

# Access to Justice



## PRACTICE NOTE

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### EXECUTIVE SUMMARY

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“The United Nations has learned that the rule of law is not a luxury and that justice is not a side issue. We have seen people lose faith in a peace process when they do not feel safe from crime. We have seen that without a credible machinery to enforce the law and resolve disputes, people resorted to violence and illegal means. And we have seen that elections held when the rule of law is too fragile seldom lead to lasting democratic governance. We have learned that the rule of law delayed is lasting peace denied, and that justice is a handmaiden of true peace. We must take a comprehensive approach to Justice and the Rule of Law. It should encompass the entire criminal justice chain, not only police, but lawyers, prosecutors, judges and prison officers, as well as many issues beyond the criminal justice system. But a “one-size-fits-all” does not work. Local actors must be involved from the start. The aim must be to leave behind strong local institutions when we depart”.

Kofi Annan, Secretary-General of the United Nations

## I. INTRODUCTION

Access to justice is a vital part of the UNDP mandate to reduce poverty and strengthen democratic governance. Within the broad context of justice reform, UNDP's specific niche lies in supporting justice and related systems so that they work for those who are poor and disadvantaged. Moreover, this is consistent with UNDP's strong commitment to the Millennium Declaration and the fulfilment of the Millennium Development Goals. Empowering the poor and disadvantaged to seek remedies for injustice, strengthening linkages between formal and informal structures, and countering biases inherent in both systems can provide access to justice for those who would otherwise be excluded.

UNDP is committed to using a human rights-based approach in its programming, guided by international human rights standards and principles. Access to justice is a basic human right as well as an indispensable means to combat poverty, prevent and resolve conflicts.

This practice note is intended to suggest strategies for UNDP support to access to justice, particularly for the poor and disadvantaged, including women, children, minorities, persons living with HIV/AIDS and disabilities. Part II of the note emphasizes the need to focus on capacities to seek and provide remedies for injustice and outlines the normative principles that provide the framework within which these capacities can be developed. Part III of the note sets out principles for action, approaches and techniques that can be used by UNDP practitioners involved in access to justice programming. It also suggests steps in policy dialogue, partnership building, design, implementation and execution that are intended to increase the likelihood of success of access to justice programmes. Part III also highlights issues related to monitoring and evaluation that are particularly important, including the use of disaggregated data to indicate whether there have been results for different poor and disadvantaged groups. Part IV suggests ways to capitalize on UNDP's advantage as an impartial and trusted partner of developing countries, and suggests possible entry points for programming. Finally, Part V lists knowledge resources for practitioners engaged in access to justice programming.

## II. THE ISSUE AND ITS DIMENSIONS

Justice is closely related to UNDP's mandate — poverty eradication and human development. There are strong links between establishing democratic governance, reducing poverty and securing access to justice. Democratic governance is undermined where access to justice for all citizens (irrespective of gender, race, religion, age, class or creed) is absent. Access to justice is also closely linked to poverty reduction since being poor and marginalized means being deprived of choices, opportunities, access to basic resources and a voice in decision-making. Lack of access to justice limits the effectiveness of poverty reduction and democratic governance programmes by limiting participation, transparency and accountability.

For the purposes of this practice note, the “justice sector” includes the criminal justice system and the civil justice system. For many countries there are also

separate mechanisms and procedures of the justice system to address constitutional issues related to governance. It is also crucial to recognize the importance of the formal and informal institutions that comprise the justice sector. Creating a sustainable environment with equal access to justice requires working with different types of institutions and with various actors, such as: the police, the courts, prosecutors, social workers, prison officials, community leaders, paralegals, traditional councils and other local arbitrators; and taking account of the linkages between them.

Informal and traditional mechanisms of justice are often more accessible to poor and disadvantaged people and may have the potential to provide speedy, affordable and meaningful remedies to the poor and disadvantaged. But they are not always effective and do not necessarily result in justice. UNDP recognizes the progress represented by uniform and codified law, and the need for traditional systems to evolve toward serving justice in full respect of international human rights standards, such as gender equality, non-discrimination for reasons of age or social status, respect for life and due process guarantees for criminal defendants.

There is a general tendency for access to justice reform (both multilateral and bilateral) to focus on programmes supporting formal mechanisms of justice, especially processes of adjudication through the judiciary. This is understandable from a governance perspective. However, from access to justice perspectives, it is essential that common parameters of assessment be applied to both formal and informal justice mechanisms. Hence, UNDP's approach to justice sector reform focuses on strengthening the independence and integrity of both formal and informal justice systems, making both more responsive and more effective in meeting the needs of justice for all—especially the poor and marginalized.

### Box 1. BARRIERS TO ACCESS TO JUSTICE

From the user's perspective, the justice system is frequently weakened by:

- ▶ Long delays; prohibitive costs of using the system; lack of available and affordable legal representation, that is reliable and has integrity; abuse of authority and powers, resulting in unlawful searches, seizures, detention and imprisonment; and weak enforcement of laws and implementation of orders and decrees.
- ▶ Severe limitations in existing remedies provided either by law or in practice. Most legal systems fail to provide remedies that are preventive, timely, non-discriminatory, adequate, just and deterrent.
- ▶ Gender bias and other barriers in the law and legal systems: inadequacies in existing laws effectively fail to protect women, children, poor and other disadvantaged people, including those with disabilities and low levels of literacy.
- ▶ Lack of de facto protection, especially for women, children, and men in prisons or centres of detention.
- ▶ Lack of adequate information about what is supposed to exist under the law, what prevails in practice, and limited popular knowledge of rights.
- ▶ Lack of adequate legal aid systems.
- ▶ Limited public participation in reform programmes.
- ▶ Excessive number of laws.
- ▶ Formalistic and expensive legal procedures (in criminal and civil litigation and in administrative board procedures).
- ▶ Avoidance of the legal system due to economic reasons, fear, or a sense of futility of purpose.

## Normative framework

A number of international instruments establish principles and minimum rules for the administration of justice and offer fairly detailed guidance to states on human rights and justice. They comprise the [Universal Declaration of Human Rights](#) and specific covenants, conventions, rules, guidelines and standards promulgated by the international community under the auspices of the United Nations. These standards must inform and influence UNDP support to the justice sector. Some of them are mentioned in the box below.

### Box 2. NORMATIVE FRAMEWORK FOR JUSTICE

The [International Covenant on Civil and Political Rights](#) enshrines the principles of equality before the law and the presumption of innocence, and includes guarantees of freedom from arbitrary arrest and detention and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law.

The independence of the judiciary is addressed in the [Basic Principles on the Independence of the Judiciary](#). This instrument requires that the independence of the judiciary be guaranteed by national law and prohibits the inappropriate and unwarranted interference with the judicial process. Furthermore, it protects due process through established legal procedures that are fair and respect the rights of the parties. It also obligates states to provide adequate resources to enable the judiciary to properly perform its functions, and sets forth principles for the selection, training and conditions of service and discipline of the judiciary.

The [Basic Principles on the Role of Lawyers](#) requires governments to ensure that efficient procedures and responsive mechanisms for equal access to lawyers are provided, including the provision of sufficient funding and other resources for legal services to the poor and other disadvantaged persons. In addition, it entitles lawyers to form and join self-governing professional association, while at the same time such professional associations are required to cooperate with governments in the provision of legal services.

The [Guidelines on the Role of Prosecutors](#) identify the responsibility of prosecutors in protecting human dignity and upholding human rights and ensuring due process. The Guidelines also strictly separate judicial functions from the office of the prosecutor.

Requirements of law enforcement officials, including military authorities that exercise police powers, are set out in the [Code of Conduct for Law Enforcement Officials](#). The Code, among other things, requires officers of the law to uphold the human rights of all persons and to provide particular assistance to those who, by reason of personal, economic, social or other emergencies, are in need of immediate aid.

Several international instruments address the rights of prisoners and detainees. Among them, the [Basic Principles for the Treatment of Prisoners](#) prohibits discrimination, insists on respect for human rights as contained in international instruments and calls for the reintegration of ex-prisoners into society under the best possible conditions and with due regard to the interests of victims.

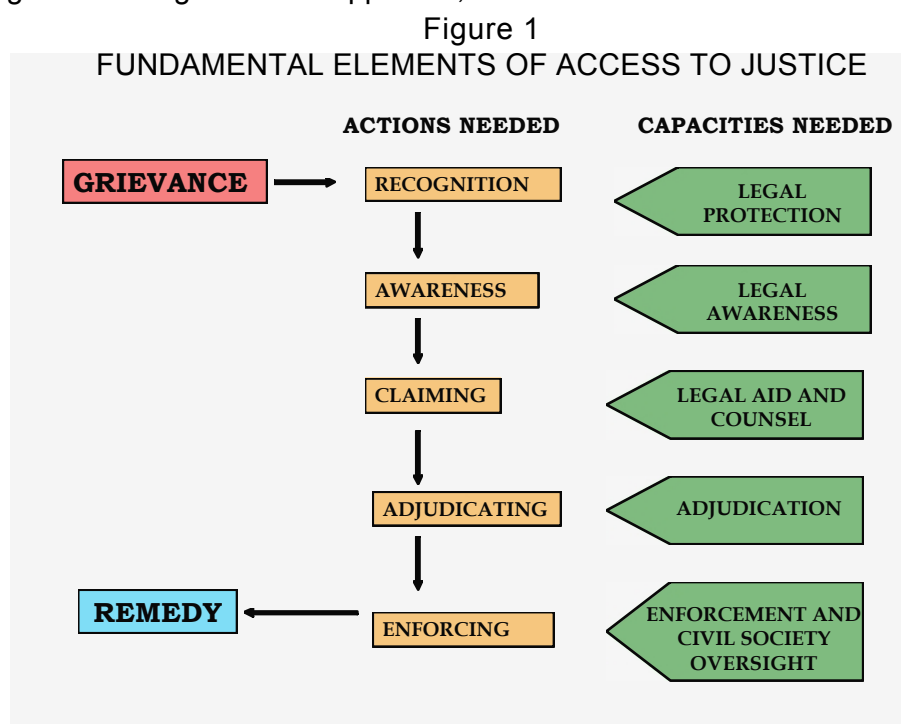
## Human rights-based approach to access to justice

UNDP is committed to using a human rights-based approach in its programming, guided by international human rights standards and principles. A human rights-based approach is useful to:

- a) Focus on the immediate, as well as underlying causes of the problem—the factors impeding access (lack of safeguards to access, or insufficient mechanisms that uphold justice for all under any circumstances);
- b) Identify the “claim holders” or beneficiaries — the most vulnerable (rural poor, women and children, people with diseases and disabilities, ethnic minorities, among others);
- c) Identify the “duty bearers”—the ones accountable for addressing the issues/problems (institutions, groups, community leaders, etc.); and

- d) Assess and analyse the capacity gaps of claim-holders to be able to claim their rights and of duty-bearers to be able to meet their obligations and use analysis to focus capacity development strategies.

Access to justice is, therefore, much more than improving an individual's access to courts, or guaranteeing legal representation. It must be defined in terms of ensuring that legal and judicial outcomes are just and equitable. According to a human rights-based approach to development, it is important to identify the grievance that calls for a remedy or redress. A grievance is defined as a gross injury or loss that constitutes a violation of a country's civil or criminal law, or international human rights standards. The capacity and actions needed to achieve access to justice, following a human rights-based approach, are outlined below.



Following the analysis above, the promotion of access to justice may require various types of support as detailed in Table 1 below.

Particular attention should be given to crisis and post-conflict countries, where challenges to access to justice may be aggravated because the public administration lacks sufficient capacity to provide effective public service. In some cases, police and other judicial institutions might be a source of public insecurity, intimidation or violence, or they are mistrusted because of abuses by previous regimes. In these cases, a country is often faced with a significant need to undertake a large number of reforms related to past violations of human rights and atrocities, and factors contributing to recurrent instability. Furthermore, the justice and security sector may have collapsed due to damage to infrastructure, insufficient capacity and leadership, and a continued threat of conflict and violence.

Problems relating to access to justice in crisis and post-conflict countries are usually more pronounced and pervasive than in non-crisis contexts, especially relating to the criminal justice system. It is impossible to cover in this Practice Note the vast and complex issues associated with justice in post-conflict situations. It should be

noted that BCPR is planning to prepare a Practice Note devoted to these issues. Annex II sets out entry points for justice programming in a post-conflict context.

Table 1. TYPES OF SUPPORT TO PROMOTE ACCESS TO JUSTICE

Type	Description	Key actors
Legal protection	Provision of legal standing in formal or traditional law — or both — involves the development of capacities to ensure that the rights of disadvantaged people are recognized within the scope of justice systems, thus giving entitlement to remedies through either formal or traditional mechanisms. Legal protection determines the legal basis for all other support areas on access to justice. Legal protection of disadvantaged groups can be enhanced through: (a) Ratification of treaties and their implementation in the domestic law; (b) implementation of constitutional law; (c) national legislation; (d) implementation of rules and regulations and administrative orders; and (e) traditional and customary law.	<ul style="list-style-type: none"> <li>- Parliament</li> <li>- Ministries of Foreign Affairs</li> <li>- International/regional fora</li> <li>- Ministries of Law and Justice, police forces</li> <li>- National Human Rights Commissions</li> <li>- Law Reform/Legislative Commissions</li> <li>- Legal drafting cells of relevant ministries</li> <li>- Local officials involved in legal drafting</li> <li>- Judges, particularly of courts whose decisions are binding on lower courts or, under the law, are able to influence courts in other jurisdictions</li> <li>- Traditional Councils</li> <li>- Community leaders (chiefs, religious leaders)</li> <li>- CSOs, especially those involved in legal research, legal advocacy and monitoring</li> </ul>
Legal awareness	Development of capacities and effective dissemination of information that would help disadvantaged people understand the following: (a) their right to seek redress through the justice system; (b) the various officials and institutions entrusted to protect their access to justice; and (c) the steps involved in starting legal procedures. UNDP's service line on access to information provides an opportunity to develop capacities and strategies to promote legal awareness.	<ul style="list-style-type: none"> <li>- Ministry of Justice</li> <li>- Ministry of Education/higher education, schools and universities</li> <li>- NHRIs</li> <li>- Legal aid providers</li> <li>- Quasi-judicial bodies (human rights, anti-corruption, and electoral commissions).</li> <li>- Local government bodies</li> <li>- Non-governmental institutions (e.g. NGOs, Bar associations, universities, communities)</li> <li>- Labour unions</li> </ul>
Legal aid and counsel	Development of the capacities (from technical expertise to representation) that people need to enable them to initiate and pursue justice procedures. Legal aid and counsel can involve professional lawyers (as in the case of public defence systems and pro bono representation), laypersons with legal knowledge (paralegals), or both (as in "alternative lawyering" and "developmental legal aid").	<ul style="list-style-type: none"> <li>- Ministries of Justice and state-funded legal aid programmes</li> <li>- Public Attorneys</li> <li>- Court system (e.g. to deal with court fees)</li> <li>- Local governments</li> <li>- Police and the prison system</li> <li>- Non-governmental organizations (NGOs)</li> <li>- Bar associations</li> <li>- Law clinics (often linked to university faculties of law)</li> </ul>
Adjudication	Development of capacities to determine the most adequate type of redress or compensation. Means of adjudication can be regulated by formal law, as in the case of courts and other quasi-judicial and administrative bodies, or by traditional legal systems.	<ul style="list-style-type: none"> <li>- Courts</li> <li>- National human rights institutions (Human Rights Commissions and Ombudsman Offices)</li> <li>- Alternative dispute resolution mechanisms: these can be attached to the court system, or be administrative bodies (such as land and labour boards)</li> <li>- Traditional and indigenous ADR</li> </ul>
Enforcement	Development of capacities for enforcing orders, decisions and settlements emerging from formal or traditional adjudication. It is critical to support the capacities to enforce civil court decisions and to institute reasonable appeal procedures against arbitrary actions or rulings.	<ul style="list-style-type: none"> <li>- Prosecution</li> <li>- Formal institutions (police and prisons)</li> <li>- Administrative enforcement</li> <li>- Traditional systems of enforcement.</li> </ul>
Civil society and parliamentary oversight	Development of civil society's watchdog and monitoring capacities, so that it can strengthen overall accountability within the justice system.	<ul style="list-style-type: none"> <li>- NGOs working on monitoring and advocacy</li> <li>- Media</li> <li>- Parliamentary select and permanent committees</li> </ul>



### III. OPERATIONAL IMPLICATIONS

#### 1. Principles for action

UNDP's experience to date offers a number of principles for action on access to justice. Among them are:

**Policies and programmes need to ensure an explicit focus on the poor and disadvantaged.** The concerns of the disadvantaged need to be included in programme conception and design from the outset so that they do not fall through the cracks of justice reform. People's perceptions of justice, the obstacles they face and the ways they address them need to be understood. If justice programming does not produce results for the most disadvantaged, we run the risk of widening existing gaps in access to justice.

**Capacity development for access to justice requires building on existing strengths and solutions.** UNDP's focus is on enhancing people's own capabilities rather than substituting national actors with external consultants. UNDP support must build on the strengths of people and institutions. The judiciary and the legal profession in some countries have developed creative ways to reach the poor and marginalized and civil society has been involved in community organizing and developing paralegal and alternative lawyering services.

**Effective reforms leading to access to justice require an integrated approach that includes:**

- protection of rights, especially those of the poor and disadvantaged
- strengthening capacities to seek remedies through formal and informal mechanisms
- improving institutional capacities to provide remedies in relation to adjudication, due process, enforcement mechanisms (police and prisons), and civil society efforts to foster accountability.

**Justice sector reform entails strengthening relevant national institutions and democratic governance initiatives.** This involves: (a) strengthening Parliament's legislative capacity to establish an appropriate legal framework for the judiciary; (b) establishing mechanisms for transparency and public scrutiny; (c) supporting decentralization; (d) capacitating local institutions; (e) improving public information systems; (f) post-crisis confidence building and other governance activities. Additionally, anti-corruption efforts and human rights protection often need to address the judicial system.

**Access to justice programming needs to be linked with development activities in other sectors.** The multidimensional nature of access to justice programming requires consultations within various programme units in the CO, and also with other UN agencies and donors.

**In some societies, the disadvantaged and other marginalized groups prefer the traditional justice system over the formal one.** Although the importance of an independent judiciary in ensuring access to justice is well recognized, programming

could take greater account of traditional justice systems. They are preferred for their conciliatory approach and a perception that they preserve social cohesion and accommodate cultural freedom. Formal institutions, on the other hand, are seen to be remote, alien and intimidating. Worse still, formal institutions, such as the police, may be viewed with distrust or fear. In such societies, traditional and customary systems usually resolve 90 per cent of conflicts. Yet, a significant portion of development assistance to the justice sector (80 per cent) gets allocated to formal systems. It is important to note, however, that traditional justice systems are not always consistent with human rights norms. They may reflect prevailing power relationships that not only perpetuate biases in terms of gender, caste, religion or ethnicity, but also lack the integrity and moral authority to provide due process or appropriate penalties.

**Assessments on aid absorption capacities are critical. Expecting quick results may unintentionally undermine institutional systems and democratic processes.** A large portfolio of well-intentioned programmes can fail if national actors get overwhelmed in managing it. This can crowd reform agendas and weaken institutions that are not capable of absorbing substantial reforms in short periods of time.

**Wide participation is crucial.** Justice system reforms need to engage actors beyond the circle of legal professionals. They affect and concern the entire society and must, therefore, involve social participation and consensus. Particular attention should be paid to consultations with duty-bearers, claim-holders, universities, bar associations and civil society organizations. It is not only a matter of creating legitimacy for reforms. Among other results/objectives, participation increases the likelihood of sustainability. It is also important to strengthen leadership to effectively conduct the participatory process.

**Find solutions for problems instead of imitating models.** In countries with legal traditions inherited from the colonial past, discussions about general legal models (such as accusatorial or inquisitorial models) can divert attention from real problems and deficits in the sector. Focus on identifying and solving problems (no matter where the solution comes from) rather than trying to match one or another model. Each reform process is unique in terms of the solutions that can be applied. The challenge is to learn from other experiences (in particular, those from developing countries that have overcome similar challenges) but also to provide customized solutions for particular situations.

## 2. Approaches and techniques for programming

Although it is important to draw lessons from previous development experiences, the most important lesson is that the “best practice” is always based on the national context and the needs of the specific disadvantaged groups.

### 2.1. Legal Protection

Legal norms can determine people’s choices (e.g. while some societies mandate access to free legal counsel, others deny inheritance rights to women). For many of the disadvantaged groups of concern to UNDP, existing legal frameworks — formal and traditional — are inadequate, thereby depriving them of justice. Legal reforms

that seek to bring formal and traditional justice systems into conformity with human rights norms and standards are therefore needed. Support should be available to countries to meet this need. Constitutional and legal reform processes that seek to strengthen judicial independence, improve legal aid, and enhance due process of law, deserve support.

UNDP has supported the enactment of pro-poor and human rights legislation, treaty ratification, and capacity development for the analysis, scrutiny and drafting of legislation. Such assistance has helped governments address key grievances that trap disadvantaged people into poverty, such as women's property rights or indigenous people's rights to ancestral domains. It has also helped consolidate jurisprudence, and has assisted governments in efforts to link traditional with formal legal systems.

Built-in mechanisms within ministries of justice, national human rights institutions, or in some cases, justice committees in parliaments, are important. These mechanisms enable scrutiny of legislation for compliance to constitutional and international obligations, and their potential for positive impact on disadvantaged groups.

Initiatives on legal protection will normally require coordination with other Democratic Governance areas. Below are some key points for programming and policy advice:

- Law reform must go beyond legal drafting and will take time. Necessary steps for law reform that are time-consuming include: identification of problems; building consensus on solutions; drafting of amendments and/or new legislation; parliamentary discussions; formulation of an implementation programme; evaluation and finalization of law reform; and finally, enforcement.
- In some countries, judicial activism, in the context of legislative and executive apathy, can create entitlements in domestic law derived from constitutional principles or international norms. The judiciary's role in advancing economic, social welfare and cultural rights in India, South Africa, Argentina and Bangladesh demonstrates the potential for converting the law into a "weapon for the weak". The legitimacy of judicial activism will depend upon the extent to which it is underpinned by constitutional principles and internationally accepted norms, and it can be undermined if the judiciary is perceived to trespass into the territory of the legislature.
- Where adequate constitutional or legal protection exists and risks of setbacks are not high, law enforcement—not law-making—deserves priority. Expanding legislation when enacted laws are not implemented will be inefficient and an ineffective use of resources. It can erode public confidence in the legal system.

## 2.2. Legal awareness

Legal awareness is the foundation for fighting injustice. The poor and other disadvantaged people cannot seek remedies for injustice when they do not know what their rights and entitlements are under the law. Information on remedies for

injustice must be intelligible to the public and knowledge provided to them must serve their practical purposes.

Strategies to promote legal awareness should be undertaken by both government and non-government actors. There are governments that overlook their obligation to inform the public about relevant rights and entitlements; or without the capacity to comply with such an obligation. Both of these common deficiencies need to be remedied.

Non-government actors engage in legal awareness activities by establishing “legal clinics” or “legal aid centres,” community awareness campaigns, and use of mass media. Although they seek to provide information targeted toward disadvantaged groups, their impact is often limited by uncoordinated efforts, dispersion, unsustainable programmes, and inability to “scale up”. These limitations can be addressed through adequate UNDP programme support. The following points can be of practical use:

- *Support communication policies, regulations and mechanisms in government departments for dissemination of legal information.*  
Framing rules to implement legislative or constitutional provisions for access to information is important. However, freedom of information policies generally place a passive obligation on agencies to provide information on request. Communication strategies should be adequate to the needs and aspirations of disadvantaged groups. Therefore, they should include employment of paralegals; production of information in user-friendly formats (including those targeted to people with disabilities and low literacy and skills); pro-active dissemination to those who face substantial physical, cultural, or economic barriers to access and other types of discrimination; and establishment of information windows or information kiosks. In this regard, extending communication strategies to sub-national and local contexts is of vital importance.
- *Support training of government officials in legal awareness and access to information to break down institutional resistance to openness.*  
Effective dissemination of information necessitates building the government’s capacity to handle new demands for legal awareness.
- *Adopt a demand-driven orientation and focus on the information needs of poor and disadvantaged groups in response to specific problems.*  
Knowledge of specific laws and regulations (e.g. agrarian reform) can be of more practical value compared to generic knowledge of international norms or constitutional principles. Among the popular education modalities that may be worth supporting are: public radio or television shows, street theatre, information kits/flyers on how to initiate legal action for those who cannot afford to hire a lawyer, legal information kiosks or centres and Website resource pages.
- *Involve non-lawyers in design and delivery of community education programmes.*  
Experience indicates that social scientists, community organizers, teachers, religious leaders and others with non-legal speciality skills can make substantial

contributions to public awareness of the law, their rights and other legal remedies they are entitled to.

- *Use information and communications technology (ICT) for expanding scale, although this may need to be combined with more traditional methods to reach disadvantaged groups.*

Innovative strategies using ICT need to be adapted to better accommodate individuals who are vision impaired and those with limited literacy, e.g. through the use of graphical and audio interfaces. An effective strategy may include a combination of ICT and more traditional means of accessing information. Public radio remains to be a strong medium of communication for reaching rural communities, including women, as well as illiterate and physically impaired citizens.

- *Use existing social networks to mobilize community members around access to legal information.*

Providing legal information to poor and disadvantaged groups is a significant challenge. Social networks that are trusted and familiar (e.g. savings groups or other community-based formal and informal networks) can be used effectively to serve the purpose.

### 2.3. Legal aid and counsel

Legal awareness can help disadvantaged people understand they have valuable rights, such as protection from: forced evictions, forced labour without pay, or torture. Remedies for violations of such rights often require the intervention of lawyers. Costs associated with the services of legal counsel and legal processes tend to discourage those who cannot afford them from seeking just remedies. Legal aid support can counter some of these impediments.

Availability, affordability and adequacy are the three major challenges faced by poor people and other disadvantaged groups when it comes to legal aid. Legal aid, like legal awareness, requires the intervention of both government and non-government actors.

Government legal aid schemes include public defence systems and other forms of financial and psycho-social support, such as exemptions in procedural costs and social services to victims and witnesses. Local governments can also be actively involved if they have the capacity to provide legal aid to the poor, by implementing legal aid or mediation services (e.g. deployment of public defenders and other legal counsels for free).

Non-government legal aid systems can provide supplemental services with pro-bono attorneys, legal clinics and alternative law and public interest law groups. Non-government services are not a substitute for state responsibility to provide legal aid, although they are a key source of assistance for the poor and the disadvantaged, especially where local governments lack the capacity to fulfil their responsibilities.

Non-government activities can also improve the overall quality of professional education, while expanding services for the poor. Strategies may include

institutionalisation of community services for law graduates and retired professionals, establishment of street and university law clinics, and support to alternative law groups.

Some recommendations for programming and policy advice to strengthen legal aid:

▶ *Ensure demand orientation*

Legal aid services are demand-oriented; they need to be strengthened in line with poor and disadvantaged people's legal needs and not depend on what lawyers are prepared to offer. Assessments can determine the most cost-effective way to expand legal aid services to vulnerable people. This may require a combination of both government and non-government services.

▶ *Promote new litigation methodologies*

Typically, the allocation of legal services is directly related to the economic capacity of the user — “the haves will come out ahead”. Effective litigation usually requires highly specialized legal expertise, plus the drive to perform extensive research/follow-up work needed to mount a comprehensive and compelling legal argument. For a lawyer to properly dedicate time to the production and implementation of a litigation strategy for a poor client, professional motivation may have to be stimulated by non-market means.

▶ *Legal aid schemes can benefit from the use of paralegals, and utilise existing structures at the local level to expand access and quality of service.*

The case for expanding the role of paralegals in the provision of legal services is threefold: accessibility, quality of communication, and financial and non-financial costs. Poor people frequently require advice and assistance that avoid the need for cases to be tried, including alternative dispute resolution mechanisms and other informal settlements. They may also require advice on whether they need legal representation, and where they could find pro bono lawyers. Such advice can be given by paralegals or persons with specialized training in providing legal assistance to disadvantaged groups, who often are members of these groups.

▶ *Strengthen coordination among state and non-state funded legal aid providers, and enhance inter-professional cooperation.*

Greater coordination between state and non-state actors can help to fill gaps in the provision of legal services to disadvantaged people. Just remedies and outcomes may often call for non-legal expertise, such as that of doctors, accountants and engineers. This type of expertise can be provided on a pro-bono basis by professional associations and other non-governmental organizations.

▶ *Ensure sustainability.*

Legal aid schemes are usually expensive and many governments do not consider them a priority. For programming purposes, particular attention should be paid to finding ways to ensure financial sustainability and cost-effectiveness. Examples include the use of pro bono lawyers, university law clinics; the participation of Bar associations, paralegals and other public

advocates; as well as a coordinated lobby for an adequate share of public revenue.

#### 2.4. Adjudication

Adjudication involves the process of determining the most appropriate type of remedy or compensation. Adjudication mechanisms include judicial and quasi-judicial processes.

There is a general tendency for justice sector reform (both multilateral and bilateral) to focus overwhelmingly on programmes supporting formal mechanisms of justice and especially processes of adjudication through the judiciary. This is understandable from a governance perspective. However, from access to justice perspectives, it is essential that common parameters of assessment be applied to both formal and informal justice mechanisms.

A strong and impartial judiciary is a cornerstone of access to justice. The judiciary's roles and functions vary from one jurisdiction to another (most notably on account of the differences between countries with common law or civil law systems). However, they should share the same basic principles in the settlement of disputes, interpretation of laws, and constitutional checks on the exercise of power by the executive and legislative branches of government. Judicial independence is crucial for an effective judiciary. Independence is manifested in impartiality in the application of the law, security of tenure and transparency, the authority to govern itself in issues concerning its independence, as well as probity and integrity. Strategies to strengthen the judiciary include, among others, the improvement of the following: judicial appointments, judicial management and internal administration, skills, infrastructure and equipment, and professional and ethical standards.

Quasi and non-judicial avenues include national human rights institutions (NHRIs) and alternative dispute resolution mechanisms. There are basically two types of NHRI: Human Rights and anti-discrimination commissions (also referred to as affirmative action commissions), and the Ombudsman offices. NHRIs are generally quasi-governmental or statutory bodies that can help poor and disadvantaged people reach remedies that would otherwise remain inaccessible to them. The presence of NHRIs may also be useful to prevent future grievances since they generally have a monitoring role, as well as one that promotes long-term, sustainable mechanisms, such as public education on human rights and corresponding duties. These institutions often create the necessary space for human rights dialogue between the executive and non-governmental entities. NHRIs can also serve as independent monitors of the actions and decisions of the executive office, including the activities of enforcement agencies and other actors within and outside the justice system. However, the realization of NHRIs' potential requires that they be equipped with a clear mandate, independence, adequate funding, capacity and public legitimacy.

Alternative dispute resolution mechanisms can be regulated or backed by formal or by traditional law. Formal alternative dispute resolution mechanisms can be attached to the courts or to a government agency, such as land and labour boards, although they should function independently from the executive.

Traditional adjudication mechanisms (e.g. a Council of Chiefs) can be recognized by formal law, or they may operate extra-legally. It is important to emphasize at the outset that traditional justice systems should only be recognized and supported when they are consistent with the rule of law and respect for the human rights of all groups in society. The operations of both formal and informal justice systems should ideally be complementary. In this respect there should be no discrimination on the basis of sex or any other status by either formal courts or traditional justice forums; and remedies imposed by formal courts and informal justice forums should be consistent with relevant constitutional and legal provisions.

Some recommendations for programme and policy support in the area of adjudication:

► *Appointment systems and mechanisms for enforcing professional and ethical standards are key to reducing discrimination against disadvantaged groups.*

Whereas training and advocacy are important to change underlying discriminatory attitudes and beliefs in the long term, more concrete mechanisms need to be put in place to ensure that discriminatory actions are prevented and adequately addressed.

► *Build on comparative advantages of formal and traditional adjudication.*

Traditional adjudication is best suited to conflicts and disputes between people living in the same community, who seek reconciliation based on restoration. Formal justice, on the other hand, is best able to provide the legal and procedural certainty in cases involving serious penalties, such as imprisonment; or where the parties are unwilling or unable to reach a compromise. Access to justice by disadvantaged people may require both formal and traditional systems; the way they enrich each other may vary in each context. Formal systems may sometimes need to be 'informalized' to become user-friendly, while in certain circumstances, traditional systems need to be formally recognized and set under the oversight of the courts to ensure fair and impartial justice.

► *Strengthen coordination of NHRIs with the judiciary, prosecution, police and prisons.* NHRIs should be allowed to file cases in court, or to have them automatically filed by the prosecution where they lack prosecutorial capacities. On the other hand, NHRIs usually have no powers to enforce their decisions; the judiciary is critical to ensure appropriate redress and prevent impunity. Linkages with police and prison institutions can expand NHRIs' access to persons in detention.

## 2.5. Enforcement

The functioning of enforcement systems is key to minimizing disadvantaged people's insecurity. It is a precondition for accountability and the elimination of impunity. Many crucial problems in justice systems, both formal and traditional, can often be traced back to deficient systems of enforcement.

The performance of prosecution departments in government (for example, the Attorney General's office) influences the effectiveness of the criminal justice system. Prosecutors file cases in courts and provide arguments for conviction. In

some legal systems, prosecutors can also supervise the work of the police. Prosecution offices can adopt a variety of systems consisting, for example, of state-funded private prosecutors, civil servants under the executive branch of the government, or independent civil servants with quasi-judicial status. UNDP can help strengthen the prosecution by supporting initiatives designed to hone investigative skills and administrative capacities through training, workshops, or exchange education programmes,

Justice reform processes too often fail to include police reform. However, the police play a fundamental role in ensuring access to justice, particularly since it is the point of first contact in the criminal justice system. It is important to ensure public security is the exclusive domain of the police, and that military forces focus on national defence only. Police performance may be affected by poor investigation and forensic capacities, weak oversight, corruption and a widespread culture of violence, which may have been inherited from autocratic regimes or from a past of violent conflict. Strategies to enhance police performance include strengthening investigative capacities, institutional structures of control, developing crime prevention strategies, changing and upgrading recruitment and training standards, and improving community-police relations. These strategies will need to go hand-in-hand with strengthening the police's conditions of service, facilities and infrastructure.

Prisons have also been left out of most justice reform processes in the past. Yet, the prison system tends to suffer the consequences of problems originated in other parts of the justice system, as is the case with judicial delays or unreasonable incarcerations. However, prison systems are a low priority for most governments. Consequently, prisoners continue to be housed in poor living conditions, while outdated penal legislation — primarily concerned with prisoner confinement rather than rehabilitation — remains in place. Strategies to improve the penal system may include improving conditions of detention, strengthening informal justice at the local level, enhancing technical and human rights training for prison managers, enhancing transparency of the prison system as a means of protecting prisoners, and socially constructive, non-custodial measures which encourage the social re-integration of offenders.

Some recommendations for programme and policy advice in the area of enforcement:

- ▶ *Improving overall criminal investigation requires the involvement of both national and local actors in assessing the problem and identifying solutions.* Regional disparities can influence the type of problems and possible solutions stakeholders are able to implement. Specific local problems often require local solutions; involving local actors in designing national strategies is necessary to achieve results at both national and local levels.
- ▶ *Processes of police and prison reform require broad, active and continuous support.* The inclusion of civil society in such processes will enhance results-orientation and transparency of reforms. Broad participation also minimizes the risk of setbacks.

- ▶ *Effective programmes to enhance criminal investigation require an integrated approach.*  
Programmes should simultaneously address police investigative capacities, prosecutorial capacities to direct investigations, as well as civil control of intelligence bodies.
- ▶ *Sound assessments are necessary to continuously evaluate impact.*  
The effectiveness of training programmes and other strategies to improve criminal investigation should be examined; what kind of impact do they actually have on reducing impunity? This requires the establishment of adequate monitoring and evaluation tools and mechanisms.

## 2.6. Civil society and parliamentary oversight

Civil society and parliamentary oversight are necessary to strengthen overall accountability in the justice system. Developing watchdog and monitoring capacities in civil society and parliament not only benefits disadvantaged groups and citizens at large, it is also useful for justice institutions themselves. Besides ensuring that remedies are adequately provided and official misconduct properly investigated, these mechanisms are an important source of information to alert senior officials on misconduct and the steps they should take to curb corruption and discriminatory or abusive practices.

Strategies may include creating civic oversight mechanisms, supporting civil society in monitoring public appointments and law implementation, developing research capacities, enhancing skills for investigative journalism and human rights reporting, and involving civil society in the establishment of access to justice indicators and baselines. Assistance can also be provided to strengthening parliamentary committees such as public petitions committees and oversight committees relating to the justice sector. Care should be taken, however, to ensure that legislatures respect the principle of independence of the judiciary, namely, in terms of judicial and prosecutorial powers.

The creation of civic oversight mechanisms can be a major entry point for larger reforms in the justice system, particularly in developing democracies. For instance, the Independent Complaints Directorate (ICD) of South Africa ensures civilian participation in the process of handling citizens' complaints against police personnel, and it may be a strategic entry point for a larger process of reform within the police.

- ▶ *Developing adequate capacities for civil society advocacy and watchdog capacities requires a long-term vision.*  
The involvement of think tanks and research institutions can help push the concerns of poor and disadvantaged groups. Similarly, civil society participation in monitoring justice reform processes or public appointments can be an effective means to strengthen accountability. Focusing on a specific theme of great political interest that could provide concrete results in the short run may be useful, as this can motivate civil society groups to continue their work, and persuade other stakeholders of its value.
- ▶ *Explore the role of the media.*

The media plays a fundamental role in performing watchdog functions (e.g. through investigative journalism). However, it can equally jeopardize access to justice through deficient or saturated reporting. In some instances, the media tend to over-report certain cases, undermining the principle of presumption of innocence. Enhancing reporting capacities of media on human rights and access to justice issues improves the enabling environment for successful justice reforms. Moreover, the media can (and in many countries do) contribute negatively to the treatment of minorities, democracy advocates and human rights defenders.

### 3. Opportunities in the programming cycle

#### 3.1. Policy dialogue and partnership building

**Policy dialogue** for access to justice will involve political judgement. UNDP should clearly determine that there is adequate political will to do justice for the poor and other disadvantaged groups before it supports a government's access to justice programme.

Effective **partnership building** for access to justice is guided by three main considerations: (a) to ensure reforms are sustained in the long run, (b) to ensure the optimum use of resources through coordination and collaboration, and (c) to reach the most disadvantaged people. How this is done, and the type of partners involved would vary depending on the country context. Most effective strategies link a range of different actors to address the problem, from government institutions to NGOs, universities and the communities themselves. Broad-based social and institutional support has often proved to have a critical impact.

Senior officials in judicial institutions and other oversight bodies, such as national human rights institutions and Ombudsman offices, can function as champions of sensitive reform processes as they have greater guarantees of independence and security of tenure. On the other hand, this makes them more vulnerable to lack of transparency and accountability. Thus, reform processes will also need to involve other government stakeholders and CSOs.

Effective partnerships with donors require their engagement in frank discussions on programme design and implementation and in the identification of possible solutions. One strategy may be to involve donors early in conceptualizing programmes and inviting their full participation in formulation exercises through their own nominated technical specialists.

#### 3.2. Assessment and programme formulation

Assessment and programme formulation should involve actors on both the supply and the demand side of justice, for instance by bringing key government departments, academic institutions and NGOs working closely with disadvantaged people. Participatory assessments can help to obtain perspectives from disadvantaged groups on their obstacles to accessing justice and how they deal with them, which is necessary to ensure a capacity development orientation. When extensive participatory assessments are not politically or financially possible, participatory consultations on a small, manageable scale may be an option.

Effective policies and programmes require qualitative and quantitative baselines. A results orientation calls for qualitative and quantitative data on cases in court, profiles of victims, prisoners and detainees, judicial and legal infrastructure, mechanisms of dispute resolution, legal information needs and the type of legal framework available for specific situations. A focus on disadvantaged people also demands disaggregated data, for example by gender, caste, ethnicity, rural/urban divide, age, HIV/AIDS, physical or mental disability.

In line with UNDP's Results-Based Management (RBM), programmes should differentiate between outcomes, outputs and activities. An output is an objective that can be fully achieved through the completion of activities under the programme. In contrast, an outcome is an objective to which the outputs of the programme can contribute, but whose full achievement is not solely under the programme's control. For instance, compilation and dissemination of jurisprudence is an activity that can strengthen the knowledge base of the courts (output); such an output can help enhance the quality of the proceedings and the credibility and authority of verdicts (outcome). But in the end, the integrity of any final ruling/judgment depends on a number of factors outside the scope of the programme.

Programme formulation needs to take into account that building capacities for greater accountability is meaningless if adequate capacities to demand such accountability are not developed as well. Furthermore, a thorough risk analysis of programme options should be undertaken at the design stage. Programmes should identify potential negative impacts on the intended target groups under specific circumstances and establish strategies to minimize such risks (e.g. empowering women to claim their property rights may increase their risk of suffering domestic violence). Similarly, there should be an assessment of the programme's potential consequences on other vulnerable groups that may be indirectly affected.

### 3.3. Implementation

#### Coordination mechanisms

Coordination can be formalized through broad-based steering committees of the programmes, where political, economic and social actors and institutional and civil society representatives provide strategic orientation and are briefed on progress. Establishing smaller subcommittees to deal with specific issues may be useful. However, though the development and careful establishment of inter-agency cooperation can yield a substantial impact on access to justice, it is also important to assess the potential for sustainability of coordination efforts once funding ends.

On a day-to-day basis, programme officers may establish a process of working through a single agency (e.g. the ministry of justice, or high court/supreme court). However, this approach works best once it has been established that the main counterpart is ultimately responsible to a multi-stakeholder steering committee.

UNDP's leadership position within the UN Resident Coordinator system helps to maximize the value of overall UN support to the justice sector. UN coordination enables various agencies to build on one another's results and draw on one another's technical expertise. Other UN agencies directly involved in the justice sector include, for example, the UN Office on Drugs and Crime with regard to crime prevention, UNICEF with regard to juvenile justice, and other agencies dealing with

particular disadvantaged groups such as UNIFEM and UNHCR. Other parts of the UN system, such as the OHCHR, play an important monitoring role — thereby promoting the willingness that makes capacities meaningful.

#### Communication mechanisms

These may include meetings, minutes, visits, reports, statistics and workshops. Reaching out to multipliers like religious leaders or community workers can strengthen accessibility and quality of communication to disadvantaged groups. Communication mechanisms are critical to improving the knowledge of all stakeholders about each other's strategies and problems. It is important that implementation mechanisms include strategies to ensure poor and disadvantaged people can access adequate information on the programme.

#### Execution strategies

Execution strategies vary depending on the context. Programmes need to ensure national counterparts are properly briefed or trained in the particular modality that is eventually selected. Projects with a large aid-coordination/management component should include in the project objectives a capacity-building component for donor coordination.

National Execution (NEX): National execution, through the government's justice department, is the most frequently used modality of implementation for access to justice and justice sector reform programmes. The ability of such a ministerial department to execute UNDP assistance needs to be carefully analyzed prior to selecting this execution modality. The assessment also needs to consider that the ministry, like any other department of the executive branch, is in itself a bureaucratic machine. The ministry may seek to use programme resources to improve its own administrative functioning. There is a need to establish results-oriented indicators to measure impact justice reform on the poor and other marginalized groups. Inclusion of civil society monitoring elements in programme implementation can help strengthen accountability, although this may initially be resisted by the both the executive and the judiciary.

It should be noted that national execution by the executive branch could, at times, undermine the independence of the judiciary. National execution can be more successful if capacity development is built-in, having the highest court or an institutional body representing the judicial power, as national counterpart.

Direct Execution by the CO (DEX): Currently, UNDP has little experience in directly executing access to justice and justice sector reform programmes, with the notable exception in post-conflict countries. On the other hand, DEX may sometimes be the best way to manage comprehensive programmes that work with actors, such as civil society, the media and grassroots level organizations who otherwise have little experience in working together.

NGO Execution: NGO execution is one way to bring specialized technical capacity to an access to justice programme without creating management layers. This can be an effective modality for small, targeted programmes and specifically for those which work with civil society. UNDP's experience with NGO execution of access to justice programmes is limited, except in the area of legal aid.

### Monitoring, evaluation and other accountability issues

Methods to monitor the implementation of the reform process include: reports (notably those to human rights treaty bodies), validation of reported data, and participatory methods. Monitoring should enhance the reforms themselves and this is not likely to happen unless the monitoring strategy operates with all stakeholders, through a participatory process and with local ownership.

Appropriate indicators are essential. Outcome indicators help assess the progressive realization of disadvantaged people's human rights. In selecting indicators, preference should be given to those with the potential to empower stakeholders and translate into policy development.

UNDP's accountability requires a thorough risk analysis of access to justice programmes as described in this section, and the establishment of adequate strategies to manage risks. It is important that information on the nature of UNDP-supported access to justice programmes is transparent and easily accessible, including user-friendly formats for poor and vulnerable groups. This can allow non-programme partners to provide critical feedback on the implementation of the programme, thereby improving accountability and effectiveness. Mechanisms can include leaflets, posters, websites, e-mail distribution lists, etc.

## IV. UNDP'S NICHE AND SUGGESTED ENTRY POINTS

### 1. UNDP's Niche

UNDP's specific niche lies in supporting justice and related systems as part and parcel of the promotion of democratic governance for poverty eradication and sustainable human development. UNDP aims to build and strengthen access to justice through processes that are respectful of human rights and result in better protection of rights. UNDP access to justice programming focuses on both traditional and formal systems, and builds interfaces between them. Therefore, UNDP's work in the area of access to justice complements that of other development actors who have prioritized the criminal justice, security sector, or civil law reform, often in order to create an enabling environment for trade and investment.

### 2. Entry points

Situations vary from country to country, therefore, there are no templates that identify generic entry points for access to justice programming. In order to choose an entry point, we must analyze the situation in relevant sectors and identify catalytic actors and institutions. Many times, seizing an opportunity when it arises can have a very positive result. Earlier parts of this practice note provide examples of possible strategies, and some key parameters for assessing programme options. Examples of entry points follow.

**Needs assessments, blueprints or national baselines on access to justice.** On occasion, the justice sector requires far-reaching reforms that can be designed only after a comprehensive review of the system. The CO can take this opportunity to

propose a needs assessment or a national policy dialogue process. Comprehensive justice sector needs assessments are generally undertaken once a CO has decided that it is interested in supporting a request for an access to justice or justice sector reform programme. This assessment requires considerable time and resource commitments both by UNDP and the national counterparts. Comprehensive needs assessments can form a useful basis on which to design UNDP support. It is, therefore, practical to combine assessment and programming missions when appropriate. Undertaking these assessments may raise expectations of follow-up unless the exploratory purpose of the assessment is made clear to partners at the outset.

Needs assessments should go beyond the identification of institutional constraints, to analysis of the political and social context of the justice sector and of constraints on governance. Factors such as the capacity of the judiciary to make independent decisions; the degree of judicial leadership; the level of organizational competence to ensure greater independence; and the capacity to promote the judiciary as a democratic institution, should be among the issues considered. Local interlocutors with a strong knowledge of the political and social contexts can strengthen the needs assessment process. Participatory assessment strategies, which engage civil society actors in identifying and defining problems, can be useful. (See Table 2 for examples of UNDP support to specific components of access to justice.)

Table 2. EXAMPLES OF UNDP SUPPORT TO ACCESS TO JUSTICE

Legal protection	<u>El Salvador and Colombia</u> : UNDP supported the incorporation of international standards on civil and criminal justice into national laws and regulations.
Legal awareness	<u>Brazil</u> : UNDP supported the establishment of Human Rights Observatories, where the paralegal skills of young community leaders are built to raise awareness on human rights issues and to identify practical strategies to overcome problems.  <u>Iran</u> : UNDP assisted the Commission on Human Rights to reach out to community paralegals to expand human rights awareness throughout the country.
Legal aid and counsel	<u>China</u> : UNDP supported strengthening the public defence system, including in relatively remote areas.  <u>Guatemala</u> : UNDP assisted in the establishment of Defensorias Indigenas, a group that provides legal assistance to indigenous people.
Adjudication	<u>Sierra Leone, Brazil, Peru and Guatemala (in remote areas)</u> : In terms of traditional justice systems, UNDP enhanced the accessibility of adjudication systems by establishing Centres for Administration of Justice. In Sierra Leone, UNDP supported the decentralised reconstruction of the basic echelons of the courts  <u>Nepal</u> : UNDP strengthened community mediation systems.  <u>Philippines, Cambodia and Venezuela</u> : In these countries, UNDP has been supporting human rights trainings for the judiciary.  <u>Georgia, Haiti and Guatemala</u> : UNDP has extended support to the Ombudsman institutions in these countries.
Enforcement	<u>Uruguay and Nicaragua</u> : UNDP supported the formulation of a national crime prevention plan. In Nicaragua, UNDP strengthened the capacity of local governments to develop and implement the crime prevention plan.  <u>Honduras and Guatemala</u> : UNDP is supporting the Attorney General's office to upgrade criminal investigation skills and improve coordination between police forces.  <u>Tanzania, Kenya, Mozambique and Ghana</u> : UNDP supports reforms aiming at democratic policing, community policing and human rights training in police and prisons  <u>Egypt, Jordan, Morocco, Lebanon and Yemen</u> : UNDP is support modernization of Arab institutions of public persecution to enhance public access to justice.
Civil society and parliamentary oversight	<u>Haiti, Panama and Argentina</u> : UNDP supported civil society organizations to monitor justice system reform process and forge a national consensus on a reform agenda.  <u>Guatemala</u> : UNDP supported a civil society network to

## ANNEX I

### Assessment of Access to Justice Support Requests CHECKLIST

The following are suggested questions to consider when assessing a request for access to justice reform programming:

- What type of judicial system exists? Does the country have a history of free and fair justice? Does the judicial system only serve for dispute settlement between the powerful and rich? Is the formal judicial system only operating in urban environments?
- Are human rights explicitly identified and guaranteed in the constitution? What international instruments has the country adhered to? Has human rights legislation been passed by parliament accordingly? What is the level of political commitment in parliament in this regard?
- What is the level of political decentralization in the country and how does this affect the distribution of legislative, executive and judicial competencies?
- How independent is the judiciary? What is the legal and political balance of power between the judiciary and the executive? What is the size of the budget of the Justice Ministry? Is there an independent judicial organ to determine expenditure, appointments, promotions, demotions and removal of judges? How stable are the positions of the judiciary and the clerical staff in the judicial system? Is the staff dependent on the Ministry of Justice, or other line ministries?
- Are there accountability mechanisms within the judiciary and other parts of the justice system (e.g. lawyers, prosecution, police)? How effective are these?
- What is the situation of judicial training institutions and of legal education in general?
- What is the level of awareness of the justice system and legal remedies by the public, particularly by poor and other vulnerable groups? Is there an existing public legal education and awareness programme?
- What factors prevent poor and other disadvantaged people from accessing the judicial system? Is the proposed programme addressing any of these factors?
- What risks and costs are incurred in accessing justice? Are there legal mechanisms for alternative dispute resolution?
- Is there a purely formal justice system or does this country work with traditional justice? If so, what is the scope and jurisdiction of traditional means of dispute resolution? What is the relationship between traditional and formal justice?
- Is there a legal aid system in place? If so, what kinds of law and justice issues does it cover? What is the degree of financial support/resources devoted to the system? Is there a good balance of support to legal aid coming from both the state and civil society? Are legal aid services available in different parts of the country, particularly in the rural areas?
- Are there national human rights institutions? Are there remedies available for citizens affected by maladministration? What mechanisms are available to citizens to make the police and prison officials accountable? Are there national, or sub-national bodies addressing discrimination? To what extent does anti-discrimination legislation, if any, reflect international standards?
- Is there a sector of civil society, directly involved in access to justice, legal aid, justice monitoring and judicial reform?
- How are resources allocated within the justice sector? Is there a fair balance in the human and financial resources allocated to each of the levels and branches of the court system and to the different components (e.g. judiciary, public defence, prosecution, police, prisons) of the justice system?

- If corruption is endemic in the country, has the judiciary demonstrated a willingness to combat corruption within its own ranks, to promote new anti-corruption legislation and/or to use existing legislation to eliminate corrupt practices?
- Has the judiciary been active in addressing corruption and human rights abuses by the police?
- Does the proposed programme identify specific access to justice concerns of the poor and marginalized groups in the country? Does the programme include adequate baselines, benchmarks, targets and indicators in this regard?
- Does the proposed programme include provisions for the participation of civil society groups in programme design and/or implementation, particularly from poor and marginalized communities?
- Does the proposed programme include provisions for accountability in programme implementation?
- Are other agencies or donors supporting access to justice programmes? Are there coordination mechanisms between them?
- Can UNDP work directly with the judiciary, i.e. through the High or Supreme Courts of a “Council of Magistrates,” or will it have to work through a ministry of the government (i.e. executive branch) and receive government clearance for activities?
- Is there political will on the part of the various actors with whom work will be undertaken? Do the political actors at the highest level, Justice Ministry Senior Officials and Senior Justices actually want reform? Do the Home and Justice Departments cooperate with the criminal justice system? If not, have any steps been taken toward reform?
- What is the perception among civil society and the media of the executive’s willingness to reform? What is the general perception among the international community of the nation’s democratic reforms?

Following an initial assessment, the CO and regional centre will need to exercise their discretion to determine whether support to the judiciary will succeed in achieving access to justice outcomes. UNDP may always retain the right to decline requests for support.

## ANNEX II

### Access to Justice in Post-Conflict Situations

#### 1. Entry Points for Justice and Human Rights in Post-Conflict Situations

##### 1.1 Immediate post-conflict assistance

- 1.1.1 Rapid assessment and diagnosis. The immediate needs of a post-conflict country relating to access to justice can vary significantly depending, inter alia, on whether an acceptable legal and institutional framework is in place; whether trained and experienced personnel are available within the country; whether the physical infrastructure exists; whether weaknesses of the justice and security sector was among the causes of insecurity and instability; and most importantly, whether laws and institutions are themselves under contestation and therefore need to be considered as part of a political solution to the conflict. Such assessments should encompass both formal and informal justice mechanisms, particularly examining the role of traditional structures in enhancing access to justice where formal institutions are not available to a majority of the population.
- 1.1.2 Rebuilding the capacity of local human rights organizations, institutions and agencies and supporting them to investigate, document and report instances of killings, physical injury, abductions, arbitrary arrest and detention, torture, etc.
- 1.1.3 Supporting national human rights and legal awareness campaigns, e.g. through the broadcast of human rights-related information and messages on the radio, television and other mass media.
- 1.1.4 Developing selection and recruitment process criteria and providing human rights training to law enforcement officers, prison administrators and the judiciary. This may require the purging of personnel who are tainted by past human rights abuses.
- 1.1.5 Identifying high-priority human resource management and administrative skills needed within each institution and providing the necessary support either through short-term training or additional personnel.
- 1.1.6 Reviewing and revising relevant sections of the penal code and the criminal procedure code to ensure due process and that other human rights of all people — particularly vulnerable groups — are protected and international human rights standards upheld. A particular area of concern tends to be pre-trial detention, especially when large numbers of people, accused of crimes committed during the conflict, are detained. Revisions must be followed with swift training of a core cadre in the criminal code and the criminal procedure code.
- 1.1.7 Facilitating coordination between institutions that comprise the criminal justice system. The lack of coordination between the police, the courts, the prosecutors and the prisons can often result in people “falling through the cracks” and being illegally detained for extended periods.
- 1.1.8 Ensuring physical access to courts. This may be particularly difficult where the conflict has wiped out the human and physical resources in the sector. Therefore, training of core personnel and the provision of basic equipment are usually a high

priority. Furthermore, in countries where security concerns still prevail and the conflict continues in certain areas, it will be even more difficult to establish independent and effective judicial structures. Innovative solutions appropriate to the particular setting such as mobile courts or facilitating transport and/or protection to judges, prosecutors, defence counsel, victims and witnesses may need to be considered.

- 1.1.9 Providing legal services and human rights protection to returning refugees and internally displaced persons. Such assistance may range from creating an awareness of basic human rights such as housing and citizenship rights, to obtaining records and facilitating registration.
- 1.2 Longer-term post-conflict support
  - 1.2.1 Training on pro-poor and pro-human rights legislation. Justice initiatives have often used training as a successful entry point for larger reform processes. Training constitutes an important entry point, but it needs to be linked to practical skills to be effective. Active participation of target groups in choosing training methodology and content is important. Successful training programmes consistently evaluate their impact on policy orientation and attitudinal change, and identify other strategies that may be necessary
  - 1.2.2 Examining the potential of traditional mechanisms of justice. Traditional systems of justice have been largely overlooked by most reform agendas in post-conflict countries. Exploring the potential of indigenous and traditional systems to enhance access to justice, particularly in post-conflict contexts, and examining how they can link to formal systems and how human rights standards and principles can be introduced may often be useful entry points. The two working in tandem is critical in post-conflict settings where the formal system is often in an embryonic stage and unable to handle a colossal caseload.
  - 1.2.3 Support to national human rights institutions (NHRIs). The establishment of NHRIs may not always be seen as a priority in a post-conflict setting, and the role of human rights monitoring may instead be undertaken on a transitional basis by international NGOs and agencies such as UNHCHR. Be that as it may, any international effort to monitor human rights should also simultaneously focus on developing national capacities to eventually undertake the same.
  - 1.2.4 Enforcement. While this may be a sensitive area, police reform remains a critical element of post-conflict justice. Post-conflict scenarios are also often characterized by a risk of rising criminality, where former armed groups become active in criminal networks, sometimes as a consequence of demobilization. Nascent justice systems are usually unprepared to deal with this problem. Moreover, practices employed to control insurgency such as curfews and extra-judicial killings may still be used to control ordinary crime once the conflict is over. Thus, there is a need to prepare a police service for its civilian role to safeguard the citizenry's security in times of peace, and for initiatives that can help transform the culture of violence that may exist in police forces as a consequence of years of conflict.
  - 1.2.5 Establishing property rights. A critical entry point in post-conflict justice relates to the clarification of titles and the recovery of registries. Real estate and land property titles may have been destroyed; often they were never registered, as a consequence of displacement or local culture and practice. In the post-conflict period such titles may be subject to conflicting claims by different people. Recovering registries, clarifying titles and supporting dispute resolution

mechanisms to deal with conflicting claims can be an important entry point in post-conflict situations. The concept of registering private property may vary according to culture. Therefore, representatives from local communities must participate in determining appropriate solutions.

- 1.2.6 Supporting transitional justice mechanisms. Transitional justice mechanisms have a crucial role to play in post-conflict settings; they assume a pivotal role in reconciliation and other peace-building endeavours. In addition to psychological benefits to victims, a truth and reconciliation commission can memorialize facts pertaining to the conflict, thereby undermining and rebutting misperceptions spread by those responsible for human rights abuses. Furthermore, such a commission can analyze institutional problems leading to the conflict so that citizens and leaders can make recommendations to deter future conflicts and abuses from re-occurring. Truth and reconciliation commissions also have a role to play in initiating and facilitating reconciliation within communities, and, in certain circumstances, at the national level. However, it is recognized that such commissions can usually only achieve enduring reconciliation if there is accountability for the most serious perpetrators of atrocities, usually in a formal justice context.
- 1.2.7 Enhancing the administration of justice and increasing accountability of the judiciary. Judges, especially those that lack experience, are often weak. At the same time, they frequently believe that the quality of what they produce would be compromised if their courts were managed by anyone other than themselves. However, efforts should be undertaken to ensure that courts are more responsive and efficient and accountable to the public they serve.
- 1.2.8 Supporting advocacy coalitions. Advocacy coalitions can help foster reforms in favour of poor and other disadvantaged people. They can also develop the capacities of the organizations involved, as they are able to share experiences and motivation. However, coalitions can suffer internal disagreement and frictions that can distract them from achieving their goals. Miscalculation in advocacy efforts can create a line of confrontation, particularly in sensitive post-conflict settings, rather than build a bridge for dialogue.

## ANNEX III

### Resources and Bibliography

#### UNDP RESOURCES

UNDP COs can draw upon a number of sources in addressing access to justice issues and judicial reform.

- Service line 3, “Access to Justice and Human Rights”, in the Democratic Governance Thematic Trust Fund (DGTTF) earmarks specific funds for the integration of human rights with development programming.
- Governance advisers (based in HQ, OGC and SURFS) are important resources persons on strategy and implementation of reform programmes.
- At the regional level there may be regional programmes, e.g., PARAGON, which works with parliaments on law reform, and with judges.
- The Asia-Pacific Rights and Justice Initiative is seeking to develop a community of practice both within and beyond the region, on access to justice (<http://intra.undp.org/bdp/surf-wsa/ap-a2j/>). An extensive toolkit for assessments and programming in the area of access to justice will be available on the website by June 2004.
- The Regional Bureaux of Latin America and the Caribbean with BDP have embarked on a project seeking to develop methodologies on how to promote access to justice and legal empowerment of the poor and other disadvantaged groups. Based on studies on intermediate-sized cities, the project aims at producing knowledge products, which will available to local governments for promoting access to justice.
- **The Regional Bureau for Arab States, through its Regional Programme on Governance has launched a regional project seeking to promote and strengthen the Independence of the Judiciary in the Arab Countries.**
- UNDP has a Memorandum of Understanding with the OHCHR on technical cooperation, which includes human rights training for the judiciary.
- DGPN network with over 700 members, many of them with specific expertise in the justice sector and on human rights.

#### PARTNER AGENCIES

Over the years, UNDP has been collaborating with several organizations active in the field of access to justice and judicial reform, namely the American Bar Association (ABA), Institute of Comparative Studies on Criminal and Social Sciences (INECIP - Argentina), Canadian International Development Cooperation (CIDA), Council for the Development of Social Science Research in Africa (CODESRIA), Department for International Development, (DFID), Inter- American Development Bank (IADB), Japanese International Cooperation Agency (JICA), Legal Resources Centre of South Africa, Organization of American States (OAS), Swedish International Development Cooperation (SIDA), Spanish Agency for International Cooperation (AECI), World Bank, regional banks in Africa and Asia, and the US Agency for International Development (USAID).

#### LISTS OF EXPERTS

BDP’s Democratic Governance Group, through Oslo Governance Centre and Headquarters and SURF advisers maintain rosters of experts that can be drawn upon as required. For Europe and the Commonwealth of Independent States, a roster of justice specialists is available from the Bratislava-based Regional Centre ([www.undp.sk](http://www.undp.sk)). Experts can also be

referred by the UNDP Headquarters and ABA programme of ILRC at LiuH@staff.abanet.org

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### Selected Reading

Michael Anderson, "Access to Justice and Legal Process Making Legal Institutions Responsive to Poor People in LDCs", Paper for discussion at WDR Meeting 16-17 August 1999, p.6, 9.

Upendra Baxi, "Access, Development and Distributive Justice: Access Problems of the Rural Population," Journal of the Indian Law Institute, Vol. 18, July-Sept, 1976.

Cappelletti, Mauro, and Bryant Garth, "Access to Justice: The Worldwide Movement to Make Rights Effective-a General Report." (Milan: Dott. A Guiffre Editore, 1978)

Golub, Stephen, "Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative", Carnegie Endowment for International Peace Rule of Law Series, Nr. 41, Oct. 2003

James M. Cooper, "Latin America in the Twenty-first Century: Access to Justice," 30 Cal. W. Int'l L. J. 629, Spring 2000

David M. Trubek and Marc Galanter, "Scholars in Self-Estrangement" 25 AM J. Comp. L., 492 (1977)

Revista Sistemas Judiciales, edited by Justice Studies Center of the Americas and INECIP, [www.cejamericas.org](http://www.cejamericas.org)

### Key Access to Justice Website Resources

<http://www.undp.org/governance/justice.htm>

<http://www.unece.org/env/pp/a.to.j.htm>

<http://www4.worldbank.org/legal/leglr/access.html>

<http://www1.worldbank.org/publicsector/legal/access.htm>

[http://www.dfid.gov.uk/left\\_bar.htm](http://www.dfid.gov.uk/left_bar.htm)

<http://www.adb.org/Law/default.asp>

<http://www.kentlaw.edu/jwc/access.html>

<http://www.judgelinek.org/a2j>

<http://www.inecip.org>

<http://www.acjnet.org>

<http://www.waaccesstojustice.org>

<http://www.accesstojustice.org>  
<http://www.cejamericas.org>  
<http://www.access-to-justice.org>  
<http://www.thearc.org/ada/crim.html>  
<http://www.txiolta.org>  
<http://www.accessjustice.ca>  
<http://www.lcd.gov.uk/atojfr.htm>  
<http://www.nuffieldfoundation.org/grants/accesstojustice/overview.asp>  
<http://www.pili.org/library/access>  
<http://www.texasatj.org>  
[http://www.brennancenter.org/programs/programs\\_pov\\_legalserv.html](http://www.brennancenter.org/programs/programs_pov_legalserv.html)  
<http://canada.justice.gc.ca/en/ps/franc/enviro/toc.html>  
<http://www.ids.ac.uk/ids>  
<http://www.lawasia.asn.au>

### Other Useful Websites and Links

Institutional websites

ABA-UNDP International Legal Resource Centre, the ABA-UNDP International Legal Resource Centre "ILRC", formerly the "Legal Resource Unit" was established in December 1999, based upon the common commitment of the American Bar Association 'ABA' and the UNDP to support and promote good governance and the rule of law around the world. Its mission is to provide legal resource capability to service UNDP global governance programmes and projects supporting legal reforms and democratic institution building. ILRC website can be accessed at [www.abanet.org/intlaw/ilrc](http://www.abanet.org/intlaw/ilrc).

USAID, [www.usaid.gov](http://www.usaid.gov), has worked on similar issues around the world. They recently published a good 'Handbook on Promoting Judicial Independence and Impartiality (<http://www.usaid.gov/democracy/dgtpindx.html#pnacm007>), which includes some case studies.

International Development Law Institute ([www.idli.org](http://www.idli.org)), among others, has experience in training judges.

Law and Judicial Reform

Law and judicial reform in post conflict situations: A case study on West Bank Gaza  
[http://www4.worldbank.org/legal/ljr\\_01/doc/lerley.pdf](http://www4.worldbank.org/legal/ljr_01/doc/lerley.pdf)

Challenges facing legal and judicial reform in post conflict environment: case study from Rwanda and Sierra Leone. [http://www4.worldbank.org/legal/ljr\\_01/doc/Mburu.pdf](http://www4.worldbank.org/legal/ljr_01/doc/Mburu.pdf)

Legal and judicial reform <http://www4.worldbank.org/legal/leglr/>

United Nations Mission in Bosnia and Herzegovina: Former Judicial System Assessment Programme (JSAP) – Reports <http://www.unmibh.org/news/jsaprep/index.asp>

## ANNEX IV

### Acronyms

AP-A2J	Asia Pacific Initiative on Access to Justice
ADR	Alternative Dispute Resolution
BCPR	Bureau for Crisis Prevention and Recovery
BDP	Bureau for Development Policy
CO	(UNDP) Country Office
CSO	Civil Society Organization
DEX	Direct Execution
DGG	(BDP's) Democratic Governance Group
ICT	Information and Communications Technology
MDGs	Millennium Development Goals
NEX	National Execution
NGO	Non-Governmental Organization
NHRI	National Human Rights Institution
OHCHR	Office of the High Commissioner for Human Rights
RBAP	(UNDP's) Regional Bureau for Asia and the Pacific
RBEC	(UNDP's) Regional Bureau for Europe and the Commonwealth of Independent States
RBLAC	(UNDP's) Regional Bureau for Latin America and the Caribbean
RBM	Results-Based Management
ROAR	Results-Oriented Annual Report
SRF	Strategic Results Framework
SURF	Sub-regional Resource Facility
TTF	Thematic Trust Fund
UNDP	United Nations Development Programme