.

more effective, institutional reforms need to also acknowledge the demand side of justice sector reform, otherwise reforms will not necessarily address the real needs of the end users.

In addition, a pure focus on the formal sector misses the institutions that actually deliver most dispute resolution services. As the graph below shows, most disputes are resolved at the local level outside of the formal institutions of the law. Village heads and *tokoh masyarakat* are the main agents of justice for the vast majority of people. Recognising this can strengthen the interaction between the formal institutions of the law and local level dispute resolution mechanisms, thereby better ensuring that institutional reforms reflect demands of communities.

Figure 1: Dispute Resolution Actors³



4.2 The Role of Access to Justice in Reducing Poverty

It is increasingly recognized that the non-adherence to the rule of law is a major impediment to sustainable poverty reduction in Indonesia.⁴ This recognition accords with international thinking on the issue – the recently launched Commission on Legal Empowerment for the Poor in particular draws the inextricable link between poverty and the absence of legal protections for the poor.

Improving access to justice can directly increase income and welfare for the poor. Poor people are vulnerable to income shocks from being victims of crime; inability to assert land rights; or failure to secure inheritance or property rights upon divorce. Recent national surveys show that the poor and vulnerable communities, including women, are less likely to take action to address legal problems when they arise.⁵ This means that their disputes remain unresolved, frequently with heavy financial repercussions.

³ See McLaughlin & Perdana, “Conflict and Dispute Resolution in Indonesia”, forthcoming, at p15 & The Asia Foundation, *Survey Report on Citizen’s Perceptions of the Indonesian Justice Sector*, 2001 at p21.

⁴ Government of Indonesia *Medium-Term Development Plan 2004-2009* (Chap 9-1) draws the link between governance, rule of law and poverty reduction.

⁵ *Supra* 3 at p61.

Increasing access to justice also has a systemic impact on poverty by strengthening the mechanisms of government that deliver public services and implement poverty reduction programs. As the World Development Report notes, “legal institutions play a key role in the distribution of power and rights. They also underpin the forms and functions of other institutions that deliver public services and regulate market practice.”⁶ An effective justice system that responds to the needs of the poor can hold government accountable and redress power imbalances that lead to elite capture of resources and disempower the poor.

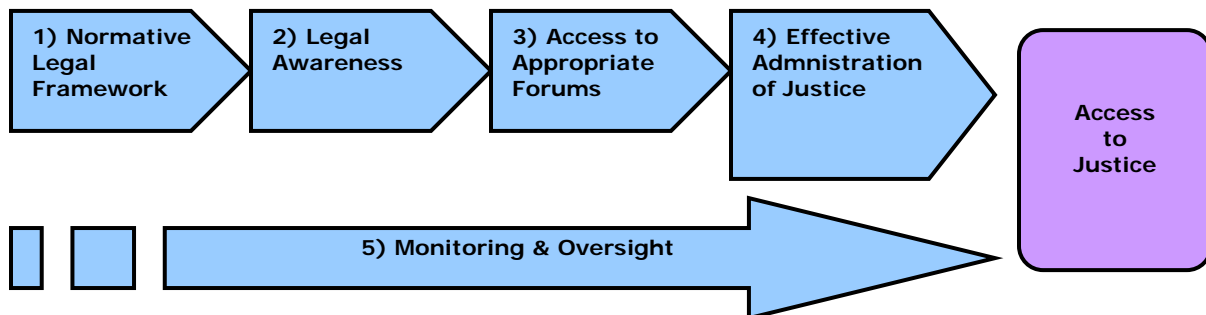
4.3 Access to Justice and Security

Maintaining public security and order remains a key priority for development in Indonesia.⁷ A strong justice sector is necessary for the promotion and protection of social stability. Most research in Indonesia shows that violent conflicts occur when an accumulation of unresolved small disputes explodes into violent responses.⁸

The recently completed Governance and Decentralization Survey highlights how an accessible justice system can work to hold government accountable, increasing confidence in the formal legal system and mitigating the risk of conflict. The survey shows a strong correlation between knowledge of legal rights and use of formal legal institutions, including the police, to resolve disputes. Furthermore, Indonesians who are aware of their rights are also more likely to believe that they will receive a just outcome from formal institutions, reducing the risk of reverting to violence. The survey also demonstrates a correlation between corruption and bribery by local officials and the reported probability of conflict.⁹

Section 5: Proposed Scope of the National Strategy

Access to justice links reform of legal and judicial institutions with better access to those institutions from the bottom up. The definition of access to justice proposed in Section 3 above is holistic, encompassing five key components:



⁶ World Bank *World Development Report 2006: Equity and Development*, New York: OUP, at 156.

⁷ See the State Address 2007.

⁸ See Patrick Barron, Rachael Diprose & Michael Woolcock, *Local Conflict and Community Development in Indonesia: Assessing the Impact of the Kecamatan Development Program*, mimeo, Development Research Group, The World Bank; ICG Asia Report 19 *Communal Violence in Indonesia: Lessons from Kalimantan*, June 2001 and ICG Asia Report 31 *Indonesia: the Search for Peace in Maluku*

⁹ McLaughlin & Perdana, “Conflict and Dispute Resolution in Indonesia”, forthcoming

1. The normative legal framework (i.e. the set of rules, procedures, actors and institutions) that promotes access to justice
2. Legal awareness, regarding the law, rights, obligations and how to access channels to resolve grievances
3. Access to appropriate forums in order that the disadvantaged can translate their legal awareness into action
4. Effective administration of justice through formal institutions and informal mechanisms
5. Monitoring and oversight to promote transparency and accountability within the four areas above.¹⁰

These five components are explored in more detail below.

5.1 Strengthening the Normative Legal Framework: Providing Legal Protection

The normative legal framework refers to the presence of a legal umbrella that defines rights and duties, reflecting customs and accepted social behaviour. This encompasses both state and adat law and has three main elements: (i) the substance of rules; (ii) processes by which rules are made and amended; and (iii) actors and institutions involved in determining the process and substance.

Key challenges that the National Access to Justice Strategy could usefully target with respect to the legal framework, with a focus on consistency and quality of regulations in a decentralized Indonesia, include:

1. *Access & Participation* – chronically low levels of public awareness are partly a product of the inaccessibility of laws and regulations. National and regional governments should make all regulations accessible, including on-line, in accordance with Presidential Decree 1/2007 on *Pengesahan, Pengundangan dan Penyebarluasan Peraturan Perundang-undangan*. Efforts to enhance public participation in the law-making process should also be strengthened.
2. *Quality* – research shows that only 15% of Perda relate to improving public services. 40% target taxes and retributions and virtually none seek to empower the poor to access justice. Efforts to document and disseminate best practices and pro-poor regulations should be supported.
3. *Harmonization* – at least 700 of the 10,000 or so Perda drafted since regional autonomy have been found inconsistent with higher legislation. Support to harmonize the regulatory environment will enhance legal consistency and certainty.

5.2 Increasing Legal Awareness

Enforcement of rights is dependent on both an awareness that those rights exist and knowledge of avenues for redress. Lack of legal awareness is a serious impediment to accessing justice, in particular for the poor who are less likely to be familiar with their rights and less likely to use the formal system. A national quantitative survey showed that 56% of Indonesians are unable to give a single example of a right to which they are legally entitled.

¹⁰ UNDP, *Access to Justice Practitioner Guide*

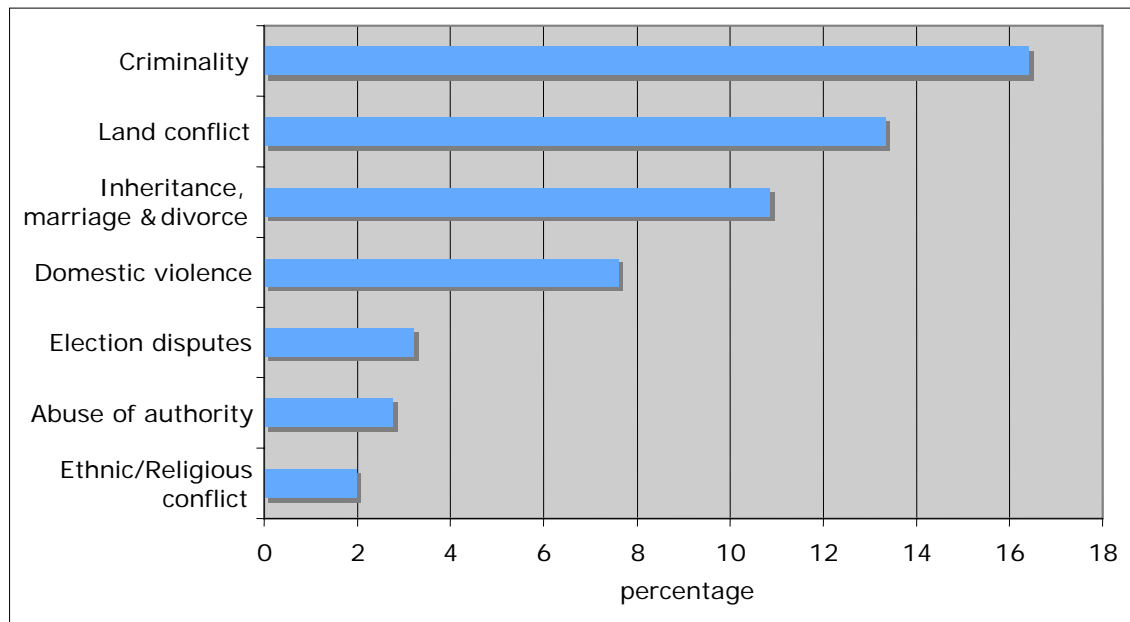
This figure increases dramatically for women (66%) and for those with no formal education (97%).¹¹ Both the government and non-government organizations have a responsibility to increase legal awareness.

Increasing Legal Awareness: Lessons From the Field

Several lessons learned can be drawn from experience implementing legal awareness programs:

1. *Link to Economic Rights/Day-to Day Needs:* Legal awareness programs need to be relevant to the day-to-day lives of the target population. They work best when linked directly to economic issues such as labour, land and property rights
2. *Importance of Local Context:* Information needs vary significantly depending on local context. For instance, labour rights tend to be more important in urban areas, whereas land rights are the main concern in rural areas. Legal information should link to the main types of disputes that occur in Indonesia (see Figure 2 below).
3. *Partnerships:* linking judges, prosecutors and police with community groups can enhance community legal awareness, increase public trust in the state and improve the capacity of the legal apparatus to respond to the needs of the poor. Community-based legal aid posts (posko bantuan hukum masyarakat) and paralegals are effective mechanisms for delivering legal information at the grassroots level.

Figure 2: Dispute Typology in Indonesia



Source GDS Data

5.3 Providing Access to Appropriate Forums

As the *World Development Report 2006* states, “people’s legal rights remain theoretical if the institutions charged with enforcing them are inaccessible.”¹² Once a normative system that

¹¹Supra 5 at p.25.

protects the poor exists, and legal awareness is increased, appropriate institutions, both formal and informal, need to be accessible to all.

Accessibility encompasses the following dimensions:

1. *Physical Access*: Physical access refers to ensuring that institutions are close to users and provide user-friendly services. This is a major challenge in a vast archipelagic country such as Indonesia. Initiatives such as reducing the number of court hearings or introducing mobile courts can be an effective way to bridge the gap.
2. *Financial Access*: the costs involved in accessing legal institutions be they direct (eg: filing fees), indirect (eg: transportation) or illegal (eg: payment of bribes) represent a major hindrance to access to justice for the poor (see Box 1 below).
3. *Sensitive Service Delivery*: poor and marginalized communities should be treated with respect once they engage with justice sector institutions. Publicly accessible court user surveys can often help to improve customer service.
4. *Access to Non-State Justice Systems*: The vast majority of Indonesians resolve disputes through mediation and arbitration via informal systems at the village level.¹³ Although informal systems are physically more accessible and are usually preferred by community members to the formal system, they often reflect the social and political inequities present in society, thereby compromising accessibility for the poor, women and ethnic minorities. A National Access to Justice Strategy should include special attention on enhancing the performance and social inclusiveness of non-state justice actors and institutions.

Box 1: Access issues and Impact on the Poor

All of the above access issues impact disproportionately on the poor.

- Research on the use of religious courts by female-headed households shows that whereas would-be users live on average 20km from the nearest courts, most actual clients live within 10km from the court.
- From a financial perspective, meeting the costs of a summons represents between 45-90% of the average monthly income of female-headed households. Similarly one-way transport costs represents, on average, 8% of monthly income, compared to less than 1% for average clients.¹⁴
- The poor are also more likely to be intimidated by proceedings of formal institutions or face linguistic challenges.
- Finally, as has been noted above, access to non-state institutions can also provide particular challenges for marginalized members of communities.

5.4 Improving the Effective Administration of Justice

The way justice institutions perform is a key element of any access to justice strategy. The public must be confident that justice institutions will perform in an efficient, neutral and professional manner. The institutions should also apply the relevant norms consistently, irrespective of status of the parties. The performance of justice institutions is important not

¹² Supra 6.

¹³ Supra 3 at 16. Village officials and informal village leaders are viewed as key dispute resolution actors by over 75% of respondents.

¹⁴ Provisional findings of an AusAID survey on access to the Religious Courts.

only to ensure satisfactory outcomes on a case-by-case basis but also to increase public confidence in the justice system.

Legal and judicial reform programs have traditionally focused strongly on this element of access to justice. These types of programs often cover issues such as improving infrastructure, training personnel and improving case management.

One major gap in the administration of justice in Indonesia is the lack of credible information on court performance. Building on the Supreme Court Blueprints, a national district courts survey to support the effectiveness and responsiveness of legal institutions to societal demand could fill this gap. Through an inventory of the condition and performance of district courts, the survey could:

- Create a data base of the condition and performance of legal institutions, which shall be routinely updated and publicly accessible;
- Create a national network of civil society agents, who in close cooperation with the legal institutions will develop the data base and collect the data; and
- Refine the data into a genuine budget for each legal institution based on need

5.5 Strengthening Enforcement and Oversight Mechanisms

Even where disputes are resolved effectively, there remain too many cases where the decisions are not adequately enforced. This frequently occurs in both the formal and informal system, diminishing public confidence in the system.

Research on local government corruption cases indicates that extensive public scrutiny of judicial procedures plays a key role in ensuring that cases progress through the legal process.¹⁵ Anti-corruption programs and strengthening external monitoring mechanisms such as NGO court watch programs are examples of ensuring improved accountability.

Section 6: Developing the Strategy: Implications and Challenges

The five-pillar definition of access to justice carries two major implications and challenges: scope and scale.

6.1 Scope

Work On All Five Elements

Improving access to justice for the marginalized involves addressing power imbalances. Strengthening each of the five components noted above so that the institutions of justice are more accessible to the poor and marginalized is essential to change the power dynamics that deny the poor legal protections. Each of the five components is equally important and

¹⁵ Taufik Rinaldi, Dewi Damayanti & Marini Purnomo (2007) *Combating Corruption in a Decentralized Indonesia*; World Bank: Jakarta

cannot be addressed in isolation. All are mutually re-enforcing. As the example below demonstrates, strengthening one element can lead to demand for improvements in others.

Demand for Better Governance: Legal Literacy Leads to Better Services

Justice for the Poor, working with PEKKA (Perempuan Kepala Keluarga) is piloting a Women's Legal Empowerment (WLE) program in West & Central Java and NTB provinces. The program provides legal education to female-headed households. In line with their needs, key issues are domestic violence, marriage, divorce, inheritance, wage disputes and rights relating to the education and health of their children. Information is provided through trained community members (*kader hukum*) with support from facilitators.

Knowledge of rights generates demand for justice and better government services. Now aware of the importance of legal identity, the PEKKA women have requested free birth certificates so their children can continue studying. They have also requested better access to religious courts to clarify marriage status and resolve divorce cases. Amongst other issues, access to courts is limited by financial resources (the average income of PEKKA members is ¼ the average court user's income); by geography (most PEKKA members live twice as far from courts as average users); and by fear (of not knowing the process, of being patronized).

To overcome some of these issues, the WLE program established a multi-stakeholder forum (MSF), comprising representatives from the legal apparatus and local government. The MSF meets periodically with the women's groups, provides legal information, answers questions and listens to complaints. Demands are being addressed, with varying degrees of success. Free birth certificates were promised to children of PEKKA members in Cianjur. The religious court is actively pursuing options to hold mobile court sessions, making them more accessible to the poor. *Kader hukum* support women in filing petitions. Women have also categorically stated that meeting legal officers through the MSF reduces their anxiety about the legal procedure.

Work with State and Non-State Legal Frameworks and Institutions

The National Strategy should lay out concrete activities to support accessibility of both formal and informal justice institutions and legal frameworks.

Both the Constitution¹⁶ and other legal instruments¹⁷ recognize that adat has a role to play in resolving disputes in Indonesia. As noted above, non-state justice systems are more popular than the institutions of the state, but still suffer from problems. Women and minority ethnic or religious groups in particular have difficulty securing just outcomes from non-state justice mechanisms.

Furthermore, in a legally pluralistic country like Indonesia, non-state mechanisms and formal mechanisms do not exist in isolation of each other. Adat and state law norms regularly clash, creating confusion and legal ambiguity. Support for non-state justice is reflected in national government policy documents such as the Medium-Term Development Plan 2004-2009, which states the need to respect and strengthen traditional customary law as a key

¹⁶ Art 18(2) Constitution of Republic of Indonesia, 1945.

¹⁷ See for example Ch 9 of the National Medium Term Development Plan, 2004-09 and Government Regulation 72/2005 on the Village.

government policy aim.¹⁸ Government Regulation 72/2005 on the Village gives authority to village heads, together with the Adat Council, to resolve disputes, which resolution is binding.¹⁹ However, the jurisdiction of the village head and the extent to which resolutions are actually binding remains ambiguous. The National Strategy could help resolve this ambiguity by clarifying the jurisdiction of formal and informal justice systems respectively.

6.2 Addressing the Scale of the Problem

The constituency of an Access to Justice strategy is broad, encompassing village institutions, the formal justice sector and the community in general. This presents a major challenge in terms of translating the Strategy from an aspirational document into concrete action. This note proposes two strategies to help address the issue of scale.

1. *Engage National and Regional Governments:* The need for commitment from national level institutions is clear. Most formal justice sector institutions remain under national institutions despite decentralization. Leadership from the national level will therefore impact on the operations of institutions such as the courts, prosecutors and the police at the local level.

Regional governments, however, also have an important role to play. Decentralization has provided regional governments with an important role in defining the normative legal frameworks. The National Strategy should recognize this increased role and also support efforts to improve the quality of local regulations and consistency with the national framework.

Regional governments can also play an active role in strengthening access to justice. They are already providing funding for legal aid, improving access to legal documentation such as birth certificates and Identity Cards and conducting socialization campaigns to increase legal awareness. Whilst examples of these types of programs do exist, they are still relatively limited. The National Strategy should engage with and encourage regional governments to do more.

2. *Mainstreaming Access to Justice through National Poverty Programs:* As has been noted above, there is increasing recognition of the role access to justice can play in reducing poverty. Mainstreaming access to justice activities into poverty reduction programs is mutually beneficial. Increasing legal awareness and improving both access to and the quality of dispute resolution mechanisms for beneficiaries can strengthen implementation of poverty reduction programs. As the example below identifies this is particularly relevant to community driven development programs. The Government of Indonesia has started this process by integrating access to justice activities in two provinces through the Program Nasional Pemberdayaan Masyarakat Mandiri (PNPM Mandiri). Further expansion of this approach through PNPM Mandiri represents an opportunity to consolidate the link between access to justice and poverty reduction on a nationwide scale.

¹⁸ Presidential Decree 7/2005 on the Medium-Term Development Plan 2004-2009, Chapter 9.

¹⁹ Rehngena Purba (2004) "Peradilan dan Penyelesaian Sengketa Alternatif Kajian Pada Masyarakat Karo", paper presented at Universitas Karo, 1 July 2004, at p. 22

Box 3: PNPM and Access to Justice

The Program Nasional Pemberdayaan Masyarakat Mandiri (*PNPM Mandiri*) program aims to reduce poverty and create jobs by community empowerment. PNPM Mandiri focuses on improving both the economic aspects and the quality of community welfare through the transfer of cash to communities and additional empowerment activities including social justice. .

The Support for Poor and Disadvantaged Areas (SPADA) Program is one of the 4 core PNPM projects. SPADA aims to strengthen governance, promote growth and improve public service delivery in initially half of the 100 poorest districts in Indonesia. In Aceh and Maluku, the program includes a Mediation and Community Legal Empowerment (MCLE) components. By including this component the program acknowledges that the resolution of legal problems and support for equitable dispute resolution is essential to the development process.

The MCLE component will focus on increasing legal awareness of community members and providing support to handle complaints at the local level. This will include handling complaints related to the implementation of development programs, including corruption. In this way the MCLE component will increase accountability of development programs and assist in ensuring that complaints are dealt with through the legal system, reducing the risk of complaints growing into larger scale conflicts.

Mainstreaming access to justice activities into poverty reduction programs also strengthens the outcomes of the access to justice activities. Linking legal awareness programs, for example, to broader development programs, enables direct access to identifiable beneficiaries, such as women headed households or IDPs. In addition it strengthens commitment for the awareness programs and sustainability.

The National Strategy could highlight these linkages and provide encouragement to government and donor agencies developing poverty reduction programs to address access to justice issues within those programs.