



*Empowered lives.
Resilient nations.*

Accelerating Achievement of MDGs by Ways and Means of Economic and Social Rights

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Introduction

R. Sudarshan, Marcus Brand and Johanna Cunningham

This publication is the result of more than a year of discussions and exchanges on a variety of themes centered on what UNDP regards as its core mandate: the human development agenda. As the 2015 target date for the MDGs is rapidly approaching, and as efforts are underway to “accelerate” progress on various targets and indicators around the world, the debate about global development goals has already moved towards looking beyond 2015. The Millennium Declaration, from which the MDGs were later developed, sets out a set of values and principles to guide global development cooperation for at least the 21st century. The core values of human rights, the rule of law and democratic governance will thus remain as valid as ever, both as fundamental for defining a life in dignity for all human beings, and as an enabling framework for efforts to expand the benefits of human progress to all.

This collection of essays is aimed at offering insights into innovative and practical ways and means of realizing human rights, linked as they are to the MDGs primarily through social and economic rights, but also through the broader human rights context where the Millennium Declaration set development goals which later became known as the MDGs. The idea was to contribute to the debates among those thinking ahead of a future set of development goals in capitals and headquarters and to also offer concrete guidance and inspiration to development practitioners in the field, in particular those working in areas related to the MDGs. The document is targeted at national government and non-governmental development experts equally as to those working in UN agencies, or other governmental or non-governmental organizations.

In UNDP, there have been recurring discussions on the relationship between democratic governance, the rule of law, human rights and economic and social development for at least two decades. It has long been understood that the apparent dichotomy exists only at the surface and a comprehensive concept of rights and economic dimensions has been encapsulated in the human development paradigm. Nevertheless, it is worth revisiting some of the arguments leading to these insights, if only to avoid getting pulled into compartmentalized thinking as a result of administrative convenience.

From a human rights perspective, the MDG agenda has often been criticized for overemphasizing aggregate country-level analysis that mask sub national and social disparities, and often disregard serious human rights concerns. The efforts to find inclusive and sustainable access to the benefits of human development for all must continue to be based on a comprehensive and pro-active understanding of human rights concerns.

More than a decade after the MDGs were laid out, the discourse has shifted to stressing a reduction of inequalities, sustainability and inclusion. These are also cross-cutting issues, certain to be incorporated into any future development agenda, such as the one to be formulated at the Rio plus 20 and other agenda-setting world meetings in the coming years. A human rights approach to development naturally implies focus on the situation of

the most marginalized, most deprived and most disadvantaged. Efforts to dig through the often deceptive veneer of aggregate data and analysis make it possible to appreciate stark and growing inequalities within societies. This, notably, is the case for both developed and developing societies alike.

The MDGs remain relevant, even if the context in which they are considered may have changed significantly over the past ten years. We still aim at MDG acceleration, and a specially designed programme helping countries to roll out MDG Acceleration Plans has been designed. It leaves it open to countries and communities to decide which goals to concentrate on, and what targets and indicators to choose. However, it emphasizes the pursuit of equality, sustainability and inclusion as per the guidelines emanating from the 2010 review summit.

The debate between human rights and the MDGs, between democratic governance and economic development will continue to interest academics and is likely to be put on the table at the macro-political level at times, but from a practical and pragmatic perspective, there is no contradiction. UNDP has been at the forefront of advocating a broad-based, comprehensive understanding of the challenges of our time, and is well-placed to continue to do so in the coming years.

This publication aims to offer a number of concrete suggestions to the development practitioner, whether in government, civil society or with an international organization. The task of the contributors was to go beyond the often normative, general and high-minded approach taken by human rights advocates when addressing development practitioners often perceived as abstract lecturing. Instead, the authors wish to suggest innovative and practical ways and means to make a difference in terms of the MDGs and other development goals by promoting changes in the constitutional or legislative framework, legal empowerment, introducing affirmative action, applying a human development approach to social protection, disaggregating data and identifying, for instance, the special needs of indigenous communities, mobilizing public action through focused advocacy or campaigns, or leveraging the powers of the judiciary wherever possible in order to overcome “bottlenecks” that may hold up progress on human development indicators.

Authors of the chapters were selected on the basis of previous academic contributions in the field, but also demonstrated track-record in implementing relevant projects in the field, be that through advocacy, legal assistance or campaigning. The focus of this publication and of the examples highlighted herein is on the Asia-Pacific region, the vast and mind-bogglingly diverse space covered by the Asia Pacific Regional Centre of UNDP who sponsored this publication. Yet, it is of value to people in other parts of the world, as the constellations under which development and human rights issues converge are similar around the globe.

In the first chapter entitled, *Constitutionalising Socio-economic Rights: a Lifeline for the Millennium Spirit*, Yash Ghai and Jill Cottrell look upon constitutions as an instrument to eradicate poverty, as a charter of social justice and as a basis of national unity, without which it may be hard to develop social solidarity. This is an essential understanding for

achieving the MDGs. For a constitution to come to life it must be observed, used, and enforced. On one hand, Ghai and Cottrell argue institutions and procedures must ensure the constitution is usable – and these institutions and procedures can be provided by the constitution itself. On the other hand, people – the citizens, the people affected by denial of their rights, the people for whom the constitution is designed—must be motivated and able to make use of it. The authors make the case for incorporating the spirit of the MDGs in a nation's constitution. Notably, it is not the Goals or Targets, but rather the underlying spirit of the Goals, expressed in the Millennium Declaration, that can and should be constitutionalised. Fundamentally, Ghai and Cottrell stress that implementation of a constitution is not about this or that provision, or even the totality of the constitution, important as these are. The Constitution is about inculcating a culture of respect for and discipline of the law, acceptance of rulings by courts and other bodies authorized to interpret the law, giving effect to judicial decisions, acceptance of the limits on government, respecting and promoting human and collective rights as well as participation and empowerment of the people.

In Chapter II, *Ways and means of ensuring that social protection helps realize economic and social rights and achieve the MDGs*, Alison Graham addresses the role of social protection in mitigating the impact of risks and help realize the Millennium Development Goals (MDGs). This role is already well acknowledged, particularly in light of the recent financial, food and fuel crises coupled with environmental degradation exacerbated by climate change, all of which have impeded or slowed down the realization of the MDGs in many parts of the world. In fact the World Bank asserts, 'without appropriate social protection mechanisms, the MDG targets for 2015 will not be achieved.' Moreover, as repeatedly emphasized by the UN's human rights institutions, guaranteeing social protection is not a charity gesture but an obligation of States under international human rights law. Despite this consensus, however, there remains considerable controversy about what this means in practice with debate continuing to focus on implementation of protection programmes, i.e. whether they should be universal or targeted, the risk of possible stigmatization, the role of conditionalities and the question of financial affordability and ensuring sustainability. In answering some of these questions, this chapter draws significantly from the various reports and recommendations of the Independent Expert/Special Rapporteur on human rights and extreme poverty.

Chapter III *Access to a Legal Remedy: Alternative Pathways to MDG Implementation*, by Tiernan Mennen, underlines how accessing legal remedies is an important structural component for enforcing the spectrum of rights and benefits corresponding to the MDGs. Ensuring access to a legal remedy is an important component to any comprehensive strategy ensuring individual people can effectively challenge denial of their economic, social and cultural rights. This chapter examines the most effective approaches for providing access to a legal remedy and details how remedies can be better oriented to address economic and social rights and other legal issues that directly impact the MDGs. The preferred approach expands upon traditional criminal justice-focused legal aid programs to incorporate legal empowerment methodologies, such as paralegals, increasing the agency of individuals to use the law as a tool and promote integration of legal solutions to a wider swath of development issues such as health, education, and public services.

Chapter IV, written by **Timothy Dolan** entitled, *Methods of Identifying Regulatory and Legislative Barriers to Empowering the Poor*, is based on various initiatives on legal empowerment undertaken by countries around the world, including members of the Legal Empowerment Asia Partnership (LEAP). Given these countries' common aspirations, a guidance note on methods of identifying regulatory and legislative barriers to empowering the poor was commissioned by UNDP Mongolia to better equip practitioners and policymakers involved in legal empowerment of the poor (LEP) programming. The guidance note is targeted towards government officials, development practitioners and programme staff involved in programme/project design, management and monitoring. This chapter, based on the guidance note, presents a review and analysis of a selection of existing methods in the field to assist LEAP member countries and others in adopting their own methodology to identify potential laws and regulations presenting themselves as obstacles to empowering the poor.

In Chapter V entitled, *The Importance of Public Action in Realizing Social and Economic Rights: The Example of the Right to Food Campaign in India*, **A.K. Shiva Kumar** provides the example of India's Right to Food Campaign, which began in 2001 and continues to this date. It is an informal network of organizations and individuals committed to the realization of the right to food in India. The civil society driven campaign believes the primary responsibility for guaranteeing basic entitlements rests with the state and aims at partnering with and enabling state institutions to achieve this realization. In order for this to occur, the right to food requires not only equitable and sustainable food systems, but also entitlements relating to livelihood security such as the right to work, land reform and social security. One of the major achievements that can be at least partially attributed to the Campaign is the introduction of hot cooked meals for school-going children across the country. Prior to 2005, school-going children received 'dry rations' (or 3 kilograms of rice or wheat) every month. Today, more than 100 million children receive hot-cooked meals in school. This has had a significant impact in terms of ending classroom hunger, enhancing attentiveness in the classroom, boosting school enrolment and bridging social distances. It has thus contributed not only to attaining the MDGs on poverty, hunger and school attendance, but has also indirectly contributed to increased gender equality and better health of children across India. India's recent experience with the 'right to food' campaign underscores the importance of strong and effective public action within a democratic framework to end human poverty. It points to the need for building a broad coalition of support and forging partnerships with and beyond government to include multiple stakeholders who can design, refine and evolve a policy consensus. It also highlights the significance of putting in place constructive pre-legislative (and policy) processes to create public awareness, utilize evidence, dispel misconceptions, generate options and stimulate public discussions – as necessary inputs into the formulation of laws and policies.

Chapter VI, *Affirmative Action as a Way and Means of Achieving Economic and Social Rights and the MDGs* by **Alison Graham**, analyses how affirmative action (also known as special measures) such as preferential regimes in areas of employment, housing, education can be crucial in complementing development strategies to secure people's human rights and ensure that progress towards achieving the MDGs benefits everyone

and not just the privileged elites. Unless specific measures are taken to address such structural and systematic discrimination, development planning and implementation cannot benefit all. Equal treatment will only reinforce power asymmetries, contribute to further marginalisation, and skew the realisation of the MDGs with policies and programmes benefitting the elites. Although widely used, affirmative action is still subject to misconceptions about its use and legal dimensions. This chapter also clarifies its legal ramifications and specifically details what a rights-based approach to affirmative action entails and what conditions affirmative action measures must fulfill to comply with human rights standards and principles.

Allison Corkery, in Chapter VII on **National Human Rights Institutions**, recalls national human rights institutions (NHRIs) as being recognized with increased frequency as a key element in a human rights based approach to the MDGs. She looks at the evolution of NHRIs in the Asia Pacific region and goes on to examine how NHRIs in the region have exercised their mandated functions on economic, social and cultural rights in ways that contribute to implementing a human rights based approach; concluding the potential added value that NHRIs bring to the MDGs is a series of 'bridging' roles they play that can help strengthen the mutually reinforcing aspects of the MDGs and human rights. It has been suggested the recommendations of NHRIs can help the strategy of governments in prioritizing development objectives to meet the MDGs. In some cases, an institution will be given an explicit mandate to do this. In some countries, a Human Rights Commission is the convener of committee on implementing the country's development plan. In other cases, policy guidance can come from a country's human rights action plan. Several countries in the Asia-Pacific have adopted such plans, with NHRIs playing a key role in their development. Recommendations made in the context of specific investigations can also guide policy. Nevertheless, expectations on NHRIs need to be realistic and the final part of the chapter therefore identifies some of the challenges facing NHRIs in addressing economic, social and cultural rights, before suggesting ways development partners can support NHRIs to address these.

Rajat Khosla, in Chapter VIII entitled, *The MDGs and Human Rights: An Indigenous Peoples' Perspective*, notes that globally, indigenous peoples remain severely affected by poverty and have not been given ample attention in MDG-related processes. Indigenous peoples have the right to benefit from the MDGs and fulfill the aspirations contained in the UN Millennium Declaration to the same extent as others. However, in a majority of countries where indigenous peoples live, they are lagging behind other parts of the population in the achievement of these goals. Indigenous peoples have distinct and unique cultures and world views, and their development needs and aspirations may differ from the mainstream population. The indigenous peoples' approach to development is based on the principles of respect for and preservation of land, natural resources and all elements of the natural environment; consensus in decision-making; mutual respect for peoples' values and ideology, including sovereignty over land, resources and the environment under natural law. The emphasis is on recognition as distinct peoples, and development has to encompass the social, cultural, political and institutional dimensions of their identity and rights. This chapter draws out connections between each MDG goal and the

UN Declaration on the Rights of Indigenous Peoples, and provides recommendations for policy and practice change to promote the rights of indigenous peoples and accelerate achievement of the MDGs.

Chapter IX, **Legal Identity and MDG Implementation** by **Tiernan Mennen**, lays out how possession of legal identity is a fundamental threshold for gaining access to a range of goods and services that have the potential to improve people's lives and help countries achieve the MDGs. Legal identity establishes citizenship and/or residency and can provide access to education, health care and social welfare, registration of title to land, receipt of pension or social security, obtaining utility connections, enforcing inheritance rights, and even registration and protection of small businesses. Legal identity also protects human rights such as freedom of movement, property rights, and the right to vote; helps limit crimes against minors such as trafficking and child labor; and improves government databases for better development planning and the adequate and equitable distribution of public resources to those who need it most. Despite the fact that legal identity is a cornerstone for access to justice and legal identity is an unequivocal provision in the Universal Declaration of Human Rights, tens of millions of people still lack formally documented legal identity. As legal identity affects development objectives pertaining to virtually all of the MDGs, and as its causes and ramifications are often not readily apparent upon initial program design, development organizations should anticipate legal identity barriers and consider potential interventions.

Chapter X, **Legal Empowerment and Organization of Vulnerable Groups** by **Madhu Kishwar** is a personal account of three decades of advocacy on behalf of India's rural and urban poor. Kishwar describes the various insights she and her organization, Manushi, have gained over three decades working on reforming inheritance legislation in rural Bihar, the successful use of mythology-based community mobilization to enhance women's economic rights, and years of campaigning for a more sensible pro-poor approach to regulating rickshaw pulling and street hawking in Delhi. She concludes that potential of legislation as an instrument for strengthening the rights of vulnerable groups can be realized only if such efforts recognize inherent limitations, especially when dealing with groups positioned so precariously in the social, economic and political hierarchy that any assertion of legal rights endangers their very lives at the hands of powerful groups at whose mercy they currently survive; Create an effective, non-partisan and accountable machinery for its implementation; Ensure the law-and-order machinery—notably the police and judiciary—is willing and capable of offering protection and redress to those whose legal rights are being violated; Have the ability to create a broad-based social consensus on the desirability of empowering vulnerable groups through specific legal measures; and rely more on *enabling legislation* instead of enacting draconian, punitive laws that inevitably lend themselves to easy abuse and sabotage if the law and order machinery is not designed and geared towards protecting the rights of vulnerable groups.

The final chapter, **Relinking the MDG Acceleration Framework with human rights and democratic governance – proposals for widening the scope of the MDG agenda in Asia-Pacific** by **Marcus Brand**, is based on a paper written in the context of discussions

within UNDP and the wider development community in Asia-Pacific on how to structure programmes aimed at meeting the Millennium Development Goals (MDGs) by 2015. As per UNDP's 2010 MDG Breakthrough Strategy, renewed and concerted efforts are to be made to help developing countries accelerate progress towards reaching the Goals, but also to ensure longer term sustainability of the progress made, and to ascertain that the overall progress made by countries also reaches the poorest of the poor, marginalized people and those otherwise left behind. The Chapter discusses the MDGs within the context of the Millennium Declaration and revisits debates of the past decade on the complex relationship between the Millennium Declaration, the MDGs and Human Rights. It briefly summarizes actual progress made in the context of the MDGs a decade into the new Millennium and offers an interim view on the MDGs' effectiveness to implement the Millennium Declaration's aspirations. It captures the main features of the 2010 review, and various efforts aimed at breakthroughs and acceleration. In doing so, the article finds that while the relationship between human rights, governance and the MDGs has been dealt with exhaustively at the conceptual level, in practice there has been a mixed record integrating the two frameworks.

At the global level, the MDG process appears to have moved away somewhat from the language of human rights and democracy, but has nevertheless taken up an important component of a human rights approach, namely the identification of disparities and inequalities within countries as a main issue to be addressed within the MDG context. However, the chapter also finds linkages between human rights, governance and the MDGs were not incorporated into the MDG Acceleration Framework (MAF) to the extent that they could have been, and much of the current reporting and programming on MDGs still fails to take this connection fully into account. Finally, the chapter proposes a number of concrete steps regarding how ongoing and future MDG-related efforts could benefit from stronger linkages to human rights and democratic governance. The chapter ends with a tentative outlook and some reflections for a possible post-MDG development agenda, which needs to be fully aligned with the values and principles of the Millennium Declaration, and should integrate a human-rights-based approach, governance dimensions and human development more comprehensively from the outset.

Most of the papers include recommendations to UNDP, or other development organizations to be taken into account when designing programming for MDG acceleration or human development. UNDP programmes, as well as country strategies and development plans, routinely include references to human rights, a human rights based approach or the interrelations between governance and development. However, the practical insights, case studies and innovative solutions identified herein will still provide useful additions to what has been emerging as a growing consensus among development practitioners at the country level. It is anticipated the experiences at both policy as well as project level made by UNDP and others will continue to inform academic analysis and debates in the coming years, and the future development goals to guide the world beyond 2015, will be firmly based on insights thus collected.

Constitutionalising Socio-economic Rights: A Lifeline for the Millennium Spirit

Jill Cottrell and Yash Ghai

1. Poverty, Development Goals and Rights

Poverty

Poverty constitutes the lack of qualities that facilitating a good life, defined in terms of access to conditions supporting a reasonable physical existence enabling individuals and communities to realize their spiritual and cultural potential—opportunities for reflection, artistic creativity, development of and discourse on morality, and contribution to and participation in the political, social and economic life of the community.

Poverty is created by societies and governments. It is about exclusion, physical and economic insecurity, fear of the future, a constant sense of vulnerability. The essential purpose of human rights, a life in dignity, is rendered impossible by extreme poverty. Not only do poor people enjoy disproportionately small measures of economic rights like education, health, and shelter, but they are equally unable to exercise civil and political rights, which require not only an understanding of the dynamics of society and access to public institutions, but also confidence in themselves. They are, for the most part, unable to use legal processes to vindicate human and legal rights.

Development Goals

It was in the belief that poverty could be eradicated that the Heads of States and Governments committed the UN and their states to the Millennium Declaration. It includes:

- respect for human rights and fundamental freedoms
- the rule of law and good governance
- making the right to development a reality for everyone
- more generous development assistance
- sustainable development
- special regard for the neediest countries and people

It also allows for certain principles to guide international relations, including freedom (in the widest sense based on the will of the people), equality, solidarity (meaning costs and burdens of meeting challenges must be fairly distributed in accordance with equity and social justice), tolerance, respect for nature and shared responsibility.

The Declaration carved out a series of more specific, inter-related and mutually supporting Goals. These constitute the “MDGs”:

1. Eradicate extreme poverty and hunger
2. Achieve universal primary education
3. Promote gender equality and empower women
4. Reduce child mortality
5. Improve maternal health
6. Combat HIV/AIDS, malaria and other diseases
7. Ensure environmental sustainability
8. Develop a global partnership for development

It was realised something more was needed to engage specific commitment from countries, and the imagination of their peoples, in the form of a set of specific targets by fixed dates. The targets have both kept the MDGs alive, and caused great criticism. For many targets, the year 2015 was selected – so that, taking 1990 as a baseline, 25 years was given for the achievement of the targets.

More detailed “indicators” have been developed in order to assess whether progress is being made towards the Goals, designed as “relevant and robust measures of progress”, to be “clear and straightforward to interpret and provide a basis for international comparison” and “constructed from well-established data sources, be quantifiable and be consistent to enable measurement over time”.¹

As 2015 approaches, there is not just concern that the targets have in many countries not been achieved, but a worry that, whether they have or not, impetus and commitment will evaporate. This paper proposes renewed commitment may be stimulated by focusing on rights, especially economic, social and cultural rights.

Rights

“We have a right” is a very special claim, implying that this has priority over others’ entitlements, or perhaps even a nation’s interest. One of the most remarkable developments of the twentieth century was the adoption of the Universal Declaration of Human Rights (UDHR) in 1948 following the Second World War and the establishment of the United Nations.

The UDHR, and the Millennium Declaration share a focus on “human dignity” which encapsulates various ideas, distinguishing the human person from other creatures, linking, for believers, the human person to God, or emphasising the essence of the human person who seeks acknowledgement and self-respect, and is indirectly related to community and human solidarity. It supplied a theoretical basis for the human rights movement. An

1 See http://devdata.worldbank.org/gmis/mdg/UNDG%20document_final.pdf.

important way the concept of human dignity has been used² is to highlight basic needs of all persons. The Millennium Declaration in its first value, “freedom”, emphasises: “Men and women have the right to live their lives and raise their children in dignity, free from hunger and from the fear of violence, oppression or injustice”.

The UDHR sees no conflict between various types of rights, civil and political rights, or economic and social; they are mutually supportive. The work stresses “social progress and better standards of life in larger freedom”. Unfortunately, ideological and material conflicts between western capitalist and communist states obscured the unity of rights and led to the denigration of economic and social rights. Now, the Millennium Declaration has drawn fresh attention to conflicts by committing Heads of State and Government, “To respect fully and uphold the Universal Declaration of Human Rights” (para 25).

The UDHR has no real legal “teeth” hence, two Covenants were established in 1966: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR), as well as subsequent human rights treaties. Each covenant has a reporting mechanism for states which comments on performance. These are supplemented by “special procedures” of the UN, especially special rapporteurs, mainly on particular topics.

Civil and political rights include the rights to life, personal liberty and security including freedom from torture and inhuman and degrading treatment, or forced labour, fair trials and treatment for the detained, freedom of movement, thought and belief, association, assembly and expression, equal rights in marriage and generally, rights to take part in public affairs and to privacy and rights of minorities “to enjoy their own culture, to profess and practise their own religion, or to use their own language”. The ICESCR includes the rights to work, and to fair conditions in work, to organise for work purposes, to social security, adequate standard of living, including adequate food, clothing and housing, to the highest attainable standard of health, to education, to cultural life, as well as the protection of the family and mothers, and of children from exploitation.

The Convention on the Rights of the Child (CRC) and the Convention for the Elimination for All Forms of Discrimination Against Women (CEDAW), on the Rights of Persons with Disability and ILO Convention and UN Declaration on the rights of indigenous peoples elaborate these rights for particular groups. Often, these add clarity and detail to wider covenants for socio- economic rights. This is especially true of the CRC. However, there is sometimes a particular emphasis that might be less obvious, for example, mention of breastfeeding for children, of equal pay for work of equal value for women, or the requirement of prior informed consent for development affecting indigenous peoples.

The Rio Declaration on Environment and Development 1992 speaks of “entitlement” to a healthy and productive life in harmony with nature. An important aspect of the

2 For a detailed analysis of the way in which international and national tribunals have interpreted and used the concept see Christopher McCrudden, “Human Dignity and Justiciability of Human Rights” 2008 *European Journal of International Law* 19.

environment is that it is not something that only an individual enjoys, but it will inevitably be something that affects a community, a region or the planet as a whole. Rights of communities as such have been recognised, particularly for indigenous peoples: e.g., Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to cultural methods of teaching and learning.” (2007 UN Declaration).

We draw no hard line between various types of rights, because:

- It is not possible to draw any clear line between different sorts of rights.
- The underlying basis for all rights is respect for human dignity.
- Distinctions between rights tend to suggest some are more important than others.
- Poverty, as has been said, is the greatest violation of rights, and it undermines all rights, and dealing with it needs all rights.
- It is a serious over-simplification to suggest that civil and political rights are cost-free and socio-economic rights expensive, or that civil and political rights just require governmental restraint, while socio-economic rights require positive actions.
- In most countries, it will be political action that brings about change, and protects socio-economic rights.

There are also regional human rights treaties and mechanisms, especially in Europe, with the oldest and most effective system, based on the European Convention on Human Rights 1950, the American Convention on Human Rights and the African Charter on Human and People’s Rights. The only broad region currently without its own treaty is Asia/Pacific, though there are some sub-regional instruments and bodies, notably the Arab Charter and the ASEAN Intergovernmental Commission on Human Rights.³

National systems of human rights protection

The primary responsibility for human rights remains at the state level, and it is at the national level that policies and decisions are made having the greatest importance for the enjoyment of rights. A national system of human rights protection involves not only institutions and rules that are designed for human rights protection, but a whole range of bodies, laws, and practices, including:

- The constitution and other major laws
- Bodies for accountability including parliament, ombudsman bodies, human rights commissions, police complaints bodies, anti-corruption bodies and so on
- The institutions of democracy, such as the electoral system, political parties, local government
- Bodies for law enforcement, including the Attorney-General, police, prosecutors, the judicial or court system
- Administrative policies and actual practices

3 See <http://www.asean.org/22769.htm> for the latter. Unofficially there is the Asian Human Rights Charter (<http://material.ahrchk.net/charter/>).

- The political culture – traditions, attitudes and practices about public life
- The media – how they work, who owns them, how they are regulated, and their traditions and cultures
- Business, commercial and productive activity – who controls what, how far the economy is controlled locally or by international forces, how far the state controls the economy and regulates the forces that affect incomes and resources
- Civil society, the part of society standing between purely private and public institutions: associations, religious groups and so on, and what part it plays, by virtue or law, tradition, or conviction in the life of the nation
- The education system, which not only fulfils rights, but can play an important role in teaching people about their rights and in developing respect for others' rights
- The “international community” – the UN, INGOs, international aid agencies, and so on.

The role of civil society

At all three levels (the international, the regional and the national), the importance of civil society is enormous. Civil society has become the key actor in the realisation of human rights: advancing proposals, auditing the performance of public and often private sectors, enforcement (e.g., through the use of public interest litigation) etc. But civil society has its weaknesses: it can be co-opted, or even created, by the very powerful groups it purports to oversee. In poor countries, much of civil societies' funding is likely to come from overseas sources that may not understand the dynamics of the country that also have their own agendas.

It is the regime of rights enabling NGOs to perform their promotional and investigative role, which has generally proved more effective than internal state mechanisms for accountability. The language of rights makes people conscious of both their oppression and the possibility of change. 'Rights' have been extraordinarily effective as a basis of networking in and across states. They have demonstrated the possibility of international solidarity, particularly for women and indigenous peoples.

Obligations under socio-economic rights: respecting, protecting, promoting and fulfilling

The Covenant on Economic Social and Cultural Rights obliges a government to take steps “to the maximum of its available resources, with a view to achieving progressively the full realization of the rights ... by all appropriate means” (Art. 2) — not to achieve miracles. The nature of the obligation has been analysed in some detail by the Committee on the Covenant and by various Special Rapporteurs. Firstly the state must achieve “at the very least, minimum levels of each of the rights” and to give priority to achieving this minimum level. Beyond that the duty is to ‘respect, protect, promote and fulfil’ the rights. This way of analysing the duty of the state fits perfectly well with its duty to respect civil and political rights as clearly stated in the Constitution of South Africa.

“Respect” would mean that the state must not confiscate printing machines or television cameras or detain journalists as this would deny the freedom of information as well as the freedom of expression. A government that seized farmers’ land, without providing for compensation or resettlement, so that farmers lose their livelihood, would probably be violating the right to an “adequate standard of living” of the farmers, of the right to work, and perhaps of the right to food more generally.

“Protecting” would include ending discriminatory hiring or admissions policies, or prohibition of the use of one’s mother tongue in private or educational institutions, or attacks on the institutions or practices of a community’s religion by racial or religious bigots, trying to stop international fishing boats destroying the livelihood of local fishermen, or requiring private schools to observe standards to satisfy the right to education.

“Promote” and “fulfil” both involve positive actions by the state. These may involve education and encouragement – taxation systems that stimulate fulfilment, for example. A state might ensure the right to housing by making available sufficient land, or ensure health by ensuring the supply of affordable medicines. Sometimes the state must go further, for example providing feeding programmes in case of droughts. The choice of particular methodology to achieve rights is a matter of policy for the government.

Much thought has also been given to the question, “a right to what?” Food must be adequate in quantity, and in nutritional value, accessible and available, and culturally acceptable. The right to “education” is to accessible education, appropriate in content and quality. The right to health does not mean a right to be healthy – but would include a right to health care that is reasonably accessible (geographically and financially) and of reasonable quality, as well as culturally and in other acceptable ways.⁴

States are required to achieve fulfilment of rights “progressively”, but to do so “to the maximum of their available resources”. The committee on ESCR has emphasised that lack of resources does not mean a state may postpone beginning the process of realisation of rights, though progress may be dictated partly by resources.

How MDGs and Rights relate to each other

National and international organisations working to support fulfilment of the MDGs and of rights, especially socio-economic rights, use similar tools to assess progress towards the fulfilment of both. However, some organisations perceive themselves as working only towards MDGs, or see themselves as human rights organisations. Here we simply intend to suggest ways for taking account of both, with the valuable common agenda of eliminating poverty.

4 For the last see General Comment No. 12 on “The right to the highest attainable standard of health”, E/C.12/2000/4.

MDG analysis may benefit rights work

A great deal of work has managed to develop targets and indicators to achieve the MDGs. This information, and these approaches, can be used by governments and organisations approaching development from a human rights perspective.

“[H]uman rights analysts find it difficult to factor in progress that is deferred, or uneven but positive, or to balance benefits of reform (for some) in relation to risks and threats (for others) over time”⁵ This is less true of individuals who focus on socio-economic rights and “progressive realisation.” However, MDG thinking about long term goals may help correct this sort of myopia.

Rights may support the achievement of the MDGs – and longer term development

In the context of constitution making and implementation, this is an obvious linkage. We propose:

- a rights analysis can counter a possible tendency of MDG analysis to focus on figures, and overlook the basic truths that motivate both sets of goals, particularly the emphasis on human dignity, and the worth of every person
- a rights analysis will draw attention especially to the needs of the most vulnerable sections of society, even if not identified (as children are) in the MDGs
- a rights analysis will, or should, encourage a rounded approach – rather than isolating particular markers of disadvantage
- a rights analysis lifts one’s horizons beyond current deadlines to the longer term: reaching 2015, whether specific goals have been achieved or not, is not, or should not be the end of efforts to realise the Millennium Declaration; the rights approach underlines this

Rights provide a framework for action

A narrow focus on goals may obscure an important point that rights emphasise: that the journey is as important as the destination. We can see this most clearly, perhaps, with the international instruments on the rights of indigenous peoples, and also on the rights of persons with disability. The focus on dignity and participation, found within these instruments, reminds us it is insufficient to focus on outcomes.

5 Robert Archer, ODI meeting see http://www.odi.org.uk/events/rights2005/meeting_10jan/archer.pdf.

2. Constitutions and Constitutionalism

A country's constitution, as fundamental law, provides the framework for structures and powers of the state. Generally, all laws, policies and administrative acts must be compatible with it.

In “developing societies”, the state is distanced from society, usually having its origins derived from colonial rule. Often, the constitution does not have effective links to either society or even the state. There is often no dominant social class or force in society and people may be divided by caste, tribe, religion or language, and forced together by an outside power, now departed. In this situation, the role of the constitution is significantly different in comparison with established societies. The constitution can be seen as a major symbol of the state and as creator of a sense of nationalism and national belonging. Many recent constitutions are designed to create stability through unity, even if that unity is generated by the recognition of ethnic and other differences. In more enlightened constitutions for this purpose, considerable emphasis may be placed on social justice and inclusion, as the only guarantee of peace and stability in a multi-ethnic society. Here we look upon the constitution as an instrument to eradicate poverty, as a charter of social justice, and as a basis of national unity, without which it may be hard to develop social solidarity, so essential for achieving the MDGs.

For a constitution to come to life it must be observed, be used, and be enforced. There must be institutions and procedures to ensure it is usable – and these institutions and procedures can be provided by the constitution itself. On the other hand, people – the citizens, the people affected by denial of their rights, the people for whom the constitution is designed—must be motivated and able to make use of it.

We believe there is considerable value incorporating the spirit of the MDGs into a nation's constitution. Some may object: an important part of the appeal of the MDGs has been the idea that “we can make poverty history” and “in our lifetime”. Some would say putting the MDGs into a national constitution is to constitutionalise poverty, when the whole thrust of the MDGs was to deny its inevitability. Some will object that a constitution is something that ought to last and should therefore be timeless. But it is not the Goals or Targets, but rather the underlying spirit of the Goals, expressed in the Millennium Declaration, can and should be constitutionalised. Even if the Goals were realised in a particular society, continued vigilance is needed to maintain that progress. The Goals are benchmarks for the journey to a just society.

Constitutions should not be changed at whim, but the supposed perpetuity of the constitution should not be made an article of faith either. A constitution should respond to needs of a particular country, and reflect what citizens believe is important. One price for this is the likelihood that the constitution will be changed or even replaced. The Constitution of India, an aspirational document, has been changed 96 times.

A constitution is a national document – the national document – but the MDGs were a commitment of an entire community of nations. The importance of the constitutionalisation of MDGs and socio-economic rights arises from the fact that the primary responsibility for their promotion lies with national governments and societies, despite the considerable development of international norms and institutions.

Some argue a constitution should be value neutral, and its sole function is to provide rules for the formation of government and the mode of decision making in the legislature and other state organs. In reality, no constitution is neutral, even if it does not explicitly contain any values. A constitution restricted to rules on formation of, and decision making within, the government is not neutral but is directed towards maintenance of the economic and social status quo.

Similarly, the argument regarding the sole purpose of a constitution is to limit and restrain the exercise of political power, is also often an ideological position ensuring that those who are already dominant in society enjoy maximum freedom, with the state only responsible for maintaining law and order.

Some believe values cannot normally be stated with clarity and it is difficult for courts to interpret implications of values for state action, weakening the constitution. However, a constitution is not just a legal document but also a political and social document as well. In truth, most constitutional provisions have a degree of ambiguity and the courts are routinely asked to interpret values or abstract terms, even if they are not labelled “principles” or “values”.

A further objection stipulates values and aspirations as being hard, if not impossible, to implement, and this failure diminishes the legitimacy of the constitution, disappointing those who have high expectations, and giving rise to the dangerous idea that the constitution need not be taken seriously or that some of its provisions can be ignored. This criticism implies accepting that a just society is impossible. Anyway, no constitution is without values and in truth, no constitution is fully implemented.

In other words, we are not convinced by those who prefer a particular minimalist constitution. More importantly, citizens in developing states are not convinced. On one hand, citizens want justice and inclusion for themselves. However, there is often little sympathy for the poor and oppressed of other communities. “Nation building” based on common citizenship is essential for many purposes, particularly commitment to a wider sense of social justice. A constitution is a valuable tool for this.

There is often little familiarity with the modalities and morals of state power, or the true significance of democracy. Consequently it is necessary to spell these out in a constitution, to guide the exercise of power and establish new institutions of accountability, since society is unable on its own to do this effectively. The full range of human rights, as a primary component of meaningful democracy, must be fully reflected in the constitution and the design of political organizations.

The very process of making or reviewing a constitution – a process which mandates articles of faith be participatory⁶ – can promote public contribution to its agenda, gain legitimacy among the people, respond to imperatives of justice, and ensure greater knowledge of the constitution and prospects of its implementation, including the MDG spirit. Constitution making or review is a marvellous opportunity to engage people in discourses on constitutions, human rights, democracy and social justice. People can be quite focussed on the process as much publicity is given in the media to issues of reform. The process can be used to promote knowledge as well as practice of democracy.

A. Effective Protection of Rights

What legal effect should be given to rights?

Rights can be recognised in the constitution in at least four ways, although these are not mutually exclusive. Most preambles now refer in some form to human rights: either to recognise past violations of rights or to emphasise the commitment of the state to protect rights. A Declaration of Fundamental Principles has been a feature of constitutions in the civil law tradition but is now becoming common practice in other countries as well, such as those with a common law tradition.

In some constitutions (e.g., Ireland, India, Namibia, Uganda, Ghana, Nigeria, Bangladesh and Papua New Guinea), certain rights, mostly socio-economic rights, are drafted in the form of “Directive Principles of State Policy”. India’s Principles include, “effective provisions for securing the right to work, to education and to public assistance in case of unemployment, old age, sickness and disablement and in other cases of undeserved want”. The constitution states directive principles are “not enforceable by any court” (often described as being “non-justiciable”), but they are “nevertheless fundamental in the governance of the country” and the state is under a duty to “apply these principles in making laws”. The Ghanaian constitution goes further when it states directive principles “shall guide all citizens, Parliament, the President, the Judiciary, the Council of State, the Cabinet, political parties and other bodies and persons in applying or interpreting this Constitution or any other law and in taking and implementing any policy decisions, for the establishment of a just and free society”.

We would advise against an optimistic assumption that broad portmanteau, like the right to life, preambles or directive principles will actually protect socio-economic rights, at least in any predictable and comprehensive manner. The expansions of other rights do not comprehensively cover the socio-economic rights. There is no guarantee at all that a court will take a sufficiently creative approach. In many countries, the right to life is used to refer only to issues like the death penalty and abortion, and the clause that says Directive Principles cannot be used as the basis of a claim in court is taken very literally.

6 This is a topic we do not have space to explore here. A detailed discussion can be found in Brandt, Cottrell, Ghai and Regan, *Constitution-Making and Reform: A Handbook* (Geneva: Interpeace, 2011)

Of the different ways of recognising rights, the most legally effective is in the form of legally enforceable, fundamental or human rights. With the agenda of the MDGs in mind, socio-economic rights should be expressed in the form of justiciable rights, as has been done in South Africa and Kenya. In this way, they will not be seen as inferior to civil and political rights, and state agencies, including courts, will have to harmonise all kinds of rights in an integrated scheme of entitlements. Basic commitment to a regime of rights through the preamble or statements of national values and principles is a useful supplement by highlighting the importance of human rights and enabling interpretations of other legal concepts and provisions in the context of human rights. These preambular statements or state principles are also a good place to indicate the objectives of human rights, such as human dignity and democracy. Some desirable objectives may be hard to turn into rights so directive principles or values would be the best place for them. Something like “elimination of poverty” or “conservation of resources” is not something that can be made a right of any person or group.

Using Declarations and Directive Principles

Despite the reservations expressed earlier about “non-rights creating” provisions in constitutions, the fact that a state does not have clear rights to food, housing, education etc in its constitution does not mean the constitution cannot be used to further these rights. Lawyerly and judicial creativity as well as different traditions of interpretation may be brought to bear for good effect. There remain a few countries where constitutions are not actually considered to be legal, as opposed to essentially political documents. This fact is evident in China. In 2001, the Supreme People’s Court seemed to be moving towards recognition of rights, but a few years later it returned to orthodoxy from what some Chinese scholars regard as an “odd decision”.

The UN Committee Against Torture has included certain demolitions of houses as a violation of the Convention Against Torture’s prohibition on “cruel and degrading treatment”, thus protecting the right to housing – a strategy that could also be used by lawyers and courts domestically. However, it is unwise to assume a court will take an expanded view of a right that is silent on a particular point. For example, the Constitutional Court in Hungary declined to hold the right to social security having a general right to housing, though it might include a right to shelter in emergency.⁷

Increasingly, courts are giving effect to directive principles in different ways. Courts may be used to justify qualifications on rights, such as the right to equality, which has been read to permitting affirmative action when a directive principle requires the state to redress the historic or contemporary injustices inflicted on a section of the community. In another instance, the courts used the directive principle on living wages and decent conditions of work to uphold the reasonableness of minimum legislation. The right to life has been interpreted with the help of directive principles to include the right to basic needs and a

7 Decision No. 42/2000. (XI. 8.) AB; see the website of the Court at http://www.mkab.hu/content/en/en3/42_2000.pdf.

clean environment.⁸ Courts have used directive principles as the basis for giving directions to governments, legislatures, and administrators to promote social justice. It is in India that directive principles have most infused rights, but similar developments have been seen in Ireland and Nepal. The Supreme Court of Ghana held these principles as enforceable – since the Constitution does not say otherwise.

In civil law countries, or areas (mostly) outside former British colonies, different traditions of legal drafting and interpretation may mean what seems to be on the surface as rather broad and aspirational provisions are actually used for a very real and concrete effect.

Another difference between civil and common law countries is many of the former recognise international treaties as forming part of national law, while most of the latter require a treaty to be “domesticated” or for national law to be passed introducing treaty provisions or provisions based on national law. So the Supreme Court of Argentina could decide that the State’s failure to arrange the production of a vaccine for a common and endemic disease was a violation of the right to health under the ICESCR,⁹ and there are a number of Colombian cases based on international treaty obligations. Even some common law countries have recently adopted the direct application approach, including Nepal and Kenya, but how this will work in practice is not yet clear.

In other words, the absence of constitutional provisions clearly recognising legally enforceable rights is not necessary resulting in the courts’ inability to give those rights meaning.

Nor are the courts the only, or even the most effective, way to protect rights. Ultimately, rights depend on governments far more than courts.

ESCR as enforceable right

If a country does have the opportunity to draft or revise its constitution, and to make socio-economic rights enforceable, how should these provisions be drafted? The following are suggestions for rights generally:

- Ideally, rights should be binding and enforceable without need for further legislation, avoiding phrases like “as provided in law”.
- If there is a genuine need for new laws and standards before a right can be effective, the constitution should be drafted in a way that such necessity is not used as an

8 See for example The Indian Supreme Court in various environmental cases such as *Rural Litigation & Entitlement Kendra vs. State of U.P.* AIR 1985 SC 652, *Indian Council for Enviro-Legal Action vs. Union of India* AIR 1996 SC 1446 and the various cases brought by M C Mehta mostly named *M C Mehta v Union of India*, including 1996 (4) SCALE (SP) 29 (pollution affecting the Taj Mahal), AIR 1988 SC 1037 (Ganges Tannery case), and very recently the Supreme Court’s order on mining in the Aravalli Hills in the case Writ Petition (C) No. 4677 of 1985 on May 8 2009 see <http://www.indiankanoon.org/doc/1188746/> (see a list of those cases at <http://www.elaw.org/resource/topic/1721>).

9 Viceconte, Mariela c. Estado Nacional (Ministerio de Salud y Ministerio de Economía de la Nación) s/ Acción de Amparo (1998) http://www.escri-net.org/caselaw/caselaw_show.htm?doc_id=419811&country=13475

excuse for total inaction, deliberately or by oversight. The Constitution could provide that after a transitional provision with a timetable for implementation, the courts could be free to apply the right, with it still being open to the legislature to pass laws for clear definition.

- As far as possible, rights should benefit not only the citizens of a country but others within the country too.
- A modern understanding of rights, even of some of the longer recognised ones like the right to life, now emphasize not just the negative obligations of the state – its duty of restraint—but also its more positive duties. It is not necessarily appropriate to spell out in detail what those positive obligations are – this will be for policies and politics to determine.
- Equality is a key feature of virtually any modern Bill of Rights. There is no need to inquire whether there was an intention to discriminate – both direct (intended) and indirect discriminatory treatment should be prohibited.
- Drafters of rights provisions should consider whether it is appropriate in the context of the particular country to recognise rights of particular groups: religious groups or ethnic, especially indigenous peoples.
- Other special rights that appear in many modern constitutions could best be described as “targeted rights” – which essentially guarantee, and underline, for specific groups with particular difficulties, the rights generally recognised as those of members of society, for example persons with disability, children and the elderly. Some constitutions have mentioned specially the rights of prisoners. The inclusion of such special rights in a constitution would encourage the members of the community in question to insist on their rights, and also help them feel accepted in society. The rights would also guide unimaginative or inexperienced lawyers, and courts, especially those unaccustomed to applying international norms.
- Some modern constitutions (including South Africa and Kenya) apply human rights “horizontally” – or between citizens and persons, as well as between the individual and the state. In any country, major rights abuses come from society rather than directly from the state. The treatment of women, Dalits and indigenous peoples are examples of abuses while corporations increasingly wield power. The duties may not be exactly the same as for the state – especially for drafters who have to consider whether it is appropriate for non-state actors to be obliged to protect and fulfil as well as to respect rights, and non-human actors (like companies) should not have the full range of rights enjoyed by human beings.¹⁰
- The drafters must be careful to ensure necessary precision while striving to achieve rights that are clear for the ordinary citizen.
- Though it is necessary to establish limitations on most rights, the drafting of these provisions must be socially careful to avoid giving *carte blanche* to government and to ensure that this by-passing of rights takes place only when unavoidable and for genuinely greater good purposes.

10 The UN Special Representative on business and human rights John Ruggie has developed Guiding principles for business in implementing the UN ‘Protect, Respect and Remedy’ Framework: see <http://www.business-humanrights.org/Documents/UNGuidingPrinciples>

Socio-economic rights: how should they be framed?

Some constitutions address social and economic rights rather generally by stating, “Everyone has the right to health”. Others include considerable detail. The details may be more important for some rights as opposed to others. There are two aspects of detail: (i) when one says a right to something, what is it a right to? and (ii) what must be done to achieve that right? As we have seen, there has been a good deal of elaboration internationally of the former aspect: often referring to issues like availability of resources, accessibility (meaning physical, financial and in other ways), appropriateness and acceptability (which includes cultural or religious acceptability).

Some constitutions, especially in Latin America, include great detail concerning government action in terms of achieving socio-economic rights. Sometimes governments even incorporate a particular political philosophy. Many people would think this is anti-democratic because it would unduly curtail the electorate’s future choices. The balance is not easy; a commitment to rights is itself the manifestation of a certain philosophy or worldview, but it is one that now has universal acceptance at least in theory. The drafting challenge is to include the core of basic rights without unjustifiably constraining legitimate political choice in the future.

The drafters of the South African Constitution decided against detailed prescriptions of how to achieve rights (though they did prescribe affirmative action for the removal of historic injustices). They turned to the ICESCR for language using the following expressions:

- “progressive realisation”
- “reasonable legislative and other measures”
- “within its available resources”

Likewise, the drafters drew on developments of rights by international mechanisms using the formulation:

- “respect, protect and fulfil rights.”

Although this gives guidance pertaining to what the responsibilities are, it does not prescribe how to achieve them. It also automatically brings in international interpretations. However, the drafters were careful: they did not permit “progressive realisation” for every right. The rights of free primary education, emergency health care and the freedom from arbitrary evictions were not something to be worked towards, but had immediate effect.

3. Implementing and Consolidating the Constitution

Despite the controversy and complexity of designing provisions for human rights, the real challenge is often not passing a new constitution but implementing it.¹¹ And the

11 For resistance to and sabotage of progressive constitutions, see Yash Ghai, “The Chimera of Constitutionalism: State, Economy and Society in Africa” in Swati Deva, ed., *Law and (in)Equality: Contemporary Perspectives* (Lucknow, India: Eastern Book Co., 2010) pp. 313-331.

full promise of instituting existing constitutions is often not realised – or realised many years after they are passed. We can see this from the Indian Constitution: public interest litigation is a phenomenon of the years after Indira Gandhi's emergency period (1975).

The constitution is not a self-operating or self-executing instrument. It is one thing to make a constitution. It is quite another to breathe life into it, making it a living, vibrant document which affects, and hopefully improves, the reality of people's lives. A living constitution is one people use in their daily existence, which governs and controls the exercise of state power, and promotes the values and aspirations expressed in it. Even more importantly, a living constitution is an agreement that political leaders and senior and junior state officials understand, respect and observe—if they are willing to submit their exercise of state power in accordance with constitutional values and procedures.

The wide-ranging ambitions often expressed in modern constitutions (particularly as they affect class or ethnic interests, such as affirmative action, social and economic rights, and identity – often as an outcome of or putative solution to conflict) make a constitution controversial and divisive, and prevent it from becoming an unquestioned point of loyalty and focus. Indeed, it faces positive opposition from entrenched interests among the ruling classes – politically and economically.

Another issue is corruption; powerful interests in or from outside a country not sympathetic to objectives of the constitution or wishing to buy illegitimate influence using corrupt means to sabotage it. This leads to the subversion of both the values and institutions of the constitution. One of the surest ways to weaken socio-economic rights is through financial or political corruption of the judiciary.

Particular problems exist when implementing socio-economic rights. The wealthy have little interest in greater social justice, which they consider is at their own expense (e.g., higher taxation). The ideologically conservative oppose socio-economic rights because they believe it will distort the logic and mechanisms of the market. Both groups are politically powerful. We have suggested that universal support for MDGs provides a good opportunity to win support for goals of social justice and to consolidate them as socio-economic rights. We have tried to suggest ways in which the drafting of a constitution may approach these challenges.

Other strategies may include setting up a special, independent commission to ensure implementation of socio-economic rights by offering assistance in preparing laws and regulations and on relevant standards and monitoring.

However, even with these measures, there is no guarantee that socio-economic rights will be protected and promoted. The viability and success of a constitution is premised on the ideology of constitutionalism, a belief in the value of restrictions on power, expressed as substantive and institutional limitations, and the practice of the rule of law, with the emphasis on rules and modes of their enforcement. These reflect and spring from political and cultural traditions. Paradoxically, countries attempting to use the constitution for social transformation often lack formal traditions.

Duties of particular other bodies to protect rights

A few constitutions state the government must report on its performance on socio-economic rights. In Ghana “The President shall report to Parliament at least once a year on all the steps taken to ensure the realization of policy objectives contained in this Chapter and, in particular, the realization of basic human rights, a healthy economy, the right to work, the right to good health care and the right to education.” In South Africa, the Human Rights Commission is given a particular responsibility to report on economic, social and cultural rights – and government departments must report annually to the Commission on their own performance. The Commission issues a voluminous report and it has devised various means to investigate and interrogate government departments. The value of the reports lies in the publicly available information and analysis, not in the recommendations per se.

The 2010 Kenyan Constitution requires use of standards to enable measurement of progress on socio-economic rights. It would not be appropriate to have too much detail in a constitution on how to monitor, but the principle of careful monitoring could be required. Coupled with a provision requiring perhaps the Statistical or Census Office to be independent (to try to avoid political tampering), and a right to information,¹² could provide useful tools for civil society and others concerned to experience realisation of rights.

The special status and role of the courts

Courts protect and implement the constitution and laws; in most systems they have the power, in certain circumstances, to decide whether existing laws and policies are compatible with the constitution (including human rights). More often, courts have the ability to interpret the law in a way compatible with human rights.

Less dramatically, but more commonly, the courts will be faced with cases about administrative actions, rather than law making. In some countries, it may not be just the actions of the state organs that are judged by human rights standards, but even those of ordinary citizens –not just the state, but private persons and bodies also, can be obliged to respect human rights. We can also think of the courts as performing an educational function: through their decisions, citizens as well as the state and its organs, learn about human rights.

The courts can only be effective in protecting the citizen against the state or the powerful persons or bodies if they are independent – not subject to state influence, not prepared to take bribes, viewing themselves as owing their duty to the constitution and the law only. Competence and integrity are as essential as independence, but are perhaps harder to ensure: much depends on ethics of the judiciary—and of the profession.

12 On the importance of access to information (especially primary data) for the achievement of the MDGs see Rafael Guerreiro Osorio, “Free Access to Primary Data Should Be a Right” International Poverty Centre One-Page No. 72, November 2008 <http://www.ipc-undp.org/pub/IPCOnePager72.pdf>.

The courts will craft their own role to a considerable extent, but the Constitution will lay down their jurisdiction and powers. A decision to put socio-economic rights in the Bill of Rights already suggests a role for the courts.

In some countries (generally those following a common law tradition), guidance is given to courts about their task of interpreting human rights provisions and the law, generally from a human rights perspective. In Canada, the Charter of Rights and Freedoms “shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians” (art. 27). The South African and Kenyan Constitutions say, more generally: the courts must “promote the values that underlie an open and democratic society based on human dignity, equality and freedom” when interpreting the Bill of Rights.

It may be helpful to urge the courts to refer to international law and to cases in other countries to fully understand the rights. The Constitution of South Africa does this when it adds the court “must consider international law; and may consider foreign law”¹³ as does the Constitution of the Fiji Islands. In many countries, reference to international law is common in the courts and it is becoming more common, but in some countries this sort of constitutional encouragement could be very useful.

Should the courts be able to order any sort of compensation to people whose rights have been violated? In some countries, courts have ordered the state to provide compensation – notably in India. Some constitutions, as in Kenya, expressly give the courts permission to order compensations for rights violations.

The Supreme Court of India has developed a whole series of modifications of traditional court procedural rules designed to enable “Public Interest Litigation” for the genuinely disadvantaged. A few other countries have followed this lead, especially in South Asia, though not with the same exuberance perhaps as in India. A few constitutions have articles that refer to constitutional remedies in a way that brings in Indian innovations or their spirit. Another feature to facilitate the role of courts is to ensure wide and easy access to courts for the defence of human rights. The Constitutions of South Africa and Kenya provide, in relation to enforcement of rights, anyone acting in their own interest or on behalf of another person who cannot act in their own name, in the interest of a group or class of persons, or in the public interest can approach the court. The Kenyan Constitution requires the courts to disregard technicalities and waive fees to litigation to promote human rights.

13 It also says: **Application of international law** 233. When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

Example for how Courts have given effect to constitutional provisions

Among the large number of cases presented before national courts on issues relating to the right to health, we can identify two, from different countries. The first occurred in India, in the *Paschim Banga Khet Mazdoor Samity v. State of Bengal*¹⁴, where the court did not use an explicit right to health (for there is none) but instead, the right to life. The petitioner had been taken to a succession of eight state medical institutions ranging from a local health centre to two medical colleges, being refused treatment at each either because of lack of beds or lack of technical capacity. The Court not only compensated the plaintiff for the violation, but also set out facilities the government must provide in the way of hospitals and their facilities at different levels of the grade of hospitals (including the scope of ambulance services and communication system between hospitals to take care of overflow in one or more hospitals. The scheme outlined by the Court was based partly on the report of a Government committee set up to investigate the incident, on the state Government's own actions following that report, and representations made by counsel for the petitioners which themselves drew partly on experience and legislation in the United States.

The second case, *Minister of Health v Treatment Action Campaign*,¹⁵ is from South Africa, which turned on the "right to access to health care services". The state was providing Nevirapine, which prevented mother to child transmission of HIV very cheaply, only through a few centres designated for research. The Court held that the government was constitutionally required to realise a programme providing progressively for the rights of pregnant women and their unborn children and the existing scheme was inadequate because it restricted Nevirapine to certain sites, but the programme must include reasonable measures for counselling and testing.

Beyond Courts: Mobilizing Rights outside the Courtroom

One of the Indian leaders of the public interest litigation movement, Justice Bhagwati, wrote

We must always remember that social action litigation is a necessary and valuable ally in the cause of the poor, but it cannot be a substitute for the organisation of the poor, development of community self-reliance and establishment of effective organisational structures through which the poor can combat exploitation and injustice, protect and defend their interests, and secure their rights and entitlements.

Political pressure, backed up by and made possible by transparency and participation will remain the main way to protect rights – with the exception of rights of minorities without political clout. The fear of not being re-elected will always be greater in the mind of the politician than the fear of the government of which the individual is in part being sued.

14 AIR 1996 SC 2426.

15 2002(5) SA 721, 2002 (10) BCLR 1033.

How Constitutions can Ensure an Inclusive Approach to Development Policy

The 2003 Human Development Report states, “The more unequal a society, the less likely it is to generate sustained political support for the Goals, because political power is usually concentrated and overlaps with economic wealth and social dominance. In unequal societies, elite-dominated progress towards the Goals is also less likely to benefit the poorest people. Moreover, national progress may still mean that large sections of the population are being left behind, as in Brazil, China, India and elsewhere”.¹⁶ Can a constitution elevating social justice and egalitarianism to a high principle overcome this challenge?

The MDGs and their targets deal on the whole with total populations (except to the extent that they speak of women, children or young persons). Poverty does not affect all groups within countries to the same extent or in the same way. Measures needed to bring people out of poverty will not necessarily be the same for all groups in a country. Women, indigenous peoples, and persons with disability are among groups for whom the constitution and institutions may need to make special provisions for. Suggested relevant provisions include:

- Permitting or even requiring affirmative action – for without special effort true equality and inclusion will not be achieved,
- Drawing particular attention to issues affecting specific groups
- Carefully drafted rights, ensuring that protection against indirect discrimination is included, and corresponding duties not just to respect but to protect and fulfil rights
- Provisions designed to ensure the public, including women, participate in the voting process and decision making process
- Inspiration for drafting may be derived from the Protocol to the African Charter on Human and People’s Rights: “States Parties shall integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and all spheres of life”; similar approaches could be adopted for other groups
- Provisions designed to enhance democracy within political parties, and to specifically encourage adoption of non-traditional candidates (for winnable seats)
- Statements of policy raising the “visibility” of special group issues, including content in the preamble and “Directive Principles”.
- Mention of “inter-sectional” issues, such as the particular problems of women in indigenous society
- Define “disability” in a way that covers all circumstances that may impair some people’s participation in society, including being HIV positive
- Provide visibility to issues and rights using specific language for clearly addressing the rights of women, persons with disabilities and minorities/indigenous groups
- Highlight important steps government might take, including use of Braille or sign language for the visually or aurally impaired.

16 *Millennium Development Goals: A compact among nations to end human poverty*, p. 132.

Beyond Rights Provisions: The Whole Constitution as a Framework for Rights

In the context of human rights and social justice, the ultimate goal of a constitution must be to fulfil Article 28 of the UDHR:

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Since the national constitution can do little about the international order, the focus of this section is on national aspects of the constitution. Article 28 requires every provision of the constitution to be “human rights friendly”.

Designing an accurate, correct and inclusive Bill of Rights is undoubtedly important. However, it is equally important the whole of the constitution is “human rights friendly”. Rights and social justice are unlikely to be respected or promoted if enormous powers are concentrated in the executive, if the government is not sufficiently accountable, if elections are not free and fair, and if the judges can be easily bought over or are willing to take instructions from the executive. We must examine electoral systems to assess what kind of people and from which communities these people are likely to be elected.¹⁷ We must also consider whether an emphasis on culture may jeopardise the rights of women, children, disabled or “low caste” persons. And we must ask whether there is too much emphasis on some rights (e.g., property, market or contract) that restrict affirmative action or other measures necessary for equity and social justice.

In colonial societies, the state was exclusionary, built on racial and ethnic distinctions, with a stronger bureaucracy for this reason. The bureaucracy was rooted in the imperative of the dominance of the various societies that made up the colony, the close relationship between the colonial administration and the foreign, business community (and consequent economic disparities), and its resistance to democracy. It is this tradition rather than any adaptation to independence or democracy marking the present reality. This system was buttressed by a battery of repressive laws and a repressive legal system, which survived the colonial era and continues to constantly undermine new democratic constitutions. These characteristics ensured independence would not bring about social transformation, but merely partial replacement of the old local ruling elite, politicians as well as bureaucrats, who found the colonial repressive apparatus highly functional.

Restructuring the post-colonial state

How far can the constitution restructure the post-colonial state (which has survived in many developing countries), eliminating its negative, destructive tendencies by introducing values and structures to promote fair and balanced development? We would suggest that, outside the formal human rights provisions, the following options can help steer the constitution and the nation in the direction of full realisation.

17 In 1997 the Indigenous Peoples of Ecuador, having previously concentrated on getting recognition of their rights moved on to include demands for institutional change in the constitution; many other groups have experienced similar frustration with rights alone.

- The constitution should set out a broad framework of values and principles forming the vision of the country to be scrupulously observed in the exercise of state powers (this may be in the Preamble, and in other statements of principle)
- Democracy must be viewed, and reflected in the constitution, as being more than periodic (and often rigged) elections. Relevant provisions to ensure full, inclusive, participatory and meaningful democracy may be:
 - an inclusive definition of citizenship
 - a fair electoral system
 - regulation of political parties for integrity, and internal democracy
 - separation of powers
 - effective accountability mechanisms, tailored to ensure all organs of the state are appropriately held to account (including the auditor-general or audit court, ombudsman and other complaints bodies, human rights commissions etc)
 - procedures for parliament giving people adequate opportunities to understand and comment on proposed laws and other matters – including making new treaties and policies
 - the decentralisation of government (which may mean local government or more radical systems) enabling greater participation of people in public affairs
 - a role for civil society organisations in public affairs
 - provisions ensuring inclusion of all sectors of society in public bodies, including the military.

Modern conflict is seldom about outright control of the state by a narrow group; it is about a share in government, and thus about inclusion and participation, and the recognition of religions, languages, culture, and sometimes about forms of self-government. There are many ways the constitution can prevent or mitigate conflict. Inclusive and participatory democracy as defined above is critical. We have indicated some principles for bringing about this type of democracy. Social justice (including affirmative action) is primary, since conflict is primarily about resources. Special attention should be paid to group identity, languages, and religion. There should be respect for cultural differences. The precise mechanisms would depend on circumstances and historical context. Some electoral systems are more hospitable to representation of minorities, and participation can be secured through forms of consultation, modes of decision making in government and legislature, power sharing, proportionality, and self-government, particularly through federalism or devolution.

The kind of constitutions being discussed are people centred, oriented towards the MDGs and social justice. It is especially important to redress the balance between politicians or elites on one hand and people on the other. What is required is genuine empowerment of people, promoting awareness of public issues and procedures, the role of public institutions, familiarity with constitutional rights, mechanisms to protect and mobilize them, and institutions and opportunities to express views and demand accountability. We have suggested the constitution should provide effective entry points for civil society initiatives. Civil society institutions could bring legal actions on behalf of the disadvantaged and the voiceless. They could work with state institutions to establish standards and benchmarks for social progress and justice. Civil society institutions could

mobilise people to take advantage of provisions for public participation. They could inform and educate on constitutional issues or play a critical role reporting to regional and international bodies on fulfilment of a country's international obligations, particularly in regards to human rights.

Ultimately, the people have to be guardians of the constitution. To perform this role the people must:

- understand the constitution and know their rights
- know how to use the machinery of the constitution and the law to hold public authorities accountable
- be involved in the conduct of public affairs
- act as agents of accountability: for example by
 - providing alternative budgets or analysing draft state budgets
 - publishing annual assessments of the record of government and corporations of human rights, social justice, environment and natural resource policies, etc
 - providing alternative reports (often known as “shadow reports” to regional and international human rights supervising bodies on the national record
 - undertaking constitutional litigation to prevent the state or private interests from breaching the constitution or law.

Active citizenry and consciousness of civic virtues are essential for sustaining democracy. Decentralisation is an important tool – though it must be well designed or it simply decentralises the problems at the centre including corruption. Various forms of direct democracy are found – as with referendums and popular initiatives (as in Switzerland and California), which have their own problems, not least of which is expense, as well as petitions and other participatory mechanisms.

Ultimately, participation is important because it transfers influence and power to groups who are often left out of traditional forms of democracy. If we believe genuine democracy is essential to diverting resources to the needs of the poor, then participation becomes central to the strategy of reaching the MDGs.

The fortunes of a constitution are shaped by many factors: personalities and elites, political parties and other organisations, social structures, economic changes, and traditions of constitutionalism. Constitutionalism cannot be willed; it must be established by deep commitment and sustained activity. The constitution cannot achieve anything by itself: like Marx's commodities, it does not have arms and legs. It must be mobilized, acted upon, used, etc. A constitution does not work, it is worked. The real task of establishing constitutionalism therefore lies in other spheres: politics, the judiciary, the rise of professionalism in public affairs, civic associations, and enlightened leadership.

Inadequate attention has been paid to these obstacles, as opposed to societal obstacles, because it is assumed that the constitution has the primary function of designing and structuring the state. However, as previously mentioned, it may structure institutions, but may also fail to infuse them with values and principles. The constitution tends to structure

macro institutions but often says little about values and procedures of the administration of the state (which may persist from one constitution to another). The constitution may not only fail to mould civic values or the behaviour of key political actors, it may also fail to generate a state capable of sound social policies and fair and honest administration. The agenda of the MDGs cannot be effectively achieved through activities of civil society alone, unless significant portions convert themselves into a direct political force, challenging the hegemony of existing, and increasingly corrupt and irresponsible, political classes.

Conclusion

Fundamentally, implementing a constitution is not about particular provisions, or even the totality of the constitution, important as these are. It is about the inculcation of a culture of respect for and discipline of the law, acceptance of rulings by the courts and other bodies authorised to interpret the law, giving effect to judicial decisions, acceptance of the limits on government, respecting and promoting human and collective rights as well as participation and empowerment of the people. This is a long term project, anticipated to be strengthened and sustained by the emergence of socio-economic goals, giving expression to the MDGs, bringing the domain of the constitution new constituencies hitherto excluded from its benefits.

Ways and Means of Ensuring Social Protection Helps Realize Economic and Social Rights and Achieve the MDGs

Alison Graham

1. Background: Why social protection?

The Asia Pacific region has some of the fastest growing economies. Yet according to the Economic and Social Commission of the Asia and Pacific (ESCAP), the region also has nearly a billion people living in poverty whose means of livelihoods 'rest on a fragile economic and social foundation'.¹⁸ They have 'uncertain income, few assets, limited social networks, no access to political processes'¹⁹ and are particularly vulnerable to different shocks such as illness, disability and unemployment that could quickly push them into extreme poverty. In times of stress, they fall back on coping mechanisms which in the long term significantly undermines their ability to escape poverty. Hence, this perpetuates poverty throughout generations. Such coping measures include withdrawing children from school to work, decreasing the number of meals, and selling assets including livestock and land.

In the Asia Pacific, vulnerability has increased through a series of recent crises including fuel, financial and food crises and new challenges of rapid urbanization. Other crises include the HIV endemic worldwide. While the rates are lower in Asian Pacific countries (less than one percent of the adult population) it is much higher amongst those communities already discriminated against, marginalized²⁰ and thereby likely to be living in difficult circumstances. Moreover, socio-economic impact studies by UNDP in the region show that people living with HIV and their households are chronically burdened by illnesses, loss of employment and income, rising medical expenses and depletion of savings or other resources in their efforts to cope with and mitigate the situation.²¹

Women have been particularly affected by these crises and are especially vulnerable to poverty. They tend to be disproportionately represented in the informal economy and thus have less access than men to many contributory social insurance benefits,

18 See *The Promise of Protection: social protection and development in Asia and the Pacific*, UN Economic and Social Commission for Asia and the Pacific 2011 P iv

19 See *The Promise of Protection: social protection and development in Asia and the Pacific*, UN Economic and Social Commission for Asia and the Pacific 2011, P iv

20 See contribution to UNDP e-discussion *Part 1: Key Features of Successful Social Protection Schemes* by Pramod Kumar and Kazuyuki Uji, HIV, Health and Development Team, UNDP Asia-Pacific Regional Centre 21 September 2011.

21 See contribution to UNDP e-discussion *Part 1: Key Features of Successful Social Protection Schemes* by Pramod Kumar and Kazuyuki Uji, HIV, Health and Development Team, UNDP Asia-Pacific Regional Centre 21 September 2011.

such as pensions, unemployment insurance and sickness benefits. Furthermore, due to lower levels of education, less control over productive resources and access to different supportive networks, women have weaker negotiating positions than men and fewer chances of finding other income-generating activities. An Asian Development Bank (ADB) Report notes that in the Greater Mekong Subregion (Cambodia, Laos, Thailand and Vietnam), there are indications that female workers may have been better positioned to weather short term economic slowdowns. However, female workers in the region tend to be less skilled, earn lower wages and many are already coping with poor housing, limited access to health care, and having to put up with harassment both in and outside the workplace.²² This can leave them resorting to even more harmful coping strategies. The ADB Report notes that under pressure to continue to provide funds to their families, some laid-off female factory workers in the Greater Mekong Subregion have turned to sex work as a coping strategy.²³

Social protection helps address and reduce this type of vulnerability that both pushes people into poverty and keeps them there. While the term social protection can be applied to many different programmes and policies, in essence it is 'a set of public measures that support society's poorest and most vulnerable members and helps individuals, households and communities better manage risks' across their life cycle.²⁴ Its two main components are social insurance (contributory insurance schemes providing pre-specified support for affiliated members) and social assistance (initiatives providing both cash and in kind assistance to those living in extreme poverty).²⁵

ESCAP notes that the Asia Pacific region has a long history implementing social protection programmes, particularly in light of the Asian financial crisis of 1998 and natural disasters. Given the diversity of States across the Asia Pacific region, there is an array of different schemes implemented with varying degrees of sophistication or success. These include cash transfer schemes, school stipends, social pensions, food vouchers, food transfers, income guarantee schemes such as public works or employment guarantee schemes, user fee exemptions for health care or education or subsidized services.²⁶ India has used public works as a tool of social protection for many years. In 1979, following an extended drought in a semi-arid region, the *Maharashtra Employment Guarantee Scheme* was established. It

22 See McGill, E., *Gender-related Impacts of the Global Economic Slowdown in the Greater Mekong Subregion: Emerging trends and issues*, Asian Development Bank Consultant's Report.

23 See McGill, E., *Gender-related Impacts of the Global Economic Slowdown in the Greater Mekong Subregion: Emerging trends and issues*, Asian Development Bank Consultant's Report

24 See *The contribution of social protection to the Millennium Development Goals*, World Bank

25 See *Report of the Independent Expert on human rights and extreme poverty to the 65th session of the General Assembly*, A/65/259, 9 August 2010. In 2001 the UN Secretary General also recognises the two main sub categories of social protection as social assistance and social insurance. See *Enhancing Social Protection and Reducing Vulnerability in a Globalizing World* 7 December 2000

26 See *Report of the Independent Expert on human rights and extreme poverty to the 65th session of the General Assembly*, A/65/259, 9 August 2010

guaranteed every adult a job provided the person was willing to do unskilled manual work on a fix piece-rate basis, amounting to the minimum wage.²⁷

Social protection programmes can contribute to the achievement of economic, social and cultural rights as well as the MDGs. The World Bank has noted fee waivers for health and education may help achieve MDG1 by allowing families to obtain crucial services without impoverishing themselves.²⁸ In rural Brazil old-age pensions paid to grandmothers to ensure the right to social security and an adequate standard of living have helped increase girls school attendance.²⁹

2. Social protection: Development strategy or human rights obligation

Social protection is often treated as a policy option. However, while it can be part of States' general development strategies, establishing effective social protection programmes should be first and foremost a human rights obligation of States, both as a right in itself and as a key means of realizing other rights.

Article 9 of the ICESCR stipulates the right to social security. The Committee on Economic, Social and Cultural Rights (CESCR)³⁰ further defines this as including social insurance and social assistance,³¹ both of which are main components of social protection.³² Social

27 See *The Maharashtra Employment Guarantee Scheme*, Policy Brief 6, Overseas Development Institute, February 2006

28 See *The contribution of social protection to the Millennium Development Goals*, World Bank.

29 See *The Promise of Protection: social protection and development in Asia and the Pacific*, UN Economic and Social Commission for Asia and the Pacific, 2011.

30 The Committee on Economic, Social and Cultural Rights (CESCR) is responsible for monitoring the implementation of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). When States ratify the ICESCR they recognise the competence of CESCR to carry out its mandate.

31 *The International Covenant on Economic, Social and Cultural Rights stipulates that everyone has the right to social security which includes social insurance and social assistance*. Several International Labour Organization conventions and declarations also recognize the right to social security, including the Declaration concerning the aims and purposes of the International Labour Organization, to pursue "the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care". The main standards are established by Convention No. 102 concerning Minimum Standards of Social Security and Convention No. 128 concerning Invalidity, Old-Age and Survivors' Benefits. Convention No. 102 establishes worldwide agreed minimum standards for all nine branches of social security: medical care, sickness benefit, unemployment benefit, old-age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit and survivors' benefit.

32 As highlighted earlier both the Independent Expert on human rights and extreme poverty and the Secretary-General recognise that social protection is made up of both social insurance and social protection See Report of the Independent Expert on human rights and extreme poverty to the 65th session of the General Assembly, A/65/259, 9 August 2010, and the report of the UN Secretary-General Enhancing Social Protection and Reducing Vulnerability in a Globalizing World, 7 December 2000

protection is also a key means of realizing the non-derogable minimum core essential levels of other economic and social rights such as the right to education, an adequate standard of living, and health amongst others.³³ While regular cash transfers can help people living in poverty access credit, promote savings and enable them to invest, they should not be operated with only that in mind. As a means of reducing poverty and realising human rights the primary focus should be on reaching the most vulnerable and marginalised who are most likely to be below a States' radar and often difficult to identify and reach.

While social protection schemes must be distinguished from general development efforts by the state, they are not mutually exclusive. Social protection schemes must be complemented by better provision of basic services, such as water and sanitation, public health facilities and education systems. For example, given the likely expense for older persons on health care and medicines to account for as much as three quarters of the income of the poorest groups, the positive impact of social protection initiatives on older persons' standards of living can be nullified by the burden posed by health-care-related costs which may push them back into extreme poverty and a life without dignity.³⁴

3. Social protection: applying a rights based approach

To comply with international human rights law, social protection programmes must reach and protect those in need. Moreover, they must do no harm. Although seeking to protect, social protection programmes can often exacerbate inequalities by only being accessible to those who live in particular areas, or they can stigmatize certain groups of persons such as the unemployed or those who are HIV positive, and add to their exclusion. When implementing social protection programmes States must therefore take steps to ensure that they do not exacerbate existing insecurities, vulnerabilities and discriminatory and negative stereotyping. Social protection programmes must recognise that poverty is not just about a lack of income but interrelated and interlocking patterns of discrimination, deprivations and vulnerability that a simplistic income approach largely overlooks.

Given that social protection programmes are implemented in a variety of distinct social, economic, political and cultural contexts, none more so than within the Asia Pacific region, it is impossible to provide a template for social protection policies or programmes. The

33 Under the *International Covenant on Economic, Social and Cultural Rights* State parties have 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights. Under this minimum core obligation, a state party in which any significant number of individuals is deprived of essential foodstuffs of essential primary health care, of basic shelter and housing, or of the most basic forms of education is prima facie failing to discharge its obligations under the covenant. If State parties can't do this due to insufficient resources they must clearly demonstrate that this is the case and seek international assistance. See CESCR General Comment 3 The nature of States parties obligations (Art. 2, par.1), 14 December 1999.

34 See J. Randel et al. (eds.), *The Ageing and Development Report: Poverty, Independence and the world's older people*, (HelpAge International, 1999) and the *Report of the Independent Expert on human rights and extreme poverty on social pensions* A/HRC/14/31 March 2010

outcomes and impacts of social protection systems vary greatly; what has worked well in one context may work differently in another. However, it is possible to identify a number of core human rights principles with which social protection programmes must comply in order to both ensure that those in need are reached and to avoid exacerbating existing or creating new vulnerabilities and marginalisation.

A human rights approach to social protection requires:

A. Ensuring an adequate legal and institutional framework for social protection

Social protection programmes must be established and protected by an adequate national legal and institutional framework. This helps prevent manipulation by political and economic elites and guarantees the long-term involvement of State authorities in all stages of the programme, regardless of political change. The legal framework must also give rights-holders the possibility to claim protection of their right. The CESCR recognises the need to embed 'social protection into a framework of legally binding and enforceable rights and obligations' which enables beneficiaries of social protection to become "rights-holders" who can make claims against the State. Similarly, States and development partners become "duty-bearers" responsible for allocating resources to social protection in a manner that reflects human rights principles.³⁵ Clear legal and institutional frameworks also clarify the various roles and responsibilities of all stakeholders. In order for legal and institutional frameworks to comply with core human rights principles, they should spell out eligibility requirements, provide for mechanisms to ensure transparency and access to information about programmes, define the various roles and responsibilities of all those involved in implementing the programme (e.g. Governments at the national and local levels, international organizations and civil society organizations), and establish accessible complaints mechanisms.

B. Respecting the principles of equality and non-discrimination

Non-discrimination and equality are key principles under international human rights law. States are obligated to not only ensure equality and non-discrimination as a right but also to ensure social protection is provided and guaranteed in a manner that neither directly nor indirectly discriminates against those in need. The concept of *de facto* equality thus requires both human rights and development practitioners to go beyond establishing formal equality through law to examining what the causes of inequality are and how they can be remedied. For instance, practitioners need to identify what would prevent certain groups of persons such as persons with disabilities, older persons, and different racial and ethnic minorities, from being able to access qualitative social protection and take the appropriate action to remedy the situation.

35 See Presentation by Dr Magdalena Sepúlveda, the Independent Expert on human rights and extreme poverty on 17-18 March in Santiago, Chile at an Expert Workshop on Conditional Cash Transfers: from a Human Rights Approach Available at <http://www.rlc.fao.org/iniciativa/expertos/documentos/trabajo/dt5.pdf>.

This principle has implications for development practitioners deciding on different technicalities currently under much debate such as targeting versus universalism, the use of conditionalities, and questions of accessibility.³⁶ Each of these requires designing social protection programmes using substantive equality and non-discrimination to ensure the approach chosen does not impede those in need from gaining necessary social protection.

i) Targeting versus universalism: Ensuring nobody is unfairly excluded

The question of universality versus targeting has experienced much debate with States often arguing that they lack the resources to implement a universal system. From a human rights perspective, universal systems comply with States' duty to protect persons against risks and vulnerabilities in an equal and non-discriminatory manner. They also clearly reduce opportunities for corruption and manipulation as well as possible stigmatization. However, as the Independent Expert on human rights and extreme poverty has frequently noted in principle, human rights standards are not compromised by the use of targeted schemes providing they prioritise and reach the most vulnerable and disadvantaged groups within a longer-term strategy of progressively ensuring universal protection.³⁷

However, targeting those in need is easier said than done. The principles of substantive non-discrimination and equality require that you cannot exclude those who are in need either directly or indirectly (exclusion errors). To minimise this risk as much as possible, below are some of the interrelated questions that must be addressed when designing targeted social protection mechanisms.

a) Who and how do you target?

Who you target depends on the aim of the social protection programme. From a human rights perspective, social protection programmes should target the most vulnerable and disadvantaged. Going further and specifying exactly who should benefit can be more difficult. It is often difficult to identify and reach the worst off or the most vulnerable and marginalised since they are often living below the radar of the State.³⁸ How do you measure those who are most vulnerable? How do you measure the different strata of poverty? Do you just measure income levels? While this may be simple, does it encompass all the different deprivations keeping a person in extreme poverty? Moreover, what happens in situations of prevalent poverty when everyone is living in extreme poverty, making distinctions between different strata is somewhat futile. In these cases, targeting is not

36 This uses and builds on the work of the Independent Expert on human rights and extreme poverty. See Presentation by Dr Magdalena Sepúlveda, the Independent Expert on human rights and extreme poverty on 17-18 March in Santiago, Chile at an Expert Workshop on Conditional Cash Transfers: from a Human Rights Approach Available at <http://www.rlc.fao.org/iniciativa/expertos/documentos/trabajo/dt5.pdf>

37 This has also been recognised by the UN Committee on Economic, Social and Cultural Rights. The Committee for instance called on Jamaica in striving for universal coverage of social security system in Jamaica, to give priority to disadvantaged and marginalized groups in society See E/C.12/1/ADD.75 (CESCR, 2001)

38 See *The Promise of Protection: social protection and development in Asia and the Pacific*, UN Economic and Social Commission for Asia and the Pacific 2011 page 56

necessarily a cheap option. Complex administrative processes will be needed to identify the lowest strata and persons in need will almost certainly be excluded. Another question is whether to target households or individuals. At first glance it may seem easier and logical to target households, but gender dynamics and traditional marginalisation within households may mean that some household members are particularly marginalised and in need of assistance even if the household itself is considered fairly affluent. An example of this is the situation of women and in particular, older women and widows.

People designing social protection programmes thus need to consider carefully the targeting mechanism, making sure it does not indirectly or directly screen out those in need. Using the wrong method can often create more possibilities for corruption and exclusion errors. One recommendation is to avoid overcomplication. As the Independent Expert has noted 'the more complicated the method of calculation (such as proxy means testing), the more opaque the eligibility criteria become and the harder it is for the intended beneficiaries to scrutinize the process'.³⁹ Moreover, the more complicated the criteria the more expensive the administrative system will be, which in turn erodes much of the 'lack of resources' argument for implementing a targeted system in the first place. While community targeting methods can help avoid exclusion errors by drawing on local knowledge, it risks reiterating and strengthening local power structures and asymmetries, which could include feudal structures, caste hierarchies and patriarchal societies.⁴⁰ This could result in the exclusion of women, lower caste communities such as *Dalits* and persons with disabilities amongst others.⁴¹

To illustrate problems previously mentioned, the Primary Education Stipend Project (PESP) in Bangladesh, which provides a conditional income transfer to poor rural households for keeping children in primary education, is estimated to have only reached 40% of its target group. This is due to problems in eligibility requirements (NGO schools are not included) and corruption in the management and administration of the programme.⁴²

b) How do you avoid stigmatisation?

Where social protection programmes are targeted there is also a greater risk of stigmatisation adding further to the marginalisation and exclusion of persons living in extreme poverty. This stigmatisation could be on the grounds of poverty itself or other qualifying elements such as HIV status. One way of reducing possible stigmatisation is

39 See Presentation by Dr Magdalena Sepúlveda, the Independent Expert on human rights and extreme poverty on 17-18 March in Santiago, Chile at an Expert Workshop on Conditional Cash Transfers: from a Human Rights Approach Available at <http://www.rlc.fao.org/iniciativa/expertos/documentos/trabajo/dt5.pdf>

40 See for instance See Davies, M., *DFID Social transfers evaluation summary report*, Institute of Development Studies, centre for Social Protection, July 2009, p6.

41 Davies notes that community-based targeting, as employed by social transfer schemes in Malawi, resulted in the exclusion of socially marginalised women. See Davies, M., *DFID Social transfers evaluation summary report*, Institute of Development Studies, centre for Social Protection, July 2009, p9

42 See Barrientos, A, Nino-Zaraxua, M., and Maitrot, M., *Social Assistance in Developing Countries Database*, Brooks World Poverty Institute, The University of Manchester, July 2010, P 55

avoiding the use of explicit labels when targeting and preserving confidentiality with sensitive information. This approach has initially been taken in regards to HIV social protection. In India, for instance, rather than implementing a new system, the state of Rajasthan has sensitized its widow pension scheme to those affected by HIV/AIDS by waiving the age limit for receiving benefits. In most states in India, AIDS-widows do not qualify for benefits because of the high age ceiling. AIDS-widows tend to be much younger.⁴³ Social protection systems designed to benefit those affected by HIV/AIDS must also ensure confidentiality since because in many countries HIV is still highly stigmatized and public disclosure of being HIV positive could result in physical violence, loss of livelihood or forced relocation.⁴⁴ By lowering the age limit, Rajasthan ensures HIV/AIDS widows (whether they are themselves HIV positive or not) are covered without being explicitly targeted, thus lowering the risk of stigmatization.

ii) Conditionality versus free access: Ensure that conditionalities do not exclude and further expose those who fail to comply⁴⁵

Another issue experiencing considerable debate is the question of imposing conditionalities, which is predominantly done in regard to cash transfer programmes. Conditionalities usually require beneficiaries to fulfil several criteria such as sending children to school, joining nutrition programmes or making use of health services. ESCAP notes that ‘following a number of success stories from Latin America, conditional cash transfers have become increasingly popular in Asia and the Pacific.’⁴⁶ For example, Indonesia has a ‘Family Hope Programme’ that distributes conditional cash transfers to households living in poverty with children aged 15 years and below, children under 18 years of age who have not yet completed primary school, and pregnant or lactating mothers. To qualify for the funds, ‘pregnant women must have four prenatal visits, take iron tablets and have their deliveries assisted by trained health professionals. They are also encouraged to make two post natal care visits’. Other conditions include the growth of children being regularly monitored, children under six being fully immunized and all children aged six to 12 be enrolled in primary school with an attendance rate of at least

43 See contribution to UNDP e-discussion *Part 1: Key Features of Successful Social Protection Schemes* by Pramod Kumar and Kazuyuki Uji, HIV, Health and Development Team, UNDP Asia-Pacific Regional Centre 21 September 2011.

44 See contribution to UNDP e-discussion *Part 1: Key Features of Successful Social Protection Schemes* by Pramod Kumar and Kazuyuki Uji, HIV, Health and Development Team, UNDP Asia-Pacific Regional Centre 21 September 2011.

45 See Presentation by Dr Magdalena Sepúlveda, the Independent Expert on human rights and extreme poverty on 17-18 March in Santiago, Chile at an Expert Workshop on Conditional Cash Transfers: from a Human Rights Approach Available at <http://www.rlc.fao.org/iniciativa/expertos/documentos/trabajo/dt5.pdf>

46 See *The Promise of Protection: social protection and development in Asia and the Pacific*, UN Economic and Social Commission for Asia and the Pacific 2011 p40

85%.⁴⁷ If a beneficiary fails to comply with any of these conditions, the cash transfers may be decreased and suspended after three months.⁴⁸

Conditionalities are often perceived as justified and necessary by development practitioners to ensure compliance with national norms, and are also considered a useful incentive to adopt certain behaviour seen as a prerequisite for the attainment of development goals. However, the concept of conditionalities does not sit happily with a human rights approach. It can be seen as undermining the agency of a person, and can essentially condition basic entitlements on 'good behaviour', such as the right to an adequate standard of living, health and education.

Given this, development practitioners must be extremely careful when designing conditionalities for social protection programmes. At the very least, practitioners must evaluate whether unfairly imposed conditionalities imposed unfairly exclude or punish already disadvantaged or marginalised persons, or exacerbate existing inequalities.⁴⁹ In Bangladesh, for instance, conditionalities of obtaining good school results have been observed as favouring children from wealthier families with stronger support at home.⁵⁰ It is also difficult for the targeted individual to access necessary health care facilities for regular check-ups required by the programme due to remoteness or time constraints, contributing to unfair or exclusionary practices. In Indonesia given the wide disparities in the provision and accessibility of health and education service between urban and rural areas, the conditionalities imposed have been observed as disproportionately affecting those living in rural areas.⁵¹ Often conditionalities can create unnecessary additional burdens on women who, as typically the main care provider, are usually responsible for fulfilling them. Another factor is the heavy time burdens of persons living in poverty. The poor already survive precariously with heavy time burdens and 'the imposition of further conditions can make their survival even more difficult.'⁵²

To avoid unfairly affecting people needing to be reached, the importance of the affected communities to be consulted in the formulation of conditionalities is paramount. Moreover,

47 See *The Promise of Protection: social protection and development in Asia and the Pacific*, UN Economic and Social Commission for Asia and the Pacific 2011 p40

48 See contribution to UNDP e-discussion *Part 1: Key Features of Successful Social Protection Schemes* by Ms Vita Febriany from the SMERU Research Institute, Jakarta, Indonesia, 12 September 2011.

49 This has been reiterated several times by the Independent Expert on human rights and extreme poverty. See for instance Presentation by Dr Magdalena Sepúlveda, the Independent Expert on human rights and extreme poverty on 17-18 March in Santiago, Chile at an Expert Workshop on Conditional Cash Transfers: from a Human Rights Approach Available at <http://www.rlc.fao.org/iniciativa/expertos/documentos/trabajo/dt5.pdf>.

50 See *Report of the Independent Expert on human rights and extreme poverty on her mission to Bangladesh*, A/HRC/15/55, 22 July 2010

51 See contribution to UNDP e-discussion *Part 1: Key Features of Successful Social Protection Schemes* by Ms Vita Febriany from the SMERU Research Institute, Jakarta, Indonesia, 12 September 2011.

52 See Swaminathan, M., A note on conditional cash transfers in the context of facilitating gender equality and social protection for the achievement of the MDGs, Indian Statistical Institute, Kolkata, P9

in some circumstances, rather than imposing a national 'one size fits all' approach to conditionalities, it may be more appropriate to leave formulation and administration to local authorities. It is not always possible for officials at the national level to understand the local context. This could stem from geographic or physical problems accessing certain public institutions, such as health clinics or schools, or from difficulties members of certain groups face when attending schools such as being made to stand at the back of the class, as is the case with *Dalit* children in many remote regions of south Asia. There may be other problems such as lack of separate toilets in schools for girls, which discourage girls from attending schools; a problem only local officials may be aware of.

Finally, conditionalities must be accompanied by avenues and mechanisms in place to challenge any alleged non-compliance with the conditions⁵³ both for individual redress and as a means of reviewing the programme, ensuring mistakes are not repeated thereby allowing for improvement. Such mechanisms and avenues must be culturally, financially and physically accessible⁵⁴ for those in need and respect basic human core principles ensuring justice is delivered.⁵⁵ In accordance with international human rights law, States are obligated to ensure a minimum core content of economic, social and cultural rights. Under no circumstances should benefits be terminated or reduced below the level necessary to ensure that a person can access the minimum essential levels of food, water, healthcare, housing and education. This is regardless of compliance with conditionalities.⁵⁶

iii) Complying with the standards of accessibility

The principle of substantive equality and non-discrimination requires States to ensure that qualitative social protection benefits are physically, culturally, and financially accessible and available to all, especially the most vulnerable and disadvantaged groups of society. Even if something is formally universal, some persons may be directly or indirectly denied access through distance, administrative reasons, a lack of awareness and/or assistance not being culturally acceptable. For example, while public works schemes have been praised for being self-targeting through design in ways that only the most poor and vulnerable are interested in, they have also been criticised for indirectly excluding certain groups through their emphasis on physical work. This has been noted regarding the public works scheme in Nepal 'Rural Access Programme'. Concerns have also been raised that the labour requirement 'places unreasonable demands' on people living in poverty that are often already 'time constrained' or 'labour constrained' i.e. persons with disabilities.⁵⁷

53 This has been repeatedly recognised by the Independent Expert on human rights and extreme poverty (now Social Rapporteur) and the CESCR.

54 This is dealt with more comprehensively in the following section entitled 'complying with the standards of accessibility'

55 This is dealt with more comprehensively in the section entitled 'accountability and access to justice'

56 See Human Rights Law Resource Centre, *Observations on the Draft General Comment on the Right to Social Security* 29 June 2006

57 See Davies, M., *Department For International Development, Social transfers evaluation summary report*, Institute of Development Studies, Centre for Social Protection, July 2009, p6.

Ensuring social protection programmes are accessible in reality and not just on paper, individuals responsible for programme design and implementation should consider the following questions:

a) Are social protection programmes physically accessible to those in need?

Usually, the most vulnerable people live in remote areas lacking infrastructure or poorly resourced urban areas without transport links. Moreover, many groups might have limited mobility such as the disabled and older persons. Women may also face protection concerns and possibility of abuse while travelling. Particular attention should be paid to the opportunity cost (loss of earnings or caretaker time) of spending disproportionate amount of time accessing the benefit or service.

States must take this into account when designing social protection programmes. The Independent Expert on human rights and extreme poverty recommended that 'States must ensure that benefits are distributed within safe physical reach and at a reasonably convenient geographic location.'⁵⁸ This includes ensuring adequate transportation is available to communities living in extreme poverty, thereby reducing travel time to services.⁵⁹ The principle of ensuring physical accessibility also requires ensuring that persons in need are covered by other social protection if they are unable to attend physical labour intensive public works programmes due to disability or any other factor.

b) Are social protection programmes administratively accessible to those in need?

Persons must be able to administratively access social protection. This requires designers of social protection programmes to bear in mind problems vulnerable and marginalised persons might have in, for example, understanding complicated registration processes. They must similarly be mindful of the problems of states with weak registration systems where many people may not hold birth certificates and older people, despite being in particular need, are less likely than other age groups to possess any legal records of their age or identity.⁶⁰ Through discriminatory practices, women may be additionally burdened by a lack of access to land ownership, formal employment and other opportunities to obtain official documents.⁶¹ In Thailand, studies observed Muslims and people from hill

58 See Presentation by Dr Magdalena Sepúlveda, the Independent Expert on human rights and extreme poverty on 17-18 March in Santiago, Chile at an Expert Workshop on Conditional Cash Transfers: from a Human Rights Approach Available at <http://www.rlc.fao.org/iniciativa/expertos/documentos/trabajo/dt5.pdf>

59 See *Report of the independent expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona, on the draft guiding principles on extreme poverty and human rights*, A/HRC/15/41, 6 August 2010

60 See *The right to social security in old age: bridging the implementation gap*, Helpage International, August 2011. Available at <http://social.un.org/ageing-working-group/documents/HelpAge%20briefing%20right%20to%20social%20security%20Aug%2011.pdf>

61 Ibid

tribes being unable to prove citizenship through a lack of identity documents, preventing them from accessing legal entitlements including social security.⁶²

These factors must be taken into account when designing social protection programmes. In some cases, the State should actively implement a registration system where people living in poverty are able to access and register. This might require innovative solutions, such as mobile registration systems available to those in need. Similarly for social pensions, innovative solutions could be used to solve problems of age verification. In Nepal for instance, the government allowed citizenship cards to be issued based on a calculation of age associated with horoscopes, which the majority of older persons had in their possession.⁶³

c) Are those in need able to financially access social protection programmes?

Social protection systems must be affordable for those in need. This includes both direct and indirect costs. While the Female Secondary/High School Stipend Program in Bangladesh has been praised for achieving gender parity in school enrolment, studies have noted that by not covering all costs (uniform, books etc) it excludes many of the most vulnerable and marginalised households.⁶⁴

The question of affordability means that governments cannot solely rely on contributory systems. To benefit fully from contributory schemes with payments from employees/employers matched by governments, persons must have reasonably stable cash incomes and be able to make regular payments. However, in the Asia Pacific region this is often not the case. ESCAP notes 'the majority of workers in Asia and the Pacific do not have stable employment contracts. Most work is in the informal sector or in informal employment within formal sector enterprise so they do not have the status of employee.'⁶⁵ ESCAP also notes that other groups, such as those working in agriculture or migrants either within the country or overseas, are likely to be excluded from contributory systems.⁶⁶ Moreover, contributory schemes often exclude women who are usually working in the informal sector and/or often have an interrupted work history due to their traditionally assigned caregiver role.

62 See *Evaluation report on the implementation of a monthly allowance for older people in Thailand* conducted by Faculty of Social Administration, Thammasat University and others, for the Ministry of Social Development and Human Security, January 2004; *Situation of Older Persons in Northern Thailand: Evidence for Action* conducted by Faculty of Nursing, Chiang Mai University, funded by UNFPA Thailand, November 2009

63 See *Challenges and opportunities for age verification in low and middle-income countries*, Helpage.

64 See contribution to UNDP e-discussion *Part 1: Key Features of Successful Social Protection Schemes* by Mr Aniruddha Bonnerjee, 13 September 2011

65 See *The Promise of Protection: social protection and development in Asia and the Pacific*, UN Economic and Social Commission for Asia and the Pacific 2011 p45

66 See *The Promise of Protection: social protection and development in Asia and the Pacific*, UN Economic and Social Commission for Asia and the Pacific 2011 p45

d) Are persons in need aware of the social protection programmes and are they culturally acceptable?

People living in extreme poverty and in need of social protection are unaware of their rights and their legal entitlements which creates potential for elite capture. Through more limited access to quality education, those living in extreme poverty are more likely to have problems reading and writing and are therefore unable to gain the necessary information through newspapers or written public notices. They may also face linguistic barriers including only being able to speak local rather than national languages and/or problems understanding a more formal language. They will also undoubtedly have limited access to media such as television.

To fully achieve transparency and access to information, States must understand the capabilities and resources of recipients such as limited education and economic resources, geographical remoteness and physical and mental disability. They must also use the appropriate way of reaching out to the disadvantaged. Questions to consider when designing outreach strategies include: are the images and language used in program information materials culturally sensitive and inclusive? Do language barriers exist in the available information or between staff and potential clients? Are beneficiaries able to understand the more formal language of state administrative processes? Does the program employ members of the targeted group for outreach and intake activities? Is the type of benefit culturally appropriate?⁶⁷ Different outreach tools that have been effective include radio, community workshops and plays.

C. Ensuring gender equality and the advancement of women

Social protection programmes must take into account the fact that “poverty is not gender-neutral”. Discrimination and gender inequality ensure that women and girls are more vulnerable to living in poverty and, once living in poverty, suffer disproportionate risk and vulnerability. For instance when shocks are confronted, gender bias within the household may lead to the allocation of fewer resources (such as food) to women or the selling of female-owned assets as an initial coping strategy. Moreover, women’s heavy and unpaid care work load may leave them with less time to gain an income and often leads women to disproportionately suffer the impact of public spending cuts on essential services.

There is evidence that social protection measures enhance the economic power of women by giving them control over resources. Income security helps women’s position in communities as well. Moreover, channelling social protection to women may amplify the impact of certain schemes reaching children or older persons. In Indonesia, the Family Hope Programme of conditional cash transfers targets the woman in a household as caregiver. It is expected that the money is more likely to be spent on goods and services

67 For more information see *For Protection and Promotion: the design and implementation of effective safety nets* World Bank 2008.

that promote a child's wellbeing.⁶⁸ Yet, rather than advancing women and contributing to gender equality, the Independent Expert warned, however, that some social protection schemes, 'if badly designed, can exacerbate or contribute to inequalities'⁶⁹ by reinforcing patterns of gender discrimination and negative stereotyping. This may be the case even for social protection programmes that explicitly target women, such as cash transfers or asset transfer schemes and public works schemes. As has already been discussed, conditional cash transfers, in which women are given full responsibility for meeting conditions such as school attendance or compulsory medical check-ups, can reinforce women's care-provider roles, increase their time burden, and/or open up possibilities for abuse if conditionalities are not met.⁷⁰ There is also potential for conflict and/or abuse if social protection programmes are perceived as challenging traditional roles for women and breaking up households. It has been noted that delivering benefits directly to women could lead to intra-household disputes and increase gender violence against women.⁷¹

States must conduct comprehensive and disaggregated gender analyses assessing the vulnerabilities of both genders as potential beneficiaries throughout their lifecycle taking into account urban/rural/regional/ethnic variations and design social protection schemes accordingly.⁷² Policymakers should invest in capacity-building to ensure individuals implementing social programmes at both the national and local level are aware of gender issues related to social protection. In recognising but not reinforcing negative stereotypes and discriminatory patterns, social protection should also be accompanied by complementary services such as child care support and/or job training. One example of this is the Employment Guarantee Scheme in the state of Maharashtra, India. This not only guarantees employment within eight miles of participants' villages but also provides childcare facilities on site.⁷³ Finally, gender sensitive social protection programmes should be accompanied by activities supporting women's organisation and awareness raising. Since access to education is usually more limited for women living in extreme poverty, women are less likely to know about their rights and usually lack adequate capacity to assert their rights.

68 See contribution to UNDP e-discussion *Part 1: Key Features of Successful Social Protection Schemes* by Ms Vita Febriany from the SMERU Research Institute, Jakarta, Indonesia, 12 September 2011.

69 See *Report of the Independent Expert on human rights and extreme poverty to the 65th session of the General Assembly*, A/65/259, 9 August 2010 p16.

70 Ibid

71 See Davies, M., *DFID Social transfers evaluation summary report*, Institute of Development Studies, Centre for Social Protection, July 2009, p9

72 See *Report of the Independent Expert on human rights and extreme poverty to the 65th session of the General Assembly*, A/65/259, 9 August 2010

73 See Thakur, S. G. (Commonwealth Secretariat), Arnold, C. (DFID), and Johnson, T. (DFID), *Gender and Social Protection* OECD 2009

D. Accountability and access to justice

According to the Universal Declaration of Human Rights 'everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law.'⁷⁴ *The remedy should include compensation and reparation to fully remedy harm suffered by the victim.* Securing justice also includes ensuring accountability i.e. holding perpetrators accountable with a penalty proportionate to the crime and ensuring its non-repetition. The right to remedy has been formally codified in *the International Covenant on Civil and Political Rights* (ICCPR) with Article 2(3) committing states to ensuring: 'that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy'

This principle holds for the right to social security and protection. Under this principle, States must provide accountability and redress mechanisms that build on the legal guarantee of this right. States must also protect persons whose right to social protection (social security) has been undermined or threatened. In addition to providing individual redress, accountability systems can provide a means of 'correcting systematic failure to prevent future harm' by essentially determining 'what is working (so it can be repeated) and what is not (so it can be adjusted)'⁷⁵ As the Independent Expert has repeatedly emphasized, 'without accountability and redress mechanisms social protection programmes are less likely to be understood in terms of entitlements or rights and are more likely to be viewed as instruments of clientelism that can be manipulated by political actors.'⁷⁶ Providing accountability mechanisms is thus more than a normative requirement by human rights law, it is vital to ensure the programme meets its objectives and protects those in need.

Accountability systems could include but not be excluded to formal state monitoring and legal mechanisms, informal mechanisms run by and at the community level, or wider political accountability through ensuring good governance and an active civil society. In India social audits have been established to monitor the implementation of the Mahatma Gandhi National Rural Employment Guarantee Act (MGNREGA). In its simplest form a Social Audit could be a public assembly where all major details of a programme are read aloud. It could also be a more complicated affair involving extensive expectation of documentation and payments made etc.⁷⁷ However, essentially a social audit acts as a 'continuous process of public vigilance to ensure public accountability in the implementation of projects, laws

74 See the *Universal Declaration of Human Rights*, Article 8

75 See *Report of the Office of the High Commissioner for Human Rights on preventable maternal mortality and morbidity and human rights*, A/HRC/14/39, 16 April 2010, para 33.

76 See Presentation by Dr Magdalena Sepúlveda, the Independent Expert on human rights and extreme poverty on 17-18 March In Santiago, Chile at an Expert Workshop on Conditional Cash Transfers: from a Human Rights Approach Available at <http://www.rlc.fao.org/iniciativa/expertos/documentos/trabajo/dt5.pdf>

77 See Vij, N., *Building Capacities for Empowerment: the Missing Link between Social protection and Social justice, the case of Social Audits in Mahatma Gandhi National Rural Employment Guarantee Act in India*, International Conference 'Social protection for Social Justice', Institute of Development Studies, 13 0- 15 April 2011. p 17

and policies by the community as a whole.⁷⁸ Some of the issues revealed by Social Audits include denial of registration which have been remedied by on spot registration and issuance of job cards.⁷⁹

Nonetheless, the desired mechanism must be in conformity with human rights standards and in this vein, certain questions need to be raised and answered when designing accountability systems. For instance, if a crime has been committed, such as fraud, to what degree does the accountability system hold the perpetrator fully accountable? This may not always be possible with just political accountability or community informal systems. To remedy this, such accountability systems could be accompanied or complemented by links to criminal proceedings. In the example of MGNREGA system in India, perpetrators of fraud were both dismissed through the Social Audit process and had an FIR (First Information Report) filed with the police, which then launched criminal proceedings against them.⁸⁰ Moreover the accountability system *must be* financially, physically and culturally accessible for all. Those in need must be aware of their rights and procedures for seeking legal redress. Finally, one must consider whether the mechanism can be easily manipulated by local elites and if so, implement the necessary safeguards. Without appropriate and necessary action, community mechanisms will echo and reinforce existing power asymmetries within the community and deny justice to marginalised communities and/or women.

E. Ensuring meaningful and effective participation

Persons living in extreme poverty are below the radar of the State and almost certainly excluded from political life. Their voices are rarely, if at all, heard in the development and implementation of legislation and policies affecting their lives. This can lead to creation and implementation of irrelevant policies, failing to account for the needs of those living in poverty. As the Independent Expert noted, 'extreme poverty cannot be eradicated if life experiences of persons living in extreme poverty continue to be ignored in public debates.'⁸¹

The design of participatory mechanisms in social protection programmes is thus not an added extra but a key part of the process from initial conception to implementation, to monitoring and finally to evaluation. The participatory mechanism must be meaningful, inclusive and penetrate rhetoric consultations accompanied by processes allowing discussions to substantively feed into decisions. It must also be inclusive of everyone, especially disadvantaged or traditionally marginalised groups, as well as economically, culturally, and physically accessible to allow for and remedy imbalanced power

78 Ibid

79 Ibid p 21`

80 Ibid

81 See *Progress Report of the independent expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona, on the draft guiding principles on extreme poverty and human rights A/HRC/15/41*, 6 August 2010, page 12.

structures and the specific vulnerabilities of different groups such as women, lower castes, landless labourers, and sub groups such as lower caste women. The mechanism must ensure members of these vulnerable groups are able to share their views freely, without fear of reprisal from other community members. This could include individual, confidential procedures or regular meetings with one particular group or sub group of persons at a time.

F. Adopting comprehensive, coherent and coordinated policies

Social protection systems must recognise poverty as multi-disciplinary and the result of a number of different interrelated and interdependent deprivations and vulnerabilities. The systems must also be approached holistically and reinforced by other social policies.⁸²

ESCAP has observed that in the Asia Pacific region, social protection programmes are often fragmented i.e. lacking coordination and cohesion, with governments considering such schemes as 'almost self-contained with their own objectives, functions, structures and budgets'.⁸³ This is attributed in part to governments designing programmes in response to a specific problem or issue and then withdrawing them once the circumstances change or if the programme is perceived as unsuccessful.⁸⁴ It also observes that this problem of fragmentation and lack of coherence is particularly apparent in least developed countries due to a greater donor presence and different donors responding to different priorities.⁸⁵ ESCAP gives the examples of both China and Indonesia. It highlights that China 'has at times offered social protection through an estimated 17 different agencies, each competing for programmes and resources'.⁸⁶ It describes Indonesia as having 'complex, overlapping systems' operating different social insurance funds for civil servants, the military and the private sector.⁸⁷ Vietnam apparently has a 'fragmented system' with different programmes being managed by different state agencies such as Vietnam Social Security or the Ministry of Labour, Invalids and Social Affairs amongst others.⁸⁸ ESCAP observes that this system 'has been difficult to manage both for the institutions involved and the beneficiaries'.⁸⁹

Fragmentation and a lack of coherence result in a higher likelihood of exclusion errors with vulnerable persons falling between the cracks. It is far more difficult to keep track of who is

82 See Presentation by Dr Magdalena Sepúlveda, the Independent Expert on human rights and extreme poverty on 17-18 March in Santiago, Chile at an Expert Workshop on Conditional Cash Transfers: from a Human Rights Approach Available at <http://www.rlc.fao.org/iniciativa/expertos/documentos/trabajo/dt5.pdf>

83 See *The Promise of Protection: social protection and development in Asia and the Pacific*, UN Economic and Social Commission for Asia and the Pacific 2011 P 45

84 Ibid

85 Ibid P 46

86 Ibid

87 Ibid

88 Ibid

89 Ibid P 47

being covered by what. Moreover, without coherence, programmes can undermine each other both in terms of competing for funding and the impact and ability to protect those in need. States must take a holistic view, and ensure coherence between the different programmes by keeping in mind the primary objective of reaching and protecting those in need from different contingencies.

Social protection programmes must be complemented by other policies such as ensuring the supply of good quality and accessible schools. While this touches on many of the issues dealt with earlier, this is a challenge in its own right. For example, focusing on cash transfers assumes the main barrier to accessing schools is financial. While this is certainly a factor for households taking children from school to engage in paid work when crises hit, it may not be the only important factor. Persons living in extreme poverty may also be prevented from accessing school by problems with physical access, lack of quality teachers, and possibilities of abuse among other things.

G. Ensuring sustainability

Social protection systems must be sustainable in the long term. Any sudden withdrawal of benefits could increase persons' vulnerability. This is particularly pertinent in the current economic climate, the possibility of a repeated recession in developed countries, reduced government spending in 2011 and 2012 and the changing demographics and financial implications of an ageing population with old age dependency ratios increasing.

This issue has been noticed by human rights mechanisms. On several occasions the CESCR has asked State parties whether their pension systems are financially viable and whether they are expected to remain so in the coming years.⁹⁰ In the list of issues presented to the Government of Belgium, the CESCR asked the Government to provide detailed statistical information on an annual basis regarding financing of the Ageing Fund established in 2001. The CESCR commented on other measures the State party intends to take to cover such as higher pensions and health costs arising from the ageing Belgian population.⁹¹ The Committee similarly asked Italy to indicate measures being taken to deal with demographic changes, namely a decreasing overall population and an expected increase in the number of elderly persons dependent on social security.⁹² While CESCR focused questions on European and North American countries whose systems of social security have been well established, these questions remain pertinent for emerging economies and developing countries such as those in the Asia Pacific region. The Asia Pacific Region is home to more than half the world's population (3.45 billion people) and its population density of 127 people per square kilometre is more than twice the world average.⁹³ There

⁹⁰ See E/C.12/2007/SR.7.

⁹¹ See E/C.12/BEL/3

⁹² See E/C.12/Q/ITA/2

⁹³ See *Health in Asia and the Pacific, Chapter 3 Demographic Trends*, World Health Organisation, 2008. Available at: http://www.wpro.who.int/NR/rdonlyres/FDE1DBDE-B905-465F-B9D4-7DC92C50D0E0/0/08_Chapter3Demographictrends.pdf

is also a shift from low dependency ratios (both child and old age) of the late 1990s with parents having smaller families to increasing old age dependency as the fertility rate declines and life expectancy increases.⁹⁴ In 1975, for example, the percentages of over 60 years in Bangladesh and India were 4.8% and 5.6% respectively. By 2005, these changed to 5.7% in Bangladesh and 7.5% in India, and are projected to increase by 2025 to 9.2% and 11.5% respectively, and further to 17% and 20.2% by 2050.⁹⁵

The need for sustainability requires the donor community to have a long-term perspective. The Independent Expert has repeatedly called on the the international community to ensure predictability and consistency and to implement and guarantee a long-term strategy regarding aid to developing countries for implementing social protection programmes.⁹⁶ Operating a short-term project based approach with limited long-term planning contributes to a fragmented approach that can result in a lack of comprehensive protection with people falling through the cracks. A fragmented short term approach is most common in the Asia Pacific region in developing countries which have a strong donor presence.⁹⁷ For example, UNDP has noted that reliance on donors for funding anti-retroviral treatment for people who are HIV positive, and subsequent questions about sustainability, could pose life threatening concerns for those who must continue receiving this treatment throughout their lives.

Given the tendency of aid to be project based, there are a number of specific 'one-off' activities donors could support that fit within the 'sustainability/long term framework'. Opportunities identified by the Independent Expert include building civil society's capacity for monitoring the social pension system and holding the Government accountable, assisting in the designing and implementation of effective tax systems, the initial set-up of social pension systems, especially in low-income countries, and providing technical and/or material assistance for identifying and registering possible beneficiaries.⁹⁸ Essentially, donors should work towards strengthening the capacity of the recipient country to 'eventually implement the social pension programme unassisted'.⁹⁹

94 Ibid

95 Ibid p 41

96 See *Report of independent expert on the question of human rights and extreme poverty*, Magdalena Sepúlveda Carmona, Mission to Zambia A/HRC/14/31/Add.1, 11 May 2011 p 20. See also *Report of the independent expert on the question of human rights and extreme poverty*, Magdalena Sepúlveda Carmona, Mission to Viet Nam, A/HRC/17/34/Add.1, 9 May 2011, p 22

97 See *The Promise of Protection: social protection and development in Asia and the Pacific*, UN Economic and Social Commission for Asia and the Pacific 2011

98 See *Report of the independent expert on the question of human rights and extreme poverty*, Magdalena Sepúlveda Carmona, A/HRC/14/31 31 March 2010

99 Ibid P 21.

4. UNDP and social protection

UNDP is mandated to implement a Human Rights Based Approach to human development of which a rights based approach to social protection is an integral part. UNDP must therefore recognise social protection as an entitlement and commit to assisting governments to secure a rights based approach that reaches marginalized people in particular need.

A. What is UNDP's added value in working on social protection?

UNDP is uniquely placed to build on the work of other UN agencies and programmes on social protection due to, amongst other things, its universal presence and extensive knowledge network.¹⁰⁰ By combining teams on Inclusive Growth, Poverty Reduction and Democratic Governance, UNDP can build bridges between the normative human rights framework and the technical implementation of projects. There are a number of practical possibilities, aside from the actual implementation of social protection programmes, for UNDP to take advantage of its unique position. However, this is by no means an exhaustive list. Instead, it is a list of ideas designed to provoke discussion within UNDP about how to ensure a rights based approach to social protection at the country level meets the needs of the most vulnerable and marginalized.

i. Identifying beneficiaries:

As emphasized throughout this paper, persons in need of social protection are usually below the radar of the State. UNDP can play a clear role in assisting States to identify and reach those in need by helping *'establish comprehensive data-collection systems that provide disaggregated data, taking into account the specific attributes of extreme poverty in each country'* using data collection and processing methods that comply with *'internationally accepted norms to protect human rights, ensure confidentiality and respect for privacy'*.¹⁰¹

ii. Co-ordination and coherence:

UNDP is in a unique position to help coordinate and ensure cohesion through its strategic partnerships with the donor community and civil society as well as through facilitator/manager of the UN Resident Coordinator System coordinating the actions and interventions of UN agencies and programmes on development issues. The coordination role of UNDP has been repeatedly recognised and guaranteed at the global level. UNDP has been frequently asked to strengthen its role in supporting the promotion of coordination,

¹⁰⁰ See *UNDP strategic plan, 2008-2011; Accelerating global progress on human development*, DP/2007/43/ rev.1, 22 May 2008 p 10

¹⁰¹ See *Report of the independent expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona, on the draft guiding principles on extreme poverty and human rights A/HRC/15/41*, 6 August 2010, pages 13 and 14.

efficiency and effectiveness of the UN system as a whole at the country level. Also, in resolutions 59/250 and 62/208 the General Assembly reiterated that the management of the resident coordinator system 'continued to be firmly anchored in the United Nations Development Programme.'¹⁰²

UNDP can help establish a policy framework ensuring both cohesion with and between existing social protection programmes and supply side issues such as ensuring accessible, quality schools and health services

iii. Help secure sustainable funding through improving revenue collection systems in accordance with human rights principles and standards:

Sustainable funding is extremely crucial. Effective national and sub-national revenue collection systems are one of the most reliable ways to ensure sustainability, giving governments the fiscal space to implement social reforms and guarantee legal entitlements. Strengthening UNDP's work in assisting governments to identify opportunities for revenue collection, supporting transparent and participatory budgetary processes and well-functioning systems of fiscal decentralization as well as strengthening the capacity of institutions to implement and enforce the fiscal policy may therefore be invaluable.

102 See *UNDP strategic plan, 2008-2011; Accelerating global progress on human development*, DP/2007/43/rev.1, 22 May 2008 p 10

Access to a Legal Remedy: Alternative Pathways to MDG Implementation

Tiernan Mennen

1. Introduction

Accessing legal remedies is an important structural component for enforcing the spectrum of rights and benefits that correspond to the Millennium Development Goals (MDGs). Ensuring access to a legal remedy is important to any comprehensive strategy in order for individual people to effectively challenge the denial of economic, social and cultural rights. Without a citizen-focused strategy and methodology, MDG achievement is limited exclusively to government policy efforts which may go unenforced at the local level. Legal challenges by citizens help refine implementation efforts by informing and improving policy. Legal remedies are not meant as a primary enforcement mechanism, but their existence and availability has proven to be a key driving force and incentive for rights protection.

Ensuring access to legal remedies is not an easy task considering the large number of poor and marginalized populations in developing and conflict-affected countries. Access barriers are further compounded by large-scale denial of rights, a lack of community legal awareness, and underdeveloped systems of legal protection. UNDP, international donors and local non-governmental organizations (NGOs) have developed many innovative approaches to tackling these barriers. However, the problem is vast and often poorly understood.

In this chapter we will examine the most effective approaches for providing access to a legal remedy and detail how they can be better oriented to address economic and social rights and other legal issues that directly impact the MDGs. The preferred approach expands upon traditional criminal justice-focused legal aid programs to incorporate legal empowerment methodologies, such as paralegals, that increase the agency of individuals to use the law as a tool and promote the integration of legal solutions to a wider swath of development issues such as health, education, and public services.

2. Access to a Legal Remedy

Supporting legal services for low-income groups is a crucial “demand-side” aspect of any strategy for comprehensive justice sector reform. In addition to providing judicial services, access to institutions and legal remedies, interventions increase legal literacy and empowerment, providing people with the knowledge and tools to find their own legal solutions and demand improvements in law and policy. Demand-side interventions can also expose deficiencies in law and create movements for needed reforms. The

interventions help inform governments of legal issues affecting the poor and often identify pro-poor solutions capable of being scaled up into policy reform.

Ensuring access to a legal remedy is, however, a daunting objective in many countries where the majority of people cannot afford a lawyer and have little trust or interaction with the formal justice system. Courts and other aspects of the formal justice system have also proven ill-suited, inaccessible and too costly for most marginalized populations. Legal professions that are largely underdeveloped or bereft of a commitment to public interest exacerbate these challenges. Alternative approaches have been developed to address these challenges by fostering public interest in legal aid programs, expanding legal service approaches to include paralegals, and cultivating the growth of legal professions. Legal remedy programs focus on accessing justice without the need to go to court and are based squarely in the reality of the poor and the use of alternative and customary forms of dispute resolution.

Justice or legal aid services can be viewed as a public good similar to public health and education. The International Covenant on Civil and Political Rights (ICCPR) Article 2 (3) provides the right to legal recourse when their rights have been violated, even if the violator was acting in an official capacity.¹⁰³ As a result, many national development and poverty reduction strategies incorporate commitments to create justice service systems aimed at the poor and marginalized based on principles of accessibility, affordability, sustainability, quality, and independence.

Delivery of legal services can and should take many forms. A spectrum of interventions supported both publicly and privately and with a strong emphasis on independent civil society implementation, should form the core of legal services and access to remedy strategies. The following are descriptions of key categories of legal services and mechanisms for providing access to legal remedy for the poor and vulnerable.

Legal Aid

Legal aid is the provision of legal assistance and representation to those that cannot otherwise afford it. In many countries, this means the majority of the population. Legal aid can be further categorized into criminal legal aid for indigent defendants (which is often a state obligation) and civil legal aid, which tends to be more nuanced in determining eligibility and uses legal information and awareness-raising more frequently than representation. Legal aid can be provided by a combination of state attorneys, normally in the form of a Public Defenders Office, individual lawyers, either through a

103 “Each State Party to the present Covenant undertakes: ... To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; to ensure that any person claiming such a remedy shall have his rights thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;”

Judicare¹⁰⁴ model or pro bono services, non-profit lawyers, or civil society organizations that employ lawyers, paralegals, mediators and other community workers. The ideal legal aid system employs a mixture of all. In many developing countries, support to civil society organizations has proven to be the most effective, given the enormous demand, relatively high cost of private lawyers, government disinterest, and lack of pro bono legal culture.

Criminal legal aid often responds to constitutional or legislative obligations on the state to provide legal representation to all arrested and accused. In some countries, this only applies to more serious offenses. In others, there is no such formal obligation. State responses to providing criminal legal aid then take on a variety of forms, dependent in part on their level of obligation. Public Defenders Offices employ government lawyers to monitor arrests and provide legal assistance to those that cannot otherwise afford a lawyer. In other instances, a legal aid government agency of some form is established to contract with independent organizations that fulfill the public legal aid obligation. In many countries there is no system in place. Criminal legal aid for indigent defendants is provided irregularly or not at all, often despite legislative obligations. The rash of prison overcrowding and pre-trial detention rates around the world has been a direct result.

Civil legal aid, as used here, can refer to a wide range of legal, judicial and dispute resolution activities, both civil and criminal. The main difference from criminal legal aid being it does not exclusively serve defendants. Most often, criminal prosecution services are the purview of the state, but in many countries crimes go unprosecuted or lie outside control of the formal system. As a result, civil legal aid services tend to be more comprehensive and nuanced and have the goal of achieving justice. In this form, legal services can also include mediation, alternative dispute resolution and community-based solutions that incorporate customary and/or restorative practices where appropriate. In many countries, civil legal aid is legally obligated for vulnerable groups such as children.

Legal services are typically provided through a range of mechanisms that include legal service organizations, community justice centers (“one-stop shops”), community-based paralegal networks, gender-based violence support centers, or any variety of programs that place lawyers, paralegals, or even social workers in important community institutions where legal information can be easily disseminated and legal advice/representation easily accessed. Community organizations provide legal services that are often supported by pro bono support and representation by public-interest lawyers or law firms, particularly on specialized areas of law (e.g., labour, contracts, property, and family). Legal services are most effective when implemented through a network of community based organizations, specialized referral organizations, and complemented with pro bono support services.¹⁰⁵

Legal Aid Boards are established in a number of countries to administer publicly-supported criminal and civil legal aid. The Boards supervise and coordinate organizations

104 Judicare is a legal aid model that uses private lawyers as service providers. They are remunerated on a case-by-case basis as determined by the appropriate legal aid agency. Judicare programs are often run and staffed by lawyers from Bar associations.

105 *Legal Services for the Poor Best Practices Handbook*, World Bank, 2003.

and/or law firms that are contracted or given grants to provide legal aid services. Boards are sometimes structured to administer a judicare model where individual lawyers are assigned cases, often in collaboration with Bar Associations, and paid for their fees. Judicare models have proven to not be cost effective where there is a large need for legal services and indigent criminal representation.

Legal Aid in South Africa*

Provisions of the South African Constitution requiring legal aid in criminal cases dramatically affect the ability of the Board to deliver legal aid in noncriminal cases. The vast majority of the Board's budget is earmarked for criminal legal aid. Of the 314,084 new matters taken by the Board's justice centers during the period from April 2006 to March 2007, a total of 279,691 (89 percent) were criminal cases and only 34,393 (11 percent) were civil matters.

With respect to civil legal aid cases, the Constitution imposes a special duty on the state to provide legal aid to children under the age of eighteen "where substantial injustice would otherwise result." The Constitution contains no additional provision that specifically requires legal aid in noncriminal matters. However, it does provide that "[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing in a court or, where appropriate, another independent and impartial forum." This raises the question of whether the state has a duty to provide legal aid to any person in a civil case who cannot afford representation. Unlike cases of arrested, detained, and accused individuals, there are no specific constitutional duties imposed on the South African state to provide the services of a legal practitioner to litigants in civil cases. If, however, the "equality of arms" (this is interesting, can you explain this a bit in a footnote, I think it might be interesting for readers in Asia what the European standard is in this regard) interpretation adopted by the European Court of Human Rights is applied, such a duty would arguably lie with the state.

Paralegals

Paralegals are an integral part of many legal systems around the world. The term paralegal commonly refers to non-lawyers that use a combination of tools, including legal assistance, to help clients and communities reach a legal solution to their problem. Paralegals can range from community-based volunteers that help raise awareness of human rights to professional paralegals that are trained, certified and regulated according to strict national standards. Networks of community paralegals have proven to be particularly successful providing cost-effective legal services in countries with unmet legal needs and underdeveloped legal professions. Depending on the context, paralegals can take a range of forms from certified professionals with law degrees to volunteer community members. In most developing country contexts they are drawn from local communities and trained to provide legal information, assistance and mediation to the poor and disadvantaged, lead local advocacy and community organization efforts, and assist in accessing formal legal representation. Paralegal networks seek to improve access to justice by creating local bases of knowledge that facilitate community involvement in the legal/administrative

processes that can resolve their problems. One of the most important aspects of the paralegal approach is the flexibility of paralegal groups to use informal, community-based legal systems to articulate rights that translate to the formal system. The empowerment aspect of paralegal work encourages advocacy and lobbying in areas outside the formal law and creates mechanisms for addressing problems across different sectors.

A number of legal advocacy NGOs have been very successful using paralegals to affect a wide range of issues. Depending on level of training, skill and the legal rules that apply, paralegals can provide a wide range of services. In some countries, paralegals represent clients in administrative tribunals. In others, paralegals provide only basic legal information to clients, conduct investigations, serve as mediators, and/or provide legal awareness training. NGO-supported paralegals have proven effective at promoting judicial access, and have helped to demystify the law and equip communities where they live and serve with the legal capabilities to meet their own needs.¹⁰⁶ Paralegal networks strengthen implementation of laws by applying informed pressure on government bodies and private offenders and heighten participatory development by bringing previously powerless voices into the decision-making process.¹⁰⁷

Paralegal networks in countries such as China, Ecuador, the Philippines, South Africa, Sierra Leone and Namibia are examples of programs that have used innovative approaches to increase “legal literacy” and affect change in a variety of environments on topics directly and indirectly related to livelihood-based legal empowerment. Namibia’s Legal Assistance Centre is a professional paralegal network who worked on apartheid issues upon inception, but now primarily helps victims of domestic violence to secure restraint orders, help workers regain jobs from which they have been unfairly dismissed, and assist disadvantaged people attempting to secure government benefits. The Sustainable Uses of Biological Resources (SUBIR) project in Ecuador developed a paralegal network in indigenous Afro-Ecuadorian and peasant communities to promote legal rights among their communities, including securing land tenure for community land previously classified as state land.¹⁰⁸ Empowerment of communities to claim legal title to the land corresponded with greater commitment and responsibility in conserving protected areas rather than administered by State Forestry agencies.

Paralegal networks are a potentially important mechanism for expanding legal aid programming to a more effective legal empowerment approach. A well-developed network has vast potential to provide a powerful combination of community-based legal literacy, legal assistance, advocacy and community organizing. Paralegal networks can

106 Dan Manning, “The Role of Legal Services Organization in Attacking Poverty” (8–12 July 2001) World Bank Conference: *Empowerment, Security and Opportunity through Law and Justice*, 21.

107 *Supra* note 69 at 297–299.

108 See “Perspectives from Research”, *Land and Development in Latin America: Issues and Openings for Policy Research* (2004) eds. Stephen Baranyi, Carmen Diana Deere and Manuel Morales, International Development Research Centre, <http://www.idrc.ca/fr/ev-71216-201-1-DO_TOPIC.html> at 22 July 2009. For more information on SUBIR, see the CARE website at: <<http://www.careusa.org/vft/ecuador/day1.asp>> at 22 July 2009.

also play an active role in referring more complicated cases to public interest lawyers. Paralegals do not just provide legal services, but also work with communities to organize and create collective solutions to common problems. Paralegals are important agents, if trained and organized properly, for working within local contexts to bridge the gap between law and the legal reality for the poor and vulnerable.

Clinical Legal Education

The development of law school clinics that focus on legal services and community empowerment can be effective for two reasons: it provides free services and legal information to disadvantaged communities and it fosters an appreciation for public-interest work in future lawyers, encouraging positive change in the culture of the legal profession. Post-graduate and law student intern programs address a full range of rights. Their placement within local communities necessitates covering a wide range of issues, from criminal representation to property disputes, especially where there is no other form of legal access.

Law clinics allow young attorneys, law students, and paralegals to provide legal or educational services to a wide array of clients, including abused women and children, refugees, people living with HIV/AIDS, prisoners, and poor rural villagers. Clinic participants work on cases involving discrimination, housing disputes, land reform, domestic violence, divorce and child custody, and consumer rights, among other issues. Law clinics also introduce students to poverty lawyering by representing the poor and disenfranchised. Students learn to understand the root causes of poverty and address those causes through both legal and interdisciplinary approaches.

Throughout the world, the definition of clinical legal education varies, but all clinical programs contain three essential characteristics: they are linked to a law school, the instruction involves real facts taken from real cases, and participants are exposed to experiential learning (in which students represent actual clients) as well as classroom-based pedagogy (in which students receive instruction from professors). Law clinics don't just combine theory and practice; they go further by extracting lessons from real cases.¹⁰⁹

In many countries, a public service requirement exists for all law students. Chile's system of Corporations for Judicial Assistance (*Corporaciones de Asistencia Juridica*), established in 1981, is a model for post-graduate law student public service.¹¹⁰ In the Corporations, recent law school graduates are required to perform six months of unpaid legal services before receiving their licenses as attorneys.¹¹¹ In total, 13 Corporations, composed of recent

109 For more information see. Legal Clinics: Serving People, Improving Justice, Open Society Justice Initiative, available at: http://www.soros.org/initiatives/justice/articles_publications/publications/legalclinics_20090101

110 Michael Samway, "Note: Access to Justice: A Study of Legal Assistance Programs for the Poor in Santiago, Chile" (Spring, 1996) 6 *Duke J. Comp. & Int'l L.* 347.

111 *Id* at 350.

law graduates and two or three staffed attorneys and social workers, work in conjunction with municipal and regional governments to provide legal services.¹¹² A typical student postulant can handle up to 110 cases over a six-month period.¹¹³

Legal Empowerment

The legal empowerment approach to development and legal aid is an expansion of traditional legal service efforts to emphasize greater community engagement that cultivates agency, voice and advocacy. The legal empowerment approach is an alternative paradigm that focuses on the use of legal services and related development activities to increase disadvantaged populations' control over their lives.¹¹⁴ In its most advanced form, the approach imparts "critical consciousness" or the ability of women, the poor and other marginalized groups to understand and think critically about the inequitable power relationships that affect their lives and to take action by challenging and transforming those relationships.¹¹⁵ The approach also incorporates community-driven, rights-based development and offers concrete mechanisms, including legal services, concentrated on alleviating poverty, advancing the rights of the disadvantaged, and making the rule of law a reality.¹¹⁶ Legal empowerment can also translate community-level needs into reforms of national laws and institutions.¹¹⁷

Golub identifies four additional, but crucial differences between rule of law efforts and legal empowerment approaches:

*1) attorneys support the poor as partners, instead of dominating them as proprietors of expertise; (2) the disadvantaged play a role in setting priorities, rather than government officials and donor personnel dictating the agenda; (3) addressing these priorities frequently involves non-judicial strategies that transcend narrow notions of legal systems, justice sectors, and institution building; (4) even more broadly, the use of law is often just part of integrated strategies that include other development activities.*¹¹⁸

¹¹² *Id.*

¹¹³ *Id.* at 358.

¹¹⁴ *Id.* (The "critical consciousness" concept was developed by Paulo Freire, see: Freire, Paulo, *Pedagogy of the Oppressed*, Herder and Herder, New York, 1970; Freire, Paulo, *Education for critical consciousness*. [1st American] ed. A Continuum book. New York,: Seabury Press, 1973.)

¹¹⁵ See, "Law and Policy at the Asian Development Bank 2001, Legal Empowerment: Advancing Good Governance and Poverty Reduction", Asian Development Bank, available at: http://www.adb.org/Documents/Others/Law_ADB/lpr_2001.asp?p=lawdevt

¹¹⁶ See, Stephen Golub, *Beyond Rule of Law Orthodoxy: The Legal Empowerment Theory*, Rule of Law Series, Democracy and Rule of Law Project, No. 41 (October 2003)

¹¹⁷ *Id.* at 5.

¹¹⁸ *Id.* at 6

Legal empowerment approaches go hand in hand with rights-based approaches to development and programs to enhance civil society. It is an approach that enhances the effectiveness of development assistance by helping citizens engage with legal and administrative institutions so they may address critical impediments that prevent them from participating in and benefiting from development assistance. Legal empowerment uses legal services through civil society groups to help the poor learn, act on and enforce their rights in pursuit of development and the goal of poverty alleviation. However, legal empowerment goes further than rights-based approaches by focusing on connections between development, freedom and power. Building on Amartya Sen's conclusions on development being a measure of freedom¹¹⁹, legal empowerment is an avenue by which the poor can increase freedom in the areas that affect their capacity to progress.

3. MDGs, Economic and Social Rights, and Access to Legal Remedies

Ensuring access to legal remedies is an important approach to enforcing rights, including economic and social rights that advance the Millennium Development Goals. Legal aid and assistance does not differentiate between economic, political and other rights, but instead work primarily at the domestic law and regulation level. A country's international human rights obligations can be brought in to domestic rights enforcements proceedings, but typically national law controls.

Most countries have signed or ratified the International Covenant on Economic Social and Cultural Rights (ICESCR) but implementation lags. Around the world, good laws are on the books as a result of the ICESCR, but means of enforcement are sometimes nonexistent or negligible. Too often, the international legal system is being called upon to enforce domestic obligations. Access to remedy focuses on strengthening the means for domestic enforcement.

The ICESCR recognizes a range of economic-related rights, including the right to an adequate standard of living, the right to work, the right to favorable conditions of work that ensure fair wages and a decent living, and the right to social security. The ICESCR entered into force in January, 1976 as the sister-agreement to the International Covenant on Civil and Political Rights (ICCPR), both of which derive from the Universal Declaration of Human Rights. However, the ICESCR has never enjoyed the same recognition as the ICCPR and the agreement is not supported by the U.S. government, among others. The ICESCR is considerably weaker than the ICCPR and only requires that States "make steps" towards protecting the enumerated rights, while also not establishing a free-standing monitoring body such as the ICCPR Human Rights Committee.¹²⁰ This has created difficulty ensuring the domestic enforcement of economic and social rights and placed greater emphasis

119 Amartya Sen, *Development as Freedom* (2000) Alfred A. Knopf, New York.

120 Beth Lyon, "Symposium: A Post-Colonial Agenda for the United Nations Committee on Economic, Cultural and Social Rights", *10 Am. U.J. Gender Soc. Pol'y & L.* 535, (2002)

on domestic legal procedures. At the same time, the UN and international human rights bodies have emphasized the need to consider all human rights as indivisible, interrelated and mutually reinforcing and that no hierarchy or distinction should be established between them.

Access to a legal remedy for economic and social rights also relates to the issue of informality and the four pillars identified by the Commission on Legal Empowerment of the Poor namely access to justice, property rights, labour rights and business rights. The economic rights delineated in the ICESCR do not directly refer to informality and economic regulations but are part of the spectrum of rights embodied by domestic laws such as contracts, property, trade practices and commerce. The economic rights of the ICESCR, however, are embodied in these laws and the goals of the ICESCR are advanced through their enforcement. The right to private property and freedom from government expropriation, for example, while not expressly recognized by the ICESCR is in the Universal Declaration of Human Rights (*Article 17–(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property.*) It is also a fundamental economic right recognized by constitutions throughout the world. Infringement of this principle is also a violation of ICESCR rights to adequate standard of living and to work. Labour rights (ICESCR Article 6, 7 and 8) are other important economic rights that have implications for the informal economy and pertain to various related domestic laws, policies, and regulations that enhance livelihood opportunities and protect the poor from abusive workplace conditions.

Rights contained in the ICCPR also directly affect legal remedies and MDG achievement. Among others, Article 2 provides for the “right to legal recourse” when rights have been violated, even when the violator was acting in an official capacity; Article 3: “the right to equality between men and women in the enjoyment of their civil and political rights”; Article 6: “the right to life and survival”; Article 26: “the right to equality before the law and equal protection”. The two conventions, namely ICESCR and ICCPR, cover the entire spectrum of rights that should be protected by domestic legal frameworks and institutions.

Legal aid and other access to remedy approaches address civil and political as well as economic and social rights. Ethnic and gender discrimination denies benefits and public services to scores of vulnerable populations around the world. Denial of civil and political rights removes large segments of the population, including minorities, from the governance process, in turn denying them of protection from the law and access to the benefits they are entitled to. By focusing on the full spectrum of legal needs and rights violations that affect the poor and disadvantaged, legal aid programs address many of the root causes of poverty and advance the MDGs through structural solutions. Each MDG has more complicated implications that can be traced to the denial of rights:

- *Goal 1: Eradicate extreme poverty and hunger* – poverty and hunger are byproducts of people not being able to make a living often because they are denied rights to land for farming, are subjected to abusive working conditions, are evicted from their houses, or are continually discriminated against because of their ethnicity, religion or gender (ICCPR Article 26). Access to public benefits (ICESCR Article 11, right to

and adequate standard of living) to counter extreme poverty and hunger are often unavailable to those most in need because of discrimination. In many countries, chronic poverty due to a lack of economic rights affects the state's revenue generation and ability to provide public benefits to all in need.

- *Goal 2: Achieve universal primary education* – primary education is often unavailable to people or whole communities that are systematically discriminated against. In other instances educational opportunities are available but severely limited, for example, by ethnic minorities not being allowed to use their native language in schools. The right to education (ICESCR Article 13 and 14) is enshrined in most national legal frameworks, but its enforcement through legal mechanisms is often unavailable to the poor.
- *Goal 3: Promote gender equality and empower women* – ensuring gender equality and women's rights (ICCPR Article 3, ICESCR Article 3) is a broad goal that touches upon a variety of national laws and regulations. Ultimately, women need to be able to access legal assistance that empowers them to challenge discrimination, whether it occurs in employment, inheritance, or compensation for abuse.
- *Goal 4: Reduce child mortality rates; Goal 5: Improve maternal health; Goal 6: Combat HIV/AIDS, malaria, and other diseases* – health-related MDGs face various rights enforcement barriers that have curtailed their progress. Vulnerable populations are often unable to enforce their right to health (ICESCR Article 12) where communities are denied service based on discrimination. As with state welfare programs, the lack of economic opportunity afforded by secure property and labour rights reduces the state's revenue and ability to provide health services to all.
- *Goal 7: Ensure Environmental Sustainability* – domestic environmental laws based on international best practices suffer from a chronic lack of enforcement. Access to legal remedies has allowed many communities to prosecute polluters and enforce the conservation of natural resources they depend upon to make a living.

The importance of property (UDHR Article 17)–the legal expression of ownership of assets–in a market-based economy cannot be understated. Property rights are composed of a bundle of associated rights that include the right to possess, use, and own land, and include rights to resources on, below and above land. Property can be held individually or in common and often vary depending on country context and local culture.

Numerous rule of law theorists have identified a lack of property rights as the primary cause of market access failure in developing countries and a chronic, structural barrier in the fight against global poverty.¹²¹ They have identified three important and overlapping ways that property rights premise the marketplace.¹²² First, property identifies and protects the set of tangible and intangible resources that can be transferred in the marketplace. Second, property secures benefits of and provides incentives for owners to seek improvement of their resources. Third, property creates security for capital borrowing and investment, turning fixed resources like land into mutable and liquid form.

¹²¹ See generally, de Soto; Reed; Bethall

¹²² O. Lee Reed, "Law, The Rule of Law and Property: A Foundation for the Private Market and Business Study", 38 *Am. Bus. L.J.* 441, 451 (Spring, 2001)

As Tom Bethall states in, *The Noblest Triumph*: ‘all areas of law radiate from the broad concepts of the property system, including the narrow modern body of ‘property law.’¹²³ But as fundamental as property is to law and to the functioning of a marketplace, the organic growth of property systems that occurred in industrialized nations has not happened on a society-wide scale in the developing world. Instead, indigenous, customary and informal property systems exist simultaneously and often in conflict with foreign, superimposed property laws—vestiges of colonial efforts to solidify elite access. Many scholars see this as a failure of the rule of law and call for inclusion of the poor into the “formal” property system used by the elites.

Hernando De Soto in *The Mystery of Capital* details how lack of access to capital, extensive government restrictions and lack of contract enforcement combine to undermine completely the capitalist economies that developing countries have been striving to create for the past half century.¹²⁴ The problem for De Soto is not that developing countries do not have formal property systems, but that most citizens cannot gain access to it. Developing countries have been trying to open up their property systems to the poor for the past 180 years. However, they have largely failed to realize property is not a primary quality of assets but the legal expression of an economically meaningful consensus *about* assets.¹²⁵ Western nations built formal property systems by discovering the ‘people’s law’ through formation of social contracts based on the practices and norms of the extralegal sector. Developing countries, in contrast (De Soto uses his native Peru as an example), have not geared their formal property systems to process extralegal proofs of ownership, which is the only kind of proof the poor have. The poor, and often indigenous in Peru, have never been given the legal mechanisms that would allow them to fix their economic rights over their assets, despite apparent legal rights.

In addition to property and other economic rights, legal access and enforcement of rights has wider implications for fostering economic opportunity and creating the enabling environment for greater economic growth. Access to legal services supports small business and poor entrepreneurs by increasing confidence and security in doing business outside of local networks, beginning with advice on creating a contract sufficient for legal action and dispute resolution using legal resources from supporting NGOs. They can also provide legal advice for individual or groups of farmers to gain access to credit for purchasing seeds or construction irrigation, including perfecting security interests in future harvests, equipment or other movable property.

Establishing integrity of contracts and enhancing their use is crucial to strengthening economic rights. While markets will still exist through extralegal means in the absence of economic rule of law, their capacity is greatly reduced when property and contractual

123 Thomas Bethall, *The Noblest Triumph: Property and Prosperity Through the Ages*, St. Martin’s Press, New York, p. 3 (1998)

124 Hernando de Soto, *The Mystery of Capital*, Basic Books, New York (2000)

125 Id at 157.

rights are not enforced or protected, a function taken for granted in wealthy nations.¹²⁶ Contract enforcement is most commonly associated with judiciary reform, but efforts to increase enforcement should also integrate alternative methods of dispute resolution. Access to justice for contract enforcement, including delays caused by extremely inefficient court systems, is a crucial issue hurting the confidence of entrepreneurs at all income levels, particularly among the poor, who have even less means by which to affect a resolution of their cases.

4. Programming Solutions for Advancing the MDGs through Legal Services

Governments, international institutions and foreign development agencies have struggled to bring effect to the various rights and legal reforms meant to strengthen development and improve progress toward the MDGs. The law and development approach of the 1970s first broached the subject of law reform for development aims by diagnosing problems in foreign domestic laws and then borrowing and inserting Western versions into their legal codes. This approach lost favor and the foreign legal academics behind it were criticized for not having a sufficient understanding of local law, power dynamics, and the unique characteristics of local culture. Reforms over the past two decades have largely focused on institutional strengthening, but have often been far removed from the informal legal realities of the poor. The World Bank, among other donors/institutions, has implemented a number of judicial reform programs but with only miniscule attention to the availability of legal remedies for women and other disadvantaged groups. For example, the 2002 Judicial Reform Program in Ecuador devoted less than \$400,000 of its \$10.6 million budget to projects providing legal services to the poor.¹²⁷ Other areas of rule of law reforms—courthouse construction and repair, purchase of computers, establishing management and administration systems of judiciaries, support for judicial and other training institutes, building bar associations and international exchanges for judges and court administrators—continue to attract the vast majority of funding.

Despite the history of rule of law efforts, greater attention is being placed on structural issues of access to justice and the role of empowerment. Greater focus on community engagement and access to legal services has the potential to both stimulate new advances and build on past reforms. Improving access to legal services can consolidate past institutional reforms by fostering citizen demand for justice reform and by equipping the poor and disadvantaged with the tools to enforce rights. Legal aid, empowerment and other rights-focused community groups have demonstrated a unique ability to navigate the complicated dynamics of local power, national law and human rights to find legal solutions from the bottom up. The international community should focus more support to these local actors.

126 See generally, Richard Posner, "Creating a Legal Framework for Economic Development", *The World Bank Observer*, vol. 13, no. 1 (February 1998).

127 *Impact of Legal Aid: Ecuador* (February 2003), World Bank, Washington DC

Legal service organizations address the range of rights afforded by law to the vulnerable through a range of mechanisms, from legal education and awareness to legal representation to advocacy for legal reform. The most effective legal service work combines empowerment with service provision and strategic engagement. The day-to-day work of legal service organizations address fundamental economic and social rights such as access to clean water, electricity, health care, education and other basic services. Legal service organizations keep people from being unjustly evicted from their homes and farms. They protect workers from abusive work conditions and discrimination. They enable pensioners and the poor to collect benefits. Legal service organizations help protect women from domestic violence, child custody, and claims for maintenance. Through representation of individuals, legal service organizations provide important services to the communities where they work while at the same time gaining a deep understanding of the needs and aspirations of poor people themselves. They address policy issues through strategic litigation and advocacy, building on their knowledge of local legal needs and right violations.

Regardless of the particular issues they work on, the most effective legal aid support also promotes systemic change. Organizations provide critical support for lasting change by helping poor groups, communities and organizations advocate for public transparency, less administrative barriers, and representation in local government decision-making. They help poor communities and community-based organizations (CBOs) devise practical solutions for problems as they arise. They recommend and advocate for law reforms to improve the equity of rights and services available to poor people and work in networks of poor people's organizations. They help create a culture of rights where both individuals and groups can assert their own interests.

Generally, legal service organizations have an important role to play in strengthening community-driven development by increasing civic engagement and fostering a climate for government accountability, particularly in public service provision and poverty reduction efforts. They call attention to discrimination in the provision of benefits and expose corruption and cooptation of scarce public resources by local elites. Legal service organizations often have to adjust their objectives and increase capacity to take this more comprehensive approach of community organizing and advocacy for the poor. This often requires a shift in attention from advising and representing individuals to working on behalf of groups.¹²⁸

A 2001 ADB study found that legal assistance and empowerment is most effective when used as a tool to improve people's daily lives, such as access to water, sanitation, or health care. It also found that engaging civil society organizations to work with local communities as well as government agencies and officials was an effective tool. In addition, it found that legal empowerment helps strengthen socioeconomic development efforts in a variety of

128 See. *Legal Services for the Poor Best Practices Handbook*, World Bank, 2003 at vi.

areas, including natural resource management and conservation, rural development, land tenure, decentralization, and women's health.¹²⁹

Some rule of law programs that focus on economic rights have made progress in identifying and reforming complicated and burdensome laws that affect legal remedies for small businesses and informal sector entrepreneurs. In Peru, for instance, misguided secured transaction laws were demonstrated to limit access to credit for poor farmers and rural businesses.¹³⁰ Financing is limited to real estate holdings (which require an elusive, legal title) because the legal framework for creation, perfection and enforcement of security interests in movable property is overly complicated. Regulations need to be reformed to allow security interests in a greater number of goods and institutions and to allow less expensive registration and easier location of registered security interests.

Strengthening property rights is another important focus for economic rights legal service programming. Most property rights programs are focused on rewriting laws or increasing funding for national titling institutes, without consideration of the local property dynamics that affect the poor. Titling programs are also expensive and often not cost effective. They can affect different segments of the poor – from working poor to the most destitute—depending on the titling initiative's design. Flexible or 'mobile' titling is an interesting approach which takes an access to legal remedy approach.¹³¹ It avoids reinforcing structural barriers such as poor location of titled land and the marginalization of women that impair social mobility and the accumulation of wealth of poor populations in the long term.

When considering programming, it is important to differentiate between economic rights reforms that result in more efficient laws from those that address the structural access issues faced by the poor. These top-down approaches fail to link formal law with informal activities of the poor. Beneficiaries are mostly limited to established, wealthy economic actors who have the capacity or political capital to access credit and contract enforcement systems, while the economically and politically disenfranchised are unaffected and left further behind economically.

It is also important to differentiate from access to justice or legal aid programs that focus on criminal defense. Many programs categorized as legal aid fill important needs for indigent defense in the criminal justice systems, often with little impact on economic and social rights. Programs that address chronic rates of pre-trial detention are an exception. Legal service programs focused specifically on economic and social rights tend to be much less developed. As economic rights and justice issues grow in prominence, legal aid programs

129 Asian Development Bank, *Legal Empowerment for Women and Disadvantaged Groups*, Final Report (2009), at <http://www.adb.org/Documents/Reports/Legal-Empowerment/default.asp>

130 Heywood W. Fleisig and Nuria de la Peña, *Peru: How Problems in the Framework for Secured Transactions Limit Access to Credit*, Center for the Economic Analysis of Law (May 1996)

131 See. Bernadette Atuahene, "Legal Title to Land as an Intervention Against Urban Poverty in Developing Nations", *36 Geo. Wash. Int'l L. Rev.* 1109, 22 (2004) (details three different models for titling programs and what sector of the poor they benefit)

are adapting to the needs of communities and focusing on a wider array of legal issues beyond the criminal justice system.

Paralegals have proven to be an efficient and flexible mechanism for providing an array of services that expand legal aid beyond legal representation and criminal justice. They tend to work on legal issues relevant to the poor and employ community-focused mechanisms that organize and create collective solutions to common problems. This aspect of the work of paralegals is particularly salient for economic, social and cultural rights. Paralegals have the potential to collaborate with a wide range of economic actors in the communities they serve to demand rights and services, and to take advantage of legal opportunities. Business associations such as farmer cooperatives, women's groups, trade unions and microfinance projects abound in many poor communities. The potential of these groups is enormous for organizing and empowering themselves to affect change in economic regulations and legal reforms with the help of community paralegals. Paralegals have the capacity to work with both individuals and groups in their residing communities to help delineate and translate informal property systems into legally protected rights.

Programming to improve access to legal remedies can take an array of forms and target a number of beneficiary groups. Legal aid services can be strict representation in court, community legal awareness, or advocacy support to local groups, many with direct contributions to the achievement of the MDGs. For example:

- Legal service lawyers can help members of a farmers' association gain greater legal security of their land, whether through outright land titles, state recognition of traditional land arrangements or other tenurial improvements, thus increasing the farmers' assets and income.
- A law and health program may enable impoverished beneficiaries to understand and act on their rights to basic medical services, thus reducing infant mortality.
- A women's group could use law, organizing and advocacy to combat domestic violence by persuading police or other government personnel to take the problem seriously, thus enhancing the physical security and independence of women in their community.
- Parents can learn how to register the births of their children, ensuring access to citizenship, education and government services later in life.
- Paralegals within legal service organizations work with grassroots groups to gradually make traditional justice systems less gender-biased.
- Market vendors, with the help of legal aid lawyers, can negotiate with local governments the right to operate legally and free of police harassment, ending fear of losing their businesses and livelihoods.
- Paralegals can help indigent defendants, often jailed unjustly or for years awaiting trial, obtain fair hearings or their freedom.

Legal aid and service programs provide an essential public good that helps the poor overcome legal and social barriers that further their marginalization. However, programs should emphasize building sustainability and systemic changes rather than focusing solely on service provision. This is a difficult task and often donor-funded legal service programs have a short shelf life and disintegrate as soon as funds disappear. A similar

and related problem is the failure to translate service provision to wider systemic change through empowerment and policy reform. Legal aid, including community paralegal programmes, can often create new dependencies and power dynamics that exacerbate the very programmatic goals of justice and empowerment. Legal aid programmes should be careful to develop robust supervision and quality control mechanisms, including strict professional codes of conduct.

Programme Examples

A number of organizations and donor-funded projects across Asia (and elsewhere) have pioneered the use of legal aid services to protect economic and social rights and advance the MDGs:

In the mid-1990's, a coalition of local CSOs was formed in the **Philippines** to engage with implementation efforts of a new Agrarian Reform Law. The coalition trained over 1,000 farmers as community paralegals, conducted legal clinics across twenty-two project areas, and helped with administrative procedures for the transfer of over 100,000 hectares. The project was supported by the Asian Development Bank (ADB). ADB monitored impact through interviews with officials from the Department of Agrarian Reform, survey responses from approximately 400 villagers, and focus groups in local communities. Information on legal service activities was gathered both from where the program had taken place, and from control communities similar in demographics and location. The ADB study concluded that in communities where legal service projects were implemented, land reforms resulted in residents with higher levels of productivity, higher incomes, more disposable income, and more investment in their farms.¹³² More recently, in 2008, the Philippine coalition helped organize, advocate and file a successful class action case on behalf of hundreds of Sumilao farmers to restore land illegally expropriated by a large corporation.¹³³

In **Bangladesh**, an ADB-financed study carried out by the Asia Foundation conducted a controlled comparison survey to measure the impact of NGO activities in target beneficiary communities. The three NGOs studied employed different community-driven strategies to empower local populations, some more legal than others. One of the NGOs, the Madaripur Legal Aid Association, has become well-respected for community legal service delivery. The study found that all intervention populations experienced reduced socioeconomic vulnerability compared to control populations. All scored higher in four critical areas: general knowledge of law; engagement and confidence in citizen advocacy; positive perceptions of gender equity and the role of women in governance; and confidence in the value of law and good governance. The most sizable gains in these

132 Stephen Golub and Kim McQuay, Legal Empowerment: Advancing Good Governance and Poverty Reduction, Appendix 1: The Impact of Legal Empowerment Activities on Agrarian Reform Implementation in the Philippines (Asian Development Bank, 2001). Available at: http://www.adb.org/documents/others/Law_ADB/lpr_2001_Part_2.pdf

133 See. *Legal Empowerment White Paper*, Haki Network, 2011, available at: <http://www.hakinetwork.org/resource-center/>

areas were achieved where legal service activities were conducted as part of an integrated development approach that combines legal and socioeconomic development activities; where high levels of women's leadership were sustained through the program period; and where women's direct participation was facilitated by and through community advocacy efforts. Where the strategy focused on mobilizing community advocacy initiatives and engaged public officials, those surveyed expressed greater confidence in governance and public services. They are also more likely to view advocacy for land rights as a positive action. The survey results further suggest that success in securing legally-mandated control of common lands by, or for the benefit of, the poor is facilitated by regular citizen-government engagement. The study also showed that legal empowerment efforts made measurable impacts on the status and material circumstances of women by restraining the illegal practice of paying dowry. Women's families from populations where legal empowerment projects took place paid dowries less often and in smaller amounts than families from control group communities. In the same study, researchers found that women exposed to legal empowerment projects reported having cash savings for emergencies at a much higher rate than women from control communities.¹³⁴

A variety of legal service activities have been supported in **Indonesia** over the past five years. UNDP, ADB and the Justice for the Poor Program at the World Bank have supported work to empower women's groups, extend paralegal counseling services to marginalized communities, and empower citizens to access and make demands for responsive public services.¹³⁵ The Legal Empowerment and Assistance for the Disadvantaged (LEAD) programme in Indonesia supported civil society organizations to establish citizen complaints centers in three provinces prone to land-based conflicts. These centers provided a resource for receiving and investigating community grievances related to land and natural resource issues. The Indonesia Legal Aid Foundation (YLBHI) is a long-standing organization that has led legal service approaches and advocated for adoption of a publicly-funded legal aid system. YLBHI provides legal counseling and representation to the poor and trains marginalized communities, including farmers, laborers and the urban poor, to work as paralegals. YLBHI trainings and activities have provided a range of benefits not easily captured with quantitative case data. One particular story of an Indonesian woman who was trained by YLBHI might be the most insightful:

134 Stephen Golub and Kim McQuay, *Legal Empowerment: Advancing Good Governance and Poverty Reduction*, Appendix 2: The Impact of Legal Empowerment on Selected Aspects of Knowledge, Poverty, and Governance in Bangladesh: A Study of Three NGOs (Asian Development Bank, 2001). Available at: http://www.adb.org/documents/others/Law_ADB/lpr_2001_Appendix2.pdf

135 See. Asian Development Bank, *Legal Empowerment for Women and Disadvantaged Groups*, Final Report (2009), at <http://www.adb.org/Documents/Reports/Legal-Empowerment/default.asp>; *Legal Empowerment of the Poor: Lessons Learned from Indonesia*. UNDP, YLBHI, Commission on Legal Empowerment of the Poor (July 2007), available at: <http://www.undp.org/legalempowerment/pdf/Indonesia.legal%20empowerment%20of%20the%20poor.pdf>; Justice for the Poor World Bank program documents available at: <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/EASTASIAPACIFICEXT/INDONESIAEXTN/0,,contentMDK:22352187~pagePK:141137~piPK:141127~theSitePK:226309,00.html>

Mbak Rini was trained by YLBHI as an urban paralegal. She is the only woman leader of the sidewalk traders association Paguyuban Depan Mesjid Baiturahman (PKL) in Semarang city. In 2000, the city government executed Regional Regulation No. 11/2000, an order expelling the sidewalk traders in the area where she ran her small business. This unfair practice compelled her and her peers to establish PKL and through collective advocacy and adept negotiation successfully challenged the regulation to include exceptions for PKL and others. Mbak Rini did not stop there. She discovered that the law called for exemptions to mandatory educational payments for poor families. The practice of school officials was different. Mbak Rini organized other parents around the issue and reported the case to the Semarang City government. The school was sanctioned and payment requirements for poor families eliminated.¹³⁶

The work of a local organization in **Zimbabwe** illustrates similar qualitative impact of legal work around issues of communal land tenure. According to Zimbabwean law, communities do not own the land and natural resources in their locality. Most communities live on communal land that has been designated as State land since independence.¹³⁷ Therefore, the State has exclusive ownership and use of all resources, but grants usufructuary rights to communities through the Rural District Councils (RDCs). RDCs have management authority over all land and natural resources located in communal areas. Once they are registered as legal entities, communities can engage with the RDCs in order to obtain management authority over the natural resources within their area and challenge land laws, policies and decisions that do not promote their interests. The Zimbabwe Environmental Law Association (ZELA) worked with one such community in southern Zimbabwe to register them as a trust and formed the Chibhememe Earth Healing Association (CHIEHA). Through a long, consultative process with government ministries and the local RDC, the CHIEHA gained control over management of its natural resources within and along the Great Limpopo Transfrontier Park.¹³⁸ CHIEHA has now become an important voice for communities of the Chibhememe region and is able to influence and negotiate with the government in the interest of the community. CHIEHA has also mobilized funding for better management and contributed to development of benefit-sharing mechanisms for the region.¹³⁹

In **Senegal**, the domestic NGO TOSTAN employed funding from the German aid agency GTZ to undertake a two-year project geared toward reducing female genital mutilation (FGM) through problem solving initiatives and awareness on women's rights. A survey of women and men in 20 villages where the TOSTAN project took place and in 20 similar

136 *Legal Empowerment of the Poor: Lessons Learned from Indonesia*. UNDP, YLBHI, Commission on Legal Empowerment of the Poor (July 2007), available at: <http://www.undp.org/legalempowerment/pdf/Indonesia.legal%20empowerment%20of%20the%20poor.pdf>

137 There are numerous examples across the developing world of this type of legal relationship where the State has exclusive ownership over land and natural resources. Most are the result of persistent colonial legal orders that benefited the resource extraction activities of colonial powers.

138 GLTP extends into South Africa and Mozambique where communities have gained similar management control.

139 From *Legal Empowerment in Practice: Using tools to secure land rights in Africa*, ed. Lorenzo Cotula, Paul Mathieu. IIED, FAO (2008), available at: <http://www.iied.org/pubs/pdfs/12552IIED.pdf>

ones where it did not indicated the project had a multifaceted impact.¹⁴⁰ It significantly enhanced both genders' awareness of human rights, gender-based violence, FGC and reproductive health in the project areas, both in an absolute sense and in comparison with the control populations. Even more significantly, there were also major drops in the reported prevalence of FGM for girls within project communities.

In **Ecuador**, the World Bank funded, as part of a large loan, the creation of five small legal aid clinics in Quito, Guayaquil, and Cuenca to help poor women and their children.¹⁴¹ The clinics provide legal consultation, representation and dispute resolution services for over two years, helping almost 17,000 poor women. A study on impact found that not only were the clinics less expensive than private lawyers, they were also more effective. Female legal aid clients had a 10.4% increase in probability that they would receive child support and average support payments increased by 50%. In approximately half of the cases where legal aid resulted in child support payments, that payment accounted for 39% or more of what the household spent per month on feeding one individual. This, coupled with a 17% reduction in the probability of suffering from domestic violence following a divorce, results in improved economic conditions for women.¹⁴²

These examples illustrate the range of legal remedy programmes and the diversity of their impact across the rights spectrum and MDGs. Despite the range of beneficiaries and legal issues, the programs take a similar demand-side approach that utilizes legal remedy as a basis from which to enforce rights at the local level and drive change from the bottom-up.

5. What can UNDP do? Conclusion and Recommendations

Access to legal remedies is a critical issue addressing structural barriers for the poor often not handled by other reform efforts. Legal service programs can take a variety of forms but the best programs combine community legal awareness with legal service provision and strategic advocacy. Legal aid programming in its traditional, more reactive criminal justice focused form is not sufficient to address the wide array of legal issues that affect economic and social rights and MDG achievement. Program design often needs to be altered to specifically target economic and social rights and to incorporate empowerment and policy reform methodologies. Working with community and civil society partners on the implementation side is the most effective approach. Developing policy and independent, public-funding options with government partners ensures sustainability.

UNDP has innovated access to justice approaches in countries across the Asia-Pacific region. Program design varies from working through government partners to establishing

140 Nafissatou J. Diop, *et al*, *The TOSTAN Program: Evaluation of a Community Based Education Program in Senegal*, FRONTIERS Final Report (Washington, D.C.: Population Council, 2004).

141 \$256,780 of the \$10.7 judicial reform project went to the legal clinics. The rest built new courts and installed modern case administration centers. Available at: <http://siteresources.worldbank.org/INTEMPowerment/Resources/486312-1098123240580/tool14.pdf>

142 Impact of Legal Aid: Ecuador (World Bank, 2003).

legal aid offices in collaboration with civil society. Many efforts have focused exclusively on indigent criminal defense, but some have touched upon economic and social rights and their enforcement.

UNDP country programs can heighten their focus on MDG-related issues through legal aid support by broadening approaches to include non-criminal legal assistance, mediation, community legal awareness, and empowerment methodologies. Legal service programs can enhance access to justice for poor and marginalized groups most effectively and across a range of issues, including economic and social rights, by combining many of the elements discussed here. Programs should consider the following principles:

- *Focus on Practical Solutions.* Solve people's daily problems as a means to provide access one case at a time, but also to identify chronic and/or systemic issues that affect the poor.
- *Be Proactive.* Develop programs that proactively identify and address economic and social rights and MDG-related issues such as property ownership, women's inheritance, right to access public services such as health and education, and legal identity.
- *Expand beyond criminal justice.* Develop legal aid programs that are selective in taking cases based on analysis of justice needs. Legal service organizations should not attempt to duplicate public defender office services, but instead be selective and take criminal cases that are more strategic or of critical need.
- *Focus on Civil Society.* Emphasize programs that use civil society and community organizations to provide legal services.
- *Empower.* Cultivate the agency and power of affected communities by providing legal education and equipping individuals with legal tools to address problems themselves, including building awareness through the media (ex. legal radio programs).
- *Cultivate Paralegals.* Develop community-based paralegal networks with a supportive, rather than lead role for lawyers.
- *Advocate.* Foster community organizing and advocacy to stimulate needed policy and legal reforms.
- *Focus on the Poor.* Incorporate legal needs analysis that helps focus legal services on the concerns of the poor and disadvantaged.
- *Build Sustainability.* Create structures such as legal aid boards that receive and administer government funding while ensuring impartiality and the independence of service provider organizations.
- *Educate Future Lawyers.* Promote clinical legal education as a means to provide free legal aid services and to instill a public interest commitment in the legal profession.
- *Engage with Traditional Authorities.* Work with local justice institutions, informal or customary, that the poor can best access. Engage and respect traditional legal regimes while building bridges with the formal sector, advocating for the positive evolution of each.
- *Combine Bottom-up and Top-down.* Use bottom up approaches to identify and build momentum behind state-based legal and institutional reforms.
- *Cultivate Demand.* Nurture a citizenry empowered to protect its rights, to pursue its own development, and to place demands on public institutions. NGOs, community-based organizations, and other civil society groups are often crucial drivers and implementers of these types of interventions.

Methods of Identifying Regulatory and Legislative Barriers to Empowering the Poor

Timothy Dolan

"A sense of fair play requires voice, which can be achieved only through public dialogue. Everyone stresses the rule of law, but it matters a great deal what kind of rule of law is established. For laws can be used to ensure equality of opportunity and tolerance, or they can be used to maintain inequalities and the power of elites."

Joseph E. Stiglitz¹⁴³

Introduction

Countries around the world, including members of the Legal Empowerment Asia Partnership (LEAP), have been undertaking various legal empowerment initiatives. Given these countries' common aspirations, a guidance note on methods of identifying regulatory and legislative barriers to empowering the poor was commissioned by UNDP Mongolia to equip practitioners and policymakers involved in legal empowerment of the poor (LEP) programming. Accordingly, this chapter is based on the guidance note targeted towards government officials, development practitioners and programme staff involved in programme/project design, management and monitoring. It presents a review and analysis of various existing methods in the field to assist LEAP member countries and others in adopting their own methodology to identify laws and regulations that may be obstacles to empowering the poor.

This overview is not an exhaustive step-by-step manual on how to identify barriers to empowering the poor but rather a practical resource presenting brief descriptions of possible methods used to identify institutional bottlenecks to poverty reduction and livelihood insecurity. It also includes a focused analysis of a few, selected methods, namely the Institute for Liberty and Democracy's (ILD) Informality Diagnostics, Access to Justice Assessments, the Doing Business Report and the MDG Acceleration Framework. The overview is organized as follows.

Each methodology is described briefly and discussed in terms of strengths and weaknesses, and in the contexts of, for example, effectiveness, easiness to use, cost, likelihood of adoption by Government and sustainability. This is followed, where applicable, by insights into possible reasons why a particular method was suitable for a particular local context and points to consider when developing or selecting a specific method for an individual country.

143 Stiglitz, Joseph E., "The Tunisian Catalyst," *Project Syndicate*, February 4, 2011, <http://www.project-syndicate.org/commentary/stiglitz135/English>.

The methodologies use examples illustrated with experience of the poor in accessing justice through the court system and out-of-court facilities as well as public bureaucracy. Frequently through the bureaucratic system, impoverished people must battle injustices and abuses from the government, particularly in the context of regulation and service delivery¹⁴⁴. The first section will look at informality diagnostic reviews, a speciality of the Institute for Liberty and Democracy. This is followed in section 2 by a presentation of a comprehensive legislative review of laws in Thailand, recently completed by Thammasat University. Section 3 addresses access to justice assessments and presents work from Indonesia's National Development Planning Agency. The National Consultations process conducted by the Commission on Legal Empowerment of the Poor is illustrated in section 4 using Bangladesh, Indonesia and the Philippines as country examples where national consultations took place. Section 5 details methodologies used to compile the World Bank's Doing Business Report. Finally, section 6 contains a discussion of the practical application of the MDG Acceleration Framework, bringing together UN agencies and member states in a process whereby institutional bottlenecks hindering achievement of the MDGs are identified and eliminated.

Background on Legal Empowerment of the Poor

Informality and livelihood vulnerability results from a lack of legal empowerment and an abrogation of certain human rights. The rights can be seen in relation to the 'four pillars' underscored by the Commission on Legal Empowerment of the Poor¹⁴⁵: access to justice, property rights, labour rights, and 'business rights'¹⁴⁶.

In 2010, the UNDP Millennium Development Goal Breakthrough Strategy recommended investing in innovations such as Legal Empowerment of the Poor (LEP) to accelerate MDG achievement¹⁴⁷. Core components of the LEP agenda, as described by the Commission on Legal Empowerment of the Poor, focus on poverty reduction, individual empowerment through voice and organisation, and the development of an enabling, legislative and regulatory policy environment fostering secure and sustainable livelihoods. Critical to the latter component is the repeal of legislative and regulatory obstacles to empowerment.

144 Commission on Legal Empowerment of the Poor.;United Nations Development Programme., *Making the law work for everyone*. (New York: Commission on Legal Empowerment of the Poor ;United Nations Development Programme, 2008), 47.

145 See Report of the Commission on Legal Empowerment of the Poor. *Making the Law Work for Everyone*, Volume I; UNDP 2008

146 Article 23.1 of the Universal Declaration of Human Rights provides for the right to work but also the right to the free choice of employment, which broadly includes right to self-employment, including the right to run businesses.

147 UNDP, MDG Breakthrough Strategy, 2010: 'A focus on legal empowerment can have important strategic value for the MDGs. By addressing the structural causes of poverty and exclusion, work designed to advance legal empowerment of the poor can help to sustain MDG progress.' 39

Unsurprisingly, there is no single recipe for implementing strategies of LEP. While some characteristics may be shared across different approaches and situations, context is extremely important. Luckily, there are many entry points to begin implementing LEP activities. One approach may emphasise land or climate change (or even the nexus between the two) while another may take violence against women and women's access to justice as starting points. Likewise, there is no single all-encompassing methodology for identifying regulatory and legislative barriers to empowering the poor. Each methodology has advantages and disadvantages and may be more suitable in one context as opposed to another. In some cases, bringing together approaches that combine the salient features of several methodologies may yield the better results. However, despite differing country contexts, insights gained from various methods, even across countries, often produce broadly comparable results. This is testimony to the universal nature of the sad realities facing the poor.

1. ILD Diagnostic Reviews: Mapping transaction procedures within the 'extra-legal' sector and contrasting with existing regulations to identify areas for reform

Description

Drawing on the theories of its founder and president Hernando de Soto, the work of the Institute for Liberty and Democracy (ILD) focuses on two of pillars¹⁴⁸ identified by the Commission on Legal Empowerment of the Poor (which de Soto co-chaired): property rights and business rights. According to the mission statement, ILD strives "[t]o provide governments with the expertise and information to implement institutional reforms in property and business rights that allow citizens to be included in the market economy and thus pull themselves out of poverty and prosper."¹⁴⁹ The ultimate objective of ILD inclusion programmes is to provide universal access to property rights and business tools which ILD considers an efficient platform for wealth creation. Significantly, ILD's multiphase approach amounts to taking necessary steps for people who are already organised (to one degree or another) to 'move into the rule of law', according to de Soto.

ILD's methodology was generated from field work conducted by ILD teams in shantytowns in the outskirts of Lima in the 1980s. To experience the process¹⁵⁰ of setting up the most basic garment factory from the point of view of the poor, ILD measured the amount of time needed to overcome obstacles preventing workers from becoming legal. The project took approximately 300 days six-hour working days and cost thirty two times the

¹⁴⁸ The other two pillars are access to justice & rule of law and labour rights

¹⁴⁹ ILD Website http://ild.org.pe/index.php?option=com_content&view=article&id=186&Itemid=89&lang=en accessed 4 January 2010.

¹⁵⁰ The World Bank's Doing Business time and motion indicator series bases itself on this methodology.

monthly minimum wage¹⁵¹. Over the last three decades, ILD's methodology has evolved into its Programme for the Transition to the Rule of Law and Inclusive Market Economy. Nevertheless, the programme still involves huge amounts of footwork for researchers to gather detailed data and insights to inform the diagnosis.

The approach combines intensive empirical research, with legal framework analysis and policy advocacy, based on gathered evidence. To date, ILD has assessed and documented informality situations in over 20 countries.¹⁵² It has identified the size and location of extralegal assets, uncovered some of the principal administrative obstacles, and proposed recommendation regarding what needs to be done to ensure that the costs of being legal are below the costs of being extralegal.

The ILD Methodology¹⁵³

ILD's programme for the transition to the rule of law and inclusive market economy consists of the following phases:

- Training and Team Building
- Diagnosis
- Institutional Reform
- Implementation
- Capital Formation

The main focus is the diagnosis phase as this is where regulatory and legal barriers to empowering the poor are being identified. ILD's diagnosis strategy is based on detailed extralegal¹⁵⁴, legal and economic research. The main purpose of the diagnosis strategy is to lay groundwork for reform and build a convincing case for change. This is supported by analysis of the existing legal system, exposing the system's shortcomings and identifying potential for providing essential institutions with wealth creation. Next comes extensive mapping of the extralegal world and evaluation of disconnects between law on paper and reality on the ground. The following step determines whether the extralegal system already functions according to rules that could potentially become the roots of a formal law or even become the seeds of future legal and economic institutions. This is followed by an analysis of whether extralegal practices and procedures enhance or hamper the functioning of basic institutions required for economic growth.

Before delving further into details of methodology, it may be useful to consider under which circumstances the programme works best and to gain insight into the scope and outcomes

151 Hernando de Soto, *The mystery of capital : why capitalism triumphs in the West and fails everywhere else* (New York: Basic Books, 2000), 190.

152 www.ild.org.pe

153 Based on authors participation in a UNDP-ILD capacity building session; Lima Peru Oct 2010

154 The Merriam-Webster online dictionary defines extralegal as 'not regulated or sanctioned by law'; It can be construed as the lack of normative instruments that a good legal system provides to create wealth: property rights and business tools.

of such initiatives. In most cases, ILD perceives the first entry point for gaining buy-in for its informality diagnosis in a given country at the head of state or government level. ILD considers the president or prime minister's persistent support as a crucial determinant of success. Interaction at this level has the advantage of promoting the country's leader as a champion of reform. This can be particularly useful at the reform implementation stage, for example when pushing through difficult and sensitive administrative reforms that may threaten many vested interests. The downside is increased dependence of outcomes on the political cycle, especially when involvement of other stakeholders is limited. Furthermore, in fragile countries, such as those emerging from conflict, leadership may not be in a position to effectively act as interlocutor with the ILD team.

While it is difficult to provide general figures, the cost of full-scale ILD programmes (of which the diagnostic review is only one part) is generally measured in millions of USD. This makes innovative partnerships (e.g. development partners, philanthropic organisations, private sector) for cost sharing an attractive option. One strategy is to provide an initial diagnosis free of charge, using gathered data to build a convincing case for reform and bring on board funding for a more detailed assessment to inform the reform proposal and support subsequent implementation.

Outcomes of ILD programmes are wide-ranging and naturally context-specific, potentially encompassing enhancements in credit and mortgage applications; collections systems for credit, rates and taxes; housing and infrastructure; insurance and information services; identifications systems; and the use of property to enhance accountability.¹⁵⁵

Outcome of ILD's work in the Philippines

"The influence of the ILD's research and ideas has also been evident in the government's own efforts to spearhead reform. In 2004, for example, President Macapagal Arroyo created the Urban Asset Reform Program, which would, in the words of her executive order, "develop the proven ideas of the economist Hernando de Soto regarding the integration of formal and informal settlements into one legal system as the framework of Philippine urban asset reform". By the end of 2006, she had issued no less than four executive orders on agrarian and urban reform and restructuring mortgage financing, while her government has initiated at least seven programs on "asset reform," land titling and tenure, and mortgages –all aimed at making it easier for the poor in rural as well as urban areas to make more productive use of their assets. On the business side, the President has signed legislation to provide incentives for registering informal enterprises and other "micro-businesses". In addition, at least 53 bills have been proposed in the Senate and House on land use and reform, housing, collateral, red tape, and small business guarantees – all bearing the ILD stamp and many mentioning de Soto by name as their inspiration." Box 1–Source: ILD Website (http://ild.org.pe/index.php?option=com_content&view=article&id=189&Itemid=81&lang=en)

¹⁵⁵ http://ild.org.pe/index.php?option=com_content&view=article&id=217&Itemid=34&lang=en

Training and Teambuilding

Building local capacity is key to the success and sustainability of the programmes and helps maintain political momentum beyond the political cycle by creating local ownership. ILD has been criticised in the past for not sufficiently building local ownership into its programmes¹⁵⁶. By developing local capacity to carry out necessary research and analysis of the extralegal economy, ILD's training programmes now seek to provide the theoretical, technical and practical knowledge needed to conduct the diagnosis stage of the programme, organize the technical group and familiarize it on the vision, principles and objectives of the programme. Goals include transferring the ILD methodology and know-how to local national teams, building an informed shared vision, designing institutional changes and an implementation strategy as well as deploying reforms and feedback mechanisms.

Research teams supporting these aims consist of a multidisciplinary group of high-ranking professionals from different fields, including economists, lawyers, public administration experts and engineers. They are responsible for executing i) the fieldwork and all other research related to diagnosing the extralegal sector of the country and ii) the related operational tasks, such as organizing and managing local working groups of consultants and subcontractors hired from the field.

From inception and with initial government engagement, ILD establishes a clear picture of where national expertise lies and identifies networks of professionals and local institutions hosting specialists to be invited as participants in local teams undertaking research and analysis of the extralegal economy. The value of local expertise from civil society organisations, such as representatives of impoverished, vulnerable and disadvantaged groups or local NGOs, must not be neglected. Involving essential stakeholders meaningfully from the earliest stage onward is key to ensuring findings reveal an accurate picture of issues facing diverse groups in the population and to maximize buy-in for the findings and for subsequent reforms to be sustainable.

A typical ILD programme includes a strategic team, an executive team and a technical team. Members of the strategic team are chosen to represent key sectors of society, maintain a reform based agenda, have experience resolving conflict and building consensus, and be able to influence leading opinion trends of the country. A key role of the strategic team is to ensure the political viability and sustainability of the programme. The team regularly meets and briefs the government (in this case the head of state) on the progress of the programme, and deals with public and private groups having vested interests in reform (or conversely, the status quo). The executive team is generally composed of a strategic coordinator and project manager supported by appropriate assistants/advisors on financial and communication issues. While the strategic coordinator is politically responsible for the development and results of the project, the project manager is entrusted with the recruitment process of the technical team and coordination and development at the work plan with the recruited team under

156 "Norway backs out of de Soto's land rights project in Tanzania," *Development Today*, January 2008, 5.

ILD supervision. The technical team, generally formed by nationals, is led by a project manager and consists of dedicated sub-teams responsible for legal research, extralegal research, and economic research.

Extralegal research

The first component, which ILD has named extralegal research, aims to identify practices and institutions that facilitate interaction among economic agents operating in an extralegal setting. Depending on the circumstances, this information is either fully incorporated or taken into consideration later in the reform design stage. This has the advantage of legitimizing regulations and increasing the likelihood of enforcement once proposed reforms are in place.

The extralegal research focuses on three areas: real estate, business and expanded markets. It involves multidisciplinary techniques based on in-depth interviews, focus groups, participant observation and surveys. The research team interacts with mediators including local sources, community leaders and authorities. Entrepreneurs and property owners also inform the research.

At this stage, it is essential safeguards are put in place to ensure findings are both representative and sufficiently illustrative to provide a thorough understanding of the origins, customs and dynamics of the extralegal sector. This understanding must also consider experiences of the most vulnerable and disadvantaged, not just the average 'poor' homeowner or entrepreneur. Bottlenecks in the legal framework may not affect the most vulnerable and disadvantaged in the same way as they would affect someone who, albeit poor, runs an unregistered business or lives under a roof without property title.

Legal Research

The legal research phase uses the concept of *typology* by characterizing and categorizing the causes of real estate and business assets extra legality. Firstly, it is used in counting and valuating extralegal assets, thereby generating data for economic research on how much dead capital¹⁵⁷ could potentially be brought back to life. Secondly, the typology concept informs legal research as it helps uncover problems affecting extralegal real estate and businesses. The analysis of typologies also yields information that feeding into the subsequent design of institutional reforms.

157 The total value of business and real estate assets that, while available for market transactions, are restricted to insecure and inefficient dealings that exclude these assets from the rule of law and the formal economy, leaving them undervalued with their potential value languishing in extralegality due to the absence of legal mechanisms to incorporate them under the legal framework.

The legal research phase also comprises detailed analysis of *procedures*¹⁵⁸ which ILD likens to an indivisible good. This phase integrates all the steps or activities an ordinary citizen must undertake to obtain specific results such as the recognition of a right, contracting, issuance of a license, permit or decree, resolution of a dispute, or registry of a right. Results generated by analysis of *procedures* and assessment of quality and suitability of rights help pinpoint institutional bottlenecks and obstacles affecting the system's ability to provide effective public services to citizens.

In many cases, ILD has found bottlenecks existing in places where citizens have incentives to create extralegal mechanisms to circumvent or bribe to complete the procedures. Public officials, in turn, have incentives to block or multiply procedures to generate extra rents (in the form of bribes) and block attempts at administrative streamlining. This is why ILD considers buy-in by the state and strong leadership—including from the highest echelons—as imperative to the success of reforms emanating from its research.

Economic Research

A key result of economic research is to quantify (using the *typologies* concept described above) the total value of business and real estate assets that, while at least available in theory for market transactions, are restricted to insecure and inefficient dealings. For example, a house built on land whose ownership is not properly recorded or an unincorporated business would be considered possessions that are not adequately documented. Therefore, the possessions be easily converted into capital or traded outside of narrow, local circles where people know and trust each other. Furthermore, the assets cannot be used as collateral for a loan or as a share against an investment.¹⁵⁹ The assets are therefore excluded from the rule of law and the formal economy, leaving them undervalued because there are no legal mechanisms for incorporation under the legal framework. In short, dead capital or assets are not fungible due to limited or absence of property rights.

Reflections

ILD's research is reputed as being precise and detailed yet expensive. The research involves large teams of international and national experts and thousands of interviews with individuals. However, there may be opportunities to broaden the scope of assessments to cover other areas and improve cost effectiveness. This could be achieved by embedding additional questions in ILD questionnaires to obtain information that can be used for capacity, MDG, gender or access to justice assessments. Cost effectiveness may also be

¹⁵⁸ This is also the approach on which Doing Business team bases its time and motion indicators although ILD focuses more on the experience from a poor person's perspective (rather than the lawyer, for example, responding to the DB questionnaire)

¹⁵⁹ de Soto, *The mystery of capital*.

improved by applying appropriate sophisticated sampling techniques and accepting a narrower confidence interval.

It is important to ensure all stages of ILD's work adequately integrate the principles of the Human Rights-based approach. In particular, the methodology must foster broad multi-stakeholder engagement and base itself on a comprehensive stakeholder analysis taking count of the interests, needs and capacities of the most disadvantaged groups. It is crucial that all relevant local players, especially vulnerable groups, are properly represented and given voice and opportunities to participate in programmes and shape the programmes from the very beginning onward. If this does not occur, such programmes risk being labelled expensive 'top-down' exercises that fail to develop sustainable local capacity by neglecting the integration of human rights, gender dimensions and sustainable livelihoods for the most vulnerable.

2. Legislative Reviews: Working with universities to conduct legislative reviews pertaining to property, labour and 'business' rights and overall access to justice

Background

In support of its on-going and wide-ranging legal empowerment programme, the government of Thailand together with UNDP has commissioned experts at Thammasat University to undertake a comprehensive legislative review, surveying laws currently in effect relating to the four empowerment domains identified by the Commission on Legal Empowerment of the Poor. The domains are: access to justice and the rule of law, property rights, labour rights and business rights. The aim of this research is to establish empirical evidence and better understanding of obstacles and challenges at different stages of the justice process in Thailand. Subsequently, this information can contribute to guide policymakers in making reforms resulting in improved and convenient, timely, inclusive access to justice for all people in Thailand.¹⁶⁰

In particular, the legislative review evaluates how laws and policies impact four target groups: the poor, the underprivileged, minority and weak groups, and non-citizens living in the country. The impact of gender, age, and cultural aspects are also factored into the review. A further iteration of the study will analyse how populations in four selected regions¹⁶¹ (six provinces¹⁶²) are able to access social services and use economic as well as other opportunities to lift themselves out of poverty. A number of research methodologies were used to inform the first phase of the study known as the legislative review.

160 Integrated ONE Annual Work Plan – Governance and Human Security Output 1.1 Support Thailand's legal reform process—"A Preliminary Analysis of Access to Justice Problems in Rural Areas"

161 North, Central, Northeast, and South regions

162 Mae Hong Son, Chiang Mai, Pitsanulok, KhonKaen, Pattani (or Yala), and Trang

While this is an ongoing research project, some observations have already been made.

Organisation

Each research group is led by an expert/professor specialising in a particular legal area pertaining to one of the four pillars, such as criminal law, land law or labour law. In the recently completed desk review phase, teams analysed laws at the statutory law/'Act' level. This analysis will be complemented by consultations with specialists concentrating on each of the issues composed by representatives of civil society, congressional groupings, the attorney general and provincial officers. At a subsequent stage, the work may evolve into a full-scale access to justice assessment. So far, results from the desk review have been submitted to the Thai government's reform committee and sub-committee on justice reform.

Research Objectives

The research objectives are threefold. First, to revise and evaluate various issues in laws and the legal process relating to existing laws, legal actions and government policy implementation which affect the poor, the underprivileged, minorities and vulnerable groups. Second, to show possibilities for improving the conditions of the four target groups within the existing legal framework. Third, to suggest ways of improving law and policy changes to empower the target groups through better protection of basic human rights and development.

Another expected benefit of the research is the potential for stakeholders such as government agencies, state enterprises, private organisations and the public to realise the importance of the problem and to stimulate the implementation of solutions for these problems.

Document research

This phase consists of comprehensive desk reviews whereby teams gather and analyse legal and non-legal documents which may impact the four aforementioned target groups. Documents examined include laws currently in effect as well as state policies. The scope encompasses sources of law such as the constitution, acts, statutes, emergency decrees and other secondary laws, as well as state policies such as current government policies, the National Economic and Social Development Plan. Strategies such as short and long-term action plans of ministries, government departments and other state agencies are also included.

Findings of the document research

The study proposes recommendations according to which area of law within the four pillars deserve particular attention and would benefit from improvement, thereby enhancing the target populations' capacity to access justice.

For Access to Justice and the Rule of Law, a key finding is that ignorance of the law by the poor constitutes a major barrier to access to justice as well as rights relating to the other three pillars namely property, labour and business. Suggested solutions, in line with the recommendations of CLEP, consist of: ensuring legal identity for all; repealing or modifying laws that are biased against the poor; facilitating creation of state and civil society organisations working in the interest of the excluded; establishing a legitimate state monopoly on the means of coercion; making the formal judicial system, land administration system, and relevant public institutions more accessible by recognising and integrating customary and informal legal procedures with which the poor are already familiar; encouraging courts to give due consideration to the interests of the poor; supporting alternative dispute resolution mechanisms; fostering and institutionalising access to legal services so that the poor will know about laws and are able to take advantage of them; and supporting measures for legal empowerment of women, minorities, refugees and internally displaced persons and indigenous peoples.

In the area of property rights, the study finds problems in property management systems and loss of agricultural lands which link to other rights. Suggested remedies include introduction of efficient management of property, determination of property rights, lands and building taxation and land-use zoning. Reference is also made to the concept of community title deeds and a land bank which could effectively address land systems management, land allocation and prevention from loss of land to capital.

Issues identified in the area of labour rights pertain to obstacles in establishing labour unions whereby the definition of 'employee' is exclusive many and the promoter (or committee member) must be a Thai national. Other labour rights issues include social security coverage excluding the informal sector, precisely those who are most vulnerable to risks social security ought to address, and the problem of protection constraints which exclude agricultural labourers and home workers, among others, from potential compensation.

In business rights, the research highlighted restrictions preventing aliens and stateless persons from operating certain types of businesses, restrictions of informal businesses in accessing competitive tenders, and restrictions in law for accessing domestic and international markets as well as in government support. Such restrictions are found to be symptoms of laws and regulations biased against the poor.

Brainstorming sessions and in-depth interviews

Several brainstorming sessions will complement the findings with ideas and opinions from stakeholders on how laws affect the four target groups. One session consists of a workshop with the various target groups, another session hears views from experts, including academics and state practitioners in areas relating to the four 'pillars' of LEP.

Case studies

The research team will collect and develop case studies on LEP to document causes of disempowerment and possible solutions, taking into account diversities of the target groups.

Reflections

The outcome of the legislative review is a first step towards enhancing understanding of how legal and policy frameworks impact the lives of the poor and disadvantaged. It will help pinpoint remedies to remove obstacles holding poor people back from opportunities to live a better and more equitable future and pave the way for informed decisions aimed at making the law work for everyone.

In contrast to ILD methodology, this study, by its very nature (and as the term 'desk review' of course suggests), focuses more on the law 'in the books' rather than on how the application (or non-application) of laws and informal rules affect people's daily lives. Rather than sending scores of researchers to survey thousands of people on the ground, it can be conducted at a much smaller scale from the confines of an academic institution. A university's reputation, network of contacts with government and influence in the law-making process are determining factors introducing policy changes as a result of the recommendation.

It would be interesting, hypothetically at least, to observe how a study conducted by a law school compares to a business school affects findings of the study and any subsequent policy recommendations.

3. Access to Justice Assessments: Seeking perspectives of claim holders and duty bearers to identify gaps and needs

Access to Justice (A2J) assessments provide a natural entry point to conduct exercises that seek to uncover regulatory and legislative barriers to empowering the poor. As recommended in the report of the Regional Dialogue on Legal Empowerment of the Poor

that took place in Bangkok in March 2009¹⁶³, on-going access to justice initiatives can offer opportunities for including other pillars of legal empowerment, according to the context of the country.

By integrating a human rights-based approach, access to justice assessments methodically evaluate the experiences of specific disadvantaged groups in accessing justice. To accurately reflect the true picture, access to justice assessments must base themselves on perceptions, priorities and experiences of the poor. Using a mix of qualitative and quantitative empirical research methods such as surveys, focus group discussions, interviews and stratified random sampling, access to justice assessments focuses on understanding how injustice affects the daily lives of impoverished and marginalised people. Access to justice assessments can reveal telling disaggregated data on gender and other inequities within the assessment population useful in formulating policy recommendations to improve people's lives.¹⁶⁴ The following is a synopsis of Indonesia's access to justice assessment which took a broad approach to justice from the perspective of poor and disadvantaged people.

Assessment of Access to Justice in Indonesia

From 2004 to 2006, UNDP and BAPPENAS, the National Development Planning Agency of Indonesia, conducted a comprehensive assessment of access to justice for the most disadvantaged populations in five post-conflict provinces¹⁶⁵ with an aim of better understanding and promoting access to justice in Indonesia.¹⁶⁶ The access to justice assessment, methodologies applied, as well as findings and recommendations are described in the joint UNDP-BAPPENAS report, *Justice for All? An Assessment of Access to Justice in Five Provinces of Indonesia*. A summary follows but the main focus detailed below pertains to the methodologies used.

A key finding of the assessment which is also quite relevant to the LEP context is that respondents throughout the five provinces emphasised the economic dimension of justice. The study attributes this to a reflection of the priorities of communities where the many challenges of maintaining an adequate livelihood are of paramount concern. Respondents across all provinces studied cited, 'equality, evenness and non-discrimination in the distribution of government services and assistance' are essential to achieving justice. In particular, interviewees and focus group discussion (FGD) participants raised concerns relating to access to government services and assistance, ownership and management of land and natural resources, gender violence and discrimination, employment and labour

163 *Making Everyone Work for Legal Empowerment of the Poor—Report of the Regional Dialogue on Legal Empowerment of the Poor 3-5 March 2009, Bangkok* (UNDP, 2009), 5.

164 UNDP, BAPPENAS 'Justice for All? An Assessment of Access to Justice in Five Provinces in Indonesia', 2003

165 West Kalimantan, Maluku, North Maluku, Central Sulawesi and Southeast Sulawesi

166 *Justice for All—An Assessment of Access to Justice in Five Provinces of Indonesia* (UNDP / BAPPENAS, 2007), ii, http://www.undp.or.id/pubs/docs/Justice%20for%20All_.pdf.

rights, criminality and inadequate law, enforcement, post-conflict security, as well as property rights and other issues.¹⁶⁷

The assessment also found that community awareness of rights remains low, villagers in most cases preferred the informal justice system, and that legal aid and other legal services are lacking and inadequate. In relation to the formal justice system, the study found that the police was the most frequently accessed formal justice institution, prosecutors have low community profile and courts are seen as expensive and unfair. With respect to the informal justice system, the assessment showed that arbitrary decision-making and discrimination against women and minority groups are two main reasons why informal justice may fail to produce fair outcomes. It also found that women are underrepresented, if not unrepresented on village decision-making bodies and as informal decision-makers.¹⁶⁸

A significant conclusion from the report is that most issues mentioned by respondents as persistent sources of injustice do not lend themselves well to resolution through the informal justice system. Disputes involving parties outside the village structure, such as government agencies, corporations or someone from a neighbouring village, are often beyond the effective jurisdiction of informal justice mechanisms.¹⁶⁹

‘The crux of the problem for many communities therefore lies in the fundamental mismatch between citizens’ relative preference for the informal justice system and the fact that the most commonly cited cases of serious injustice are largely unsuitable for resolution via this forum’¹⁷⁰

The report presented five key recommendations to government, donors and civil society.

1. Intensify efforts to build community legal awareness;
2. Reaffirm the role of the State in the provision of legal aid;
3. Support the provision of community legal services by civil society;
4. Focus on advocacy and empowerment to reduce discriminatory and arbitrary decision-making practices
5. in the informal justice system;
6. Consolidate efforts to reform the formal justice system.

Building on results from the access to justice assessment, new initiatives to enhance A2J, including the Legal Empowerment and Assistance for the Disadvantaged Project (LEAD) have been developed and implemented. Many issues identified in the access to justice assessment are now being addressed. Crucially, the access to justice assessment also informed the Working Group of experts charged with developing Indonesia’s National Strategy on Access to Justice, thereby integrating access to justice dimensions into

¹⁶⁷ Ibid., ix.

¹⁶⁸ Ibid., xiii.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid., xiii, xiv.

existing policies and programmes within the Government's Mid-Term Development Plan for 2010-2014.¹⁷¹

Access to Justice Assessment Methodology

The Indonesia access to justice assessment was carried out primarily by interdisciplinary teams of local researchers. The five teams based in the Faculty of Law at the State University of each of the five provinces¹⁷² displayed diversity in terms of ethnicity, religion and gender, and comprised academics as well as workers from civil society organisations.¹⁷³ Assessment locations were selected based on criteria developed in consultation with research teams. The criteria for assessment places took into consideration variance in terms of the intensity of conflict previously experienced, ethnic or religious homogeneity, strength of traditional *adat*¹⁷⁴ justice systems, proximity to the provincial capital, and levels of poverty and development.

Indonesia's access to justice assessment is grounded in qualitative and quantitative research¹⁷⁵. On one hand, qualitative approaches, although likely to be more onerous, often produce more nuanced and complete data in an LEP context¹⁷⁶. Quantitative data, on the other hand, can be useful in validating qualitative results and opening the possibility for data aggregation and statistical analysis (e.g. comparisons across geographical areas or with official data, or over time). On top of helping to identify bottlenecks that may prevent disadvantaged people from accessing justice, the results of both qualitative and quantitative research provide a baseline against which future progress can be measured, especially during the monitoring and evaluation phases.

In the case of Indonesia, qualitative data was gathered through socio-economic mapping, focus group discussions, secondary sources, and interviews. To complement the above, quantitative research comprised a survey using a stratified random sampling method to quantify community attitudes towards the formal and informal justice systems.

171 "National Strategy on Access to Justice-LEAD Fact Sheet.pdf", n.d., <http://www.snap-undp.org/lepknowledgebank/Public%20Document%20Library/National%20Strategy%20on%20Access%20to%20Justice%20-%20LEAD%20Fact%20Sheet.pdf>.

172 Selected on the basis that they were among the top ten priority provinces, ten priority provinces for UNDP in Indonesia, having low human development indices, high poverty rates and a proneness to crisis

173 *Justice for All-An Assessment of Access to Justice in Five Provinces of Indonesia*, 33.

174 Custom and tradition; *adat* law is customary law

175 Crosby and Brinkerhoff (referenced in CLEP Report Vol. II) recommend using qualitative rather than quantitative approaches in monitoring the system, as they offer a more complete and nuanced set of data that are numeric and narrative.

176 Commission on Legal Empowerment of the Poor.; United Nations Development Programme., *Making the law work for everyone. Vol. I* (New York: Commission on Legal Empowerment of the Poor ; United Nations Development Programme, 2008), 281.

Socio-economic mapping

Mapping helps identify and distinguish the socio-economic characteristics of members from a community and group them accordingly. Poor or disadvantaged individuals were grouped in terms of i) the non-fulfilment of basic rights to foods, health care and other government services; ii) discriminatory treatment by the government or other community members or iii) the inability to participate in decision-making affecting their futures.¹⁷⁷ Villagers were also grouped by geography, type or mode of employment, gender or ethnicity. In addition, in each village one group labelled 'disadvantaged group' was so defined because it was either worse off than the other groups in the village or because it was a unique type of group that had not been selected in any of the other villages. In each assessment village, the members of the 'disadvantaged group' were selected as the primary respondents.¹⁷⁸

Identify the most disadvantaged groups at an early stage. The most disadvantaged groups should be identified in relation to the goal. From a rights-based perspective this step is essential in order to keep a clear focus on the groups who will gain the most from the achievement of the goal. Without this step there is a risk that programmes and projects will lose sight of the most disadvantaged people and instead concentrate on groups that are easier to work with.

Box 2–Source: Programming for Justice: Access for All, UNDP 2005, p.19

Focus group discussions

Focus group discussions (FGDs) generate feedback from a group of people selected for their relevance to a particular area of investigation. The session is usually initiated by a trained facilitator in discussions meant to share insights, ideas and observations on the issue at hand. The group dynamic often leads to richer insights than would have been achieved by individual interviewing of participants.¹⁷⁹

The Indonesia access to justice assessment conducted approximately 200 FGDs with individuals from groups previously specified.¹⁸⁰ Discussants shared experiences concerning justice-related issues they face and dispute resolution through the formal and informal justice system.

177 *Justice for All—An Assessment of Access to Justice in Five Provinces of Indonesia*, 34.

178 Ibid.

179 Commission on Legal Empowerment of the Poor.;United Nations Development Programme., *Making the law work for everyone. Vol. I*, 337.

180 *Justice for All—An Assessment of Access to Justice in Five Provinces of Indonesia*, 34.

Secondary sources

Research teams also consulted administrative data available from government and justice institutions¹⁸¹. Secondary resources analysed as part of a desk review can be useful for informing research about the formal system, however, information available on its informal counterpart is usually far scarcer. Often, the level of detail in terms of aggregate data may be insufficient for the purposes of the assessment. While courts may generate statistics on annual case filings, court documents often lack more detailed information such as the type of case or delays.¹⁸² Analysing laws and regulations on the book has merits as well but all too often, what happens in reality differs from what stands *de jure*.

Interviews

Individual interviews are onerous but can yield detailed and unique insights into people's experiences and perceptions which can lead researchers to learn about bottlenecks not previously considered. Approximately 700 in-depth interviews were conducted for the Indonesia access to justice assessment. The majority of those interviewed were ordinary villagers. However, village-level community and religious leaders, sub-district officials, police, prosecutors, lawyers, judges and other duty-bearers were also interviewed.¹⁸³

Beyond the interviewee, several factors affect information obtained through interviews. Bias can result from whether the interview is structured or unstructured, who does the interviewing, what questions are asked and how they are asked. An example from a pilot study in Thailand¹⁸⁴ illustrates the unintended consequence of having a community representative personally interview poor members of the community. In this case, the subjects were requested to disclose personal information, including their income, to someone from their village who was likely in a more powerful position than they. Their ability to refuse to provide this information would have been quite limited. Even though the community driven approach was well intended, the villager's basic right to privacy would most likely have been violated.

181 Ibid.

182 Dory Reiling, Linn Hammergren, and Adrian di Giovanni, "Justice Sector Assessments—A Handbook", n.d., 33, <http://go.worldbank.org/IKYSXSGYX0>.

183 *Justice for All—An Assessment of Access to Justice in Five Provinces of Indonesia*, 34.

184 "Undertaking a Human Rights-Based Approach: Lessons for Policy, Planning and Programming" (UNESCO, 2008), 18.

Stratified random sampling

Stratified random sampling is a statistical technique used to improve the efficiency of sample design¹⁸⁵. It enhances the representativeness of a sample and reduces its statistical error by dividing members of the population into homogenous subgroups, e.g. geographical areas, age groups, genders, or income. For the Indonesia assessment, a survey comprising approximately 4500 respondents was conducted across the five provinces. For each village, one group consisting of 30 men and 30 women classified as members of the chosen disadvantaged group, and another consisting of 30 men and 30 women not considered as members of the disadvantaged group for that village were surveyed.¹⁸⁶

A key advantage of using a stratified sample is that it can be more precise than simple random sampling, given equal sample size. This often permits smaller sample sizes which saves time and money. However, this technique generally requires more effort in administering the survey and analysing the data as opposed to simple random sampling.¹⁸⁷

Reflections

By its very nature, an access to justice assessment is almost entirely based on perceptions. Despite their inherent subjectivity, perceptions matter. Individuals base their decisions on perceptions which inform expectations. For example, if the formal justice system is perceived as being corrupt, expensive and time-consuming, informal justice will tend to be the preferred forum for an individual to resolve disputes. Also, such perceptions can be shared by people who may never have been in direct contact with either form of justice.

Even if access to justice assessments are not representative of the whole country, region or other strata, their usefulness illustrates some of the types of access to justice issues a community faces.

National ownership of assessments is crucial because national actors need to be vested in the outcome and accept its legitimacy if meaningful policy recommendations are to be drawn from it. One way of achieving this, while introducing the all-important 'bottom-up' dimension, is to build local capacity, thereby empowering people in the process of conducting the assessment¹⁸⁸. Equally important is the balance between involvement of the government, NGOs, CBOs – especially groups representing the interests of the marginalised.

185 Anon., "Formalizing the Concepts: STRATIFICATION" (World Bank, n.d.), http://siteresources.worldbank.org/INTPOVRES/Resources/477227-1142020443961/2311843-1142870725726/2337154-1201128554535/JUAN_02_Stratification.ppt.

186 *Justice for All—An Assessment of Access to Justice in Five Provinces of Indonesia*, 34.

187 "Statistics Tutorial: Stratified Random Sampling", n.d., <http://stattrek.com/lesson6/str.aspx>.

188 "Bangkok—Regional consultation on access to justice assessments | Governance Assessment Portal", n.d., <http://www.gaportal.org/bangkok-regional-consultation-access-to-justice-assessments>.

One of the overall conclusions of the Regional Consultations on Access to Justice Assessments that took place in Bangkok in October 2010, is that access to justice assessments can only result in concrete improvement in access to justice if the specific conditions of that country and society are realistically taken into consideration within a custom-tailored plan and with direct involvement of all concerned stakeholders at the national and local level¹⁸⁹.

“UNDP and the National Development Planning Agency, as well as other United Nations agencies, the World Bank and civil society organizations, collaborated closely to draft the country’s National Strategy on Access to Justice. The national strategy recognizes access to justice for the poor as a critical means of eradicating poverty, focuses on society’s most disadvantaged and marginalized groups and recommends that government policies across all sectors must seek explicitly to reach the most vulnerable persons and communities.”
Box 3–Source: Report of the Secretary-General on Legal Empowerment of the Poor and Eradication of Poverty A/64/133

4. World Bank’s Doing Business: Engaging the private sector for data collection and identified best practices for ‘doing business’

Description

The underlying purpose of the World Bank’s Doing Business (DB) report is ‘to provide an objective basis for understanding and improving the regulatory environment for businesses.’¹⁹⁰ The report analyses small and medium-sized enterprises (SMEs) and measures operating regulations throughout their lifecycle. This gauges the impact of government rule-making on the cost of doing business. DB 2011 covers 183 countries and presents indicators measuring business regulation and the protection of property rights in the context of businesses. For instance, indicators show the number of procedures that must be completed to start a business or to register and transfer commercial property. They also measure regulatory outcomes, including the time and cost to enforce a contract, go through bankruptcy procedures or trade across borders. Moreover, they take a look at protections of property, by analysing, for example, how investors are protected against looting by company directors or the types of assets that can be used as collateral for credit. There are also indicators about tax burden on businesses and different aspects of employment regulation.¹⁹¹ It links into the concept of legal empowerment by highlighting

189 “Bangkok–Regional consultation on access to justice assessments | Governance Assessment Portal”, n.d., <http://www.gaportal.org/bangkok-regional-consultation-access-to-justice-assessments>.

190 *About Doing Business: measuring for impact* (World Bank Doing Business, 2011), 1.

191 “Doing Business 2011 Data Notes”, 2011, <http://www.doingbusiness.org/methodology/methodology-note>.

the cost of doing business legally thereby offering a possible explanation as to why so many eke out a living 'extra-legally'.

Methodology

Initially, the DB team collaborated with academic advisers and designed a survey based on standardized case scenarios to allow for comparisons across economies and time. In the interest of standardisation and for practical reasons (i.e. cost), the scenarios assume, for example, that the business is located in the largest business city of the country, that it is a limited liability company and that it is formally registered.

A network of over 8000 professionals including commercial lawyers, notaries, judges, architects, trade logistics specialists and accountants contributed pro bono to DB research by submitting their responses¹⁹². DB defines respondents as "professionals or government officials who routinely administer or advise on the legal and regulatory requirements covered in each Doing Business topic"¹⁹³. This has the advantage that data is gathered by professionals who regularly undertake the transactions involved. Respondents are able to gauge steps involved and the time it takes to complete administrative requirement fairly accurately. However, it does not necessarily reflect the experience of marginalised populations. Despite quality control by the DB team such as crosschecking responses by comparing them with corresponding texts of laws and regulations, the experience of the regulatory environment conveyed does not necessarily reflect the burden facing an unregistered single-person business. An informal entrepreneur may have to spend considerable time finding out which procedures apply in the first place, then find a way to travel to the administrative office in the nearest town and stand in line. In the end, the entrepreneur may even end up paying or bribing the official for services that by law are supposed to be free of charge.

The majority of indicators in DB are based on laws and regulations and most cost indicators are based on official fee schedules. Respondents fill out surveys and provide references to applicable laws, regulations and fee schedules. However, in many cases what happens in reality is different from what is written in the books. For indicators related to construction permits, contract enforcement and closing a business, for example, DB bases parts of the cost and time components on actual practice. This may introduce a certain amount of subjectivity¹⁹⁴ but nevertheless provides useful insights into specific processes that closely reflect reality.

192 <http://www.doingbusiness.org/contributors/doing-business/become-partner>

193 *About Doing Business: measuring for impact*, 16.

194 *Ibid.*, 15,16.

Reflections

DB data originates from readings of laws and regulations as well as time and motion indicators. The methodology is transparent, replicable and relatively cheap. However, DB usually assumes that companies operate under limited liability regimes as this is the most common business form in most economies. This excludes informal businesses that rarely have access to such risk sharing mechanisms let alone to the benefits that arise from legal identity. Apart from exceptional cases, DB focuses its analysis on the formal sector. Indirectly, however, this focus can also shed light on informality because where regulation is particularly onerous, levels of informality tend to be higher. Hence DB measures one set of factors that helps explain the existence of informality and guide policymakers towards potential reforms.¹⁹⁵

Complementing DB results with the World Bank's Enterprise Surveys, which directly measure informality, provides an even clearer picture of the business environment.

5. National Consultations on Legal Empowerment of the Poor (LEP): Experiences from Bangladesh, Indonesia, and the Philippines

National consultations on legal empowerment of the poor (LEP) provide an entry point for legislative and policy reform actions at the national level to help realize social and economic rights as well as achieve the MDGs. The recommendation from the Commission on Legal Empowerment of the Poor was reiterated at the Regional Dialogue on LEP in Bangkok in March 2009. The report of the Regional Dialogue notes that national and sub-national initiatives should be defined by a national consultation on LEP¹⁹⁶. The report also suggests creation of a national, inclusive multi-stakeholder mechanism as this will facilitate consensus building and buy-in from policymakers and other stakeholders, especially where issues are sensitive and complex.

In 2006 and 2007 the Commission on Legal Empowerment of the Poor organized national consultations by convening representatives from local governments, communities, academia, civil society, grassroots movements, the private sector and the media in over 20 countries covering five continents. The consultations helped ground the Commission's research and policy recommendations in local experiences and built national and regional ownership over the agenda. The meetings also served to galvanize regional and national attention on legal empowerment of the poor, and in a number of cases spurred national action by placing LEP issues on a country's development agenda.

¹⁹⁵ Ibid., 13.

¹⁹⁶ *Making Everyone Work for Legal Empowerment of the Poor—Report of the Regional Dialogue on Legal Empowerment of the Poor 3-5 March 2009, Bangkok*, 21.

Apart from building awareness, support and ownership, capturing local knowledge and experiences, setting the stages for a national platform for action and broadening the network of policymakers, technical experts and representatives of civil society contributing to LEP, a key goal of the national consultation process was to identify barriers to achieving legal empowerment within the country.¹⁹⁷

The national consultation process was overseen by the secretariat of CLEP, organized with support from the respective UNDP country offices, but driven by a locally led partner institution. The lead-partner was chosen by the UNDP country office in consultation with the CLEP Secretariat and generally consisted of NGOs or research institutes. In some cases, the host government took on the role of the lead-partner in setting up and supporting the consultation process.

Methodology

The general format of national consultations organised by the Commission involved commissioned working papers on each of the four 'pillars' and focus group meetings culminating in a one and a half-day national conference which reflected findings in the working papers and the outcome of the focus group discussions. The modalities for the national conference consisted of four panels (one per 'pillar') and presentations followed by discussion.

The lead institution and the UNDP CO selected four national authors who each drafted papers on one of the thematic areas of LEP. The working papers served to set the focus for debate in focus group meetings and at the national conference.

The focus group meetings were an opportunity for a broad and representative range of national stakeholders to engage in debates about the meaning of LEP in their country context. Organizers made a special point to reflect gender balance and include representatives of indigenous peoples. Around 12-15 people participated in each of the four focus groups. Note takers drafted records that were subsequently presented to participants in the national conference.

80-100 participants ranging from local academics, NGO representatives, government officials and other relevant stakeholders attended the national conference. The following is a description of experiences and outputs from the national consultations of Bangladesh, Indonesia, and the Philippines. A brief summary of the main findings contained in the working papers or the national consultation report is provided below. The purpose is to demonstrate that national consultations can be an effective first step in mobilising stakeholders for LEP, getting an initial picture of the policy environment, identifying needs and gaps, and beginning to set the agenda for reforms.

197 National Consultations Concept Note; Commission on Legal Empowerment of the Poor, 2006;
<http://www.undp.org/legalempowerment/reports/National%20Consultation%20Reports/2.0.%20Overview%20of%20Consultation%20Process%20Final.doc>

Bangladesh

The lead-partner for national consultations in Bangladesh was the School of Law of BRAC University. Highlights from the Access to Justice working paper¹⁹⁸ relate to a mix of systemic and psychological barriers that prevent the poor from accessing both formal and informal justice mechanisms; poor people tend to find remedies in the formal system ineffective; legal complexities, unfamiliarity, cost, delays, corruption and overemphasis on the normative aspects of the law repel the poor from the formal system; in accessing informal justice, poor people also face barriers in the form of bias, gender discrimination, corruption, change in rural social structure leading to a decline of the *shalishers*¹⁹⁹. A key recommendation is to reform the legal sector while strengthening and structuring the role of the informal justice sector and promoting NGO engagement.

The Property Rights paper²⁰⁰ enumerates numerous difficulties with respect to poor people's access to property rights. The report notes that nearly 70% of people are landless; the poor have often been excluded from schemes aimed at providing land to the landless; there is a repressive land management and revenue collection system; the system is biased towards national and local elites; minorities, women and indigenous populations are particularly disadvantaged in accessing property rights and are frequently victims of eviction; only limited recognition of women's right to immovable property exists in Muslim and Hindu Dayahaga²⁰¹ law; there is a gap between the legal regime and its application. Recommendations include better implementation of existing laws; improvement of the Khas land distribution scheme; integrating property rights into poverty alleviation efforts; more NGO involvement; paying more attention to minorities, indigenous peoples and women.

The paper on business rights²⁰² bases some of its findings on case and field studies prepared as a result of interviewing poor entrepreneurs on their perception of threats and security issues concerning their business, factors that prevent them from expanding their business, acquiring assets and loans, problems they face selling goods and buying inputs and concerns regarding social security. The paper finds that entrepreneurs in the informal sector choose to operate informally to avoid the cost and effort of formalization (inc. incorporation, tax registration, licenses etc.) or because of lack of literacy and education in entrepreneurship.

198 Ferdous Jahan, From the Rule of Law to Legal Empowerment of the Poor in Bangladesh: Towards an Agenda for Change; A2J Working Paper for the National Consultations

199 Shalish actually means- "the practice of gathering village elders for the resolution of local dispute" (The Asia Foundation, 2002 cited in (see fn above); Shalishkers refers to the elders with role of mediator/adjudicators

200 *Property Rights of the Poor*, Working Paper for the National Consultations on Legal Empowerment of the Poor (Nijera Kori NGO, n.d.), http://www.undp.org/legalempowerment/reports/National%20Consultation%20Reports/Country%20Files/4_Bangladesh/4_4_Property_Rights.pdf.

201 One of several schools of Hindu Law with a strong focus on inheritance procedure.

202 *Legal mechanisms to empower informal business-Bangladesh Perspective*, Working Paper for the National Consultations on Legal Empowerment of the Poor (School of Law-BRAC University, January 2007), http://www.undp.org/legalempowerment/reports/National%20Consultation%20Reports/Country%20Files/4_Bangladesh/4_5_%20Informal_Business_Rights.pdf.

However, the document also notes that operating outside the law has considerable costs, especially in terms of lack of social protection, workers' benefits, and representation or voice. The paper recommends that business formalization initiatives take account of the interlinkages between business rights and the other three empowerment domains (access to justice, property and labour) ; that a Commission on the Informal Sector be established to coordinate research and promote business registration; that the statistical base on the subject be enhanced, that a mechanism to issue identity cards to informal entrepreneurs and a social fund for the informal sector be set up; that measure to improve working conditions and security, access to credit and financial services be implemented; that business regulations be simplified and that measures directed towards poor women entrepreneurs are put in place.

Indonesia

In its capacity as lead-partner, the Indonesian Legal Aid Foundation (YLBHI) published a report on the national consultation on legal empowerment of the poor in Indonesia²⁰³ synthesizing the working papers, the results of the multi-stakeholder consultations and the national consultation itself. The report notes that many legal empowerment efforts had already been attempted in Indonesia but with mixed success.

Recommendations for improving access to justice for the poor include: more sincerity in implementing the principle of justice; building the capacity of security forces; improving the efficiency of monitoring mechanisms; legal socialization for the poor, legal assistance and support services for the poor; synergizing A2J efforts; real support from the government to NGOs; dispelling stereotypes and eliminating discriminatory practices.

In the area of property rights, the report underlines the need for evaluating policies that exaggerate privatization in terms of their effect on ordinary people's property rights; deriving legal documents on property rights from national culture, understanding the importance of properties' social value (e.g. farmland, forests, sea); rearranging the use of land to reduce agrarian conflict; for property policies to focus on women's rights.

In the area of labour rights, recommendations include: reinforcing labour rights, providing social security for informal workers and increasing voice and representation in the informal sector, government protection of informal and formal workers according to universal principles, elimination of all policies failing to meet human rights principles or violating constitutional rights, including the rights of women and minorities, proper implementation of Law no.04/2004 on a National Social Security System, additional polices on migrant workers' rights, and concentration on fulfilling the rights of poor women labourers.

203 *Legal Empowerment of the Poor: Lessons learned from Indonesia*, National Consultations on Legal Empowerment of the Poor (Indonesian Legal Aid Foundation (YLBHI), 2007), http://www.undp.org/legalempowerment/reports/National%20Consultation%20Reports/Country%20Files/13_Indonesia/13_4_Legal_Empowerment_of_the_Poor_Lessons_Learned_from_Indonesia.pdf.

Recommendations in the context of entrepreneurship, specifically the micro, small and medium enterprises call for more and better opportunities to access credit, tailored training programmes for entrepreneurs, more balanced industrial policies that are less biased against the interests of micro, small and medium enterprises; providing government protection to allow entrepreneurs to expand.

Philippines

The lead-partner for national consultations in the Philippines was ESCR-Asia. A major cross-cutting recommendation emanating from the national consultation papers was the need for both policy reform and implementation reform. Specifically, while there may be laws that address various aspects of poverty, national and local government implementation policies are in need of reform²⁰⁴.

Additional recommendations common to all four thematic LEP areas were: need for substantial review of existing laws, especially those that affect the informal sector to lead to a reformulation of related existing policies; strengthening partnerships among all development actors, including people's organisations, basic and informal sector; shift in attitude of how government and the informal sector view each other; disaggregated statistics to detail vulnerable groups; tackle problems related to gender issues that are rampant in all four thematic LEP areas; active involvement of the informal sector in all decision-making processes; targeted education on laws, policies and programmes to help the poor get out of poverty; and a need to approach the issues from a human rights perspective.

The Access to Justice paper²⁰⁵ relies on a review of literature, interviews and collection of experiences from key people in the field of access to justice that represent constituencies and specific vulnerable groups, comments from the panel of advisers as well as focus group discussions. On top of institutional shortcomings identified by the 2001 Action Plan for Judicial Reform such as delays in proceedings, erroneous decisions rendered by lower courts, prohibitive cost of litigation and lack of information about the judicial system, the paper identifies societal issues that hamper access to justice by the informal sector.

Some of the other findings were: public service characterised by patrimonialism and patronage politics, limited opportunities to access justice due to insufficient resources and personal connections, lacking capacity of the state, lack of access to legal education by the poor and marginalized groups, lack of information on the part of judges and other

204 Rosario K. Garcia and Gilbert Sembrano, *The Way Forward: Legal Empowerment of the Poor in The Philippines (The Integration of Four Thematic Papers)*, Working Paper for the National Consultations on Legal Empowerment of the Poor (ESCR-ASIA, 2007), 2, http://www.undp.org/legalempowerment/reports/National%20Consultation%20Reports/Country%20Files/21_Philippines/21_7_Final_Report_on_LEP.pdf.

205 Glenda T. Litong, *Defining an Alternative Development Paradigm: Reducing Poverty and Ensuring Access to Justice through Legal Empowerment of the Poor*, Working Paper for the National Consultations on Legal Empowerment of the Poor (ESCR-ASIA, 2007), http://www.undp.org/legalempowerment/reports/National%20Consultation%20Reports/Country%20Files/21_Philippines/21_3_Access_to_Justice.pdf.

administrators of the justice system concerning the poor, lack of support mechanisms, issuance and implementation of anti-poor policies and decisions, general discrimination against the poor within the justice system (esp. vulnerable groups – children in conflict with law, women, indigenous peoples, informal sector and people living with HIV/AIDS); structural and systemic problems within the judiciary and a justice system that prevents poor and marginalized groups from access to justice (hostile atmosphere in the justice agencies, absence of community participation in the appointment of judges and justices, non-recognition of indigenous legal system, language barriers etc.); gender insensitivity of the courts.

6. Millennium Development Goals (MDG) Acceleration Framework: UN Agencies identifying institutional bottlenecks to MDG 1

A staggering fact about poverty, which is not addressed explicitly in the MDGs, is that the vast majority of the world's poor live their daily lives in the *informal* or *extralegal*²⁰⁶ sector, often excluded from the benefits of the rule of law. Poor women and men generally lack effective legal protection and recognition of their economic assets and transactions. They often have limited or no access to formal policy and welfare systems that make security available to all and complement informal systems of local security and care. The Millennium Development Goals Acceleration Framework provides multiple options for factoring LEP into action plans to help reach MDG targets by 2015.

The Millennium Development Goals Acceleration Framework (MAF) is a tool developed by UNDP designed to assist countries in developing their own action plans to accelerate progress towards the MDGs by systematically identifying and addressing bottlenecks. A component of UNDP's MDG Breakthrough Strategy is based on the premise that if impediments hindering progress are known, these bottlenecks can be removed through the application of sound, evidence-based knowledge of what works.²⁰⁷ In short, the MAF suggests four methodical steps, three of which answer questions regarding what needs to happen to reach a particular MDG target; why this is not happening; how it can be made to happen, while the final step consists of formulating an action plan among all development partners to actually make it happen.

In a nutshell, the MAF focuses on three dimensions: a diagnostic dimension to identify lagging MDGs and binding constraints, a prescriptive dimension where proven interventions for overcoming the constraints have been identified, and a roll-out dimension where support is provided to countries for MDG acceleration. In the diagnostic phase, lack of legal empowerment (rights and their realization) of the poor may be

206 See footnote 12

207 *Unlocking progress: MDG acceleration on the road to 2015—Lessons from the MDG Acceleration Framework pilot countries* (UNDP, September 2010), http://content.undp.org/go/cms-service/download/asset?asset_id=2844466.

identified as a binding constraint in MDG achievement. As an example, consider the context of access to productive resources or basic social services. If that is the case, then it may be beneficial to see where establishment of legal rights for the poor has contributed to enhance their access and to suggest that type of intervention as a way of overcoming the bottlenecks.²⁰⁸

In India, in the area of primary and secondary education, many poor were unable to send their children to school simply because there were no schools in the near vicinity of where they live. As per the Right of Children to Free and Compulsory Education Act of 2009, a legal measure was taken whereby the state is required to provide schools to people within feasible reach.

If the state fails to do so, citizens can initiate public interest litigation against the state. Many have actually done so. This has increased enrolment of children, both boys and girls, particularly from poor neighbourhoods and contributed to acceleration of MDG 2 (achieving universal education by 2015) in India. If the same binding constraint is found today in another country with regard to schools or healthcare centres, a similar intervention could be quite effective²⁰⁹. Such measures can be part of the MDG Action Plan, anchored in national development processes and aligned with the United Nations Development Assistance Frameworks (UNDAFs) that are being developed in MAF countries. Box 4–Source: Dolan & Kjørven, 2011

At the beginning of 2010, the MAF was rolled out for field testing to 10 pilot countries. An interesting common theme identified among many of the pilot countries is that the MAF process has helped increase focus on existing sub national disparities, especially in regard to the needs of the most poor and vulnerable, including women, the elderly and ethnic minorities, thereby bringing an equity dimension to the solutions and measures being devised.²¹⁰ As of mid-2011, fourteen countries have employed the Acceleration Framework; of those, ten have arrived at their own detailed action plans, and six are now in the process of implementation, with the others expected to follow shortly. Thirty more countries have requested UN support to use the Acceleration Framework.

208 Timothy Dolan and Olav Kjørven, "Legal Empowerment of the Poor—A strategy for inclusive development for the present and beyond 2015," *Kart og Plan* 71 (June 2011): 105-112.

209 One perverse impact of the RTE, however, seems to be that the legality of home schooling, a frequent form of schooling in rural areas, which in some cases arguably can provide better quality in education, has been put into question. It would obviously be important that any replication elsewhere address this issue, where relevant.

210 *Accelerating Progress Towards the MDGs Innovative options for reaching the unreached—Lao People's Democratic Republic* (UNDP, 2010), 17.

MAF Methodology: Developing an MDG Action Plan or ‘Acceleration Compact’

Four sequential steps to drawing up an MDG action plan

1. Identification of the necessary interventions to achieve the MDG target: Identify the MDG target (i.e. the one that is off track or unlikely to be met if ‘business as usual’ prevailed) and list the key interventions that are considered necessary to reach it. In many cases, key interventions can be taken from the national development plan, sector strategies and plans, and relevant policy planning document.

2. Identification of bottlenecks that impede the effectiveness of key interventions on the ground: Identify the bottleneck – the cause of the lack of complete success of each intervention listed in step 1. Bottlenecks should then be prioritized in terms of their potential impact on the MDG target. Bottlenecks have a tendency to either be cross-cutting, affecting several MDGs simultaneously, or specific, mainly affecting the MDG in question. In addition, it is useful to classify the bottleneck into one of four categories: policy and planning, budget and financing, service delivery and service utilization.

3. Identification of high-impact and feasible solutions to prioritized bottlenecks: Review feasible solutions and rank them according to their impact (magnitude, speed, sustainability, assessment of adverse effects) and feasibility (enabling environment including governance, capacity and funding availability). Describe each solution by a set of activities to be implemented by entities best placed to do so. Solutions can come from within the country or as adaptations of other country’s solutions. But it is noteworthy that solutions may need to be complemented by additional, longer term measures to improve the enabling environment and sustain gains. This is another entry point for LEP measures.

4. formulation of an action plan, with identified roles for all development partners, that will help realize the solutions: Combine activities paired with their identified implementers to constitute the MAF Action Plan (or MDG Acceleration Compact) which may engage a broad range of relevant key players, while also helping in designing a monitoring and evaluation plan based on each of the partners’ roles. Box 5–Source: UNDP; Unlocking progress: MDG acceleration on the road to 2015–Lessons from the MDG Acceleration Framework pilot countries. September 2010.

As mentioned in box 5, step 2, above, the MAF helps identify sector bottlenecks across four categories. “Policy and Planning” and “Service Delivery” are most relevant for this review.

Policy and planning bottlenecks relate to the adequacy of existing national or sub-national strategies, sector policies and plans, regulations, standards, and guidelines, including the legal framework and laws (within and outside control of the sector), that potentially affect service delivery or the implementation of identified intervention(s).

Service utilization – demand: Bottlenecks in the delivery of goods and services on the ground from the demand-side are likely to occur in the following areas: adequacy of services provided, empowerment of users to utilize the services when available,

information available, education, awareness and advocacy, intervention promotion, physical distance (lack of transportation), affordability and quality of services, and cultural barriers that prevent service utilization.

Lao PDR's MDG Acceleration Framework

Lao People's Democratic Republic (PDR) is one of the 10 pilot countries participating in the roll-out of the MAF, the only participant in continental Asia. Lao PDR's ambitious action plan covers key sectors such as infrastructure, energy, sustainable agriculture, environmental management, education, gender, health and water sanitation. The additional efforts therefore cover all MDGs ²¹¹. It builds upon ongoing and planned initiatives in the country such as recommendations of the MDG Progress Report and the Mid-term Review of the 6th Plan. Where appropriate, these are complemented by innovative initiatives serving to help close specific development gaps.²¹² For purposes of this chapter, focus is concentrated on MDG 1.

The 2008 MDG Progress Report identifies Lao PDR as being on track for reaching the target of reducing poverty by half; However, the nation is seriously off track concerning the target of reducing hunger by half²¹³. Accordingly, one of the six priority areas identified in the Lao PDR MAF for accelerating MDG achievement is "Sustainable practices for improved food security and environment". To inform the diagnosis, the Lao PDR MAF draws from existing research (rather than embarking outright on new, potentially onerous, duplicative and delaying data gathering) on locations of the poor, regions with an insecure food supply and the scope of food insecurity from the Comprehensive Food Security and Vulnerability Assessment published by the World Food Programme.

One of eight strategies for MDG acceleration in the agriculture and environment priority proposed in the Laos PDR MAF is improving incomes of the rural poor. Particularly interesting from an LEP perspective are interventions on improving access to formal credit and implementing a policy of community participation in issues related to land use. In basic terms the food security or, 'LEP nexus' can be understood as follows: Access to land or secure tenure can improve investment in agriculture and food production. Selling agricultural produce provides opportunities for generating income, which can be used to buy food. In addition to enhancing food security through these means, land has a safety net function which can reduce poor people's vulnerability to external shocks, induced, for example, by food or economic crises or climate change.

Indeed, Lao PDR's MAF recognizes access to formal credit as an essential factor for improving economic opportunities for the poor therefore, the MAF suggests reforming the bank loan structure to support agricultural loans that extend beyond the scale of

211 *Accelerating Progress Towards the MDGs Innovative options for reaching the unreached–Lao People's Democratic Republic.*

212 Ibid.

213 Ibid., Table I–1.

microloans and that are non-discriminatory to women, while expanding service reach. The Lao MAF also recognizes that land titling can be very important for food security and recommends that “land reforms should include a process of land titling to ensure that sustainable agricultural practices can be enhanced.”²¹⁴

Lao PDR’s MAF also notes that land ownership is often demanded as collateral for obtaining credit and that security of land ownership can be integrally connected to investments aimed at increasing agricultural productivity and land use management. Conceding that land reform and titling are long-term activities, the MAF recommends that in the interim, a policy on participation of local communities in decisions related to the allocation of concessions and changes in land use be implemented.²¹⁵

Lao PDR’s framework, and in particular its recommendations for specific actions, subsequently fed into preparation of the Lao PDR’s 7th National Socio-Economic Development Plan²¹⁶. Implementation of the LMAF is coordinated and monitored by existing structures set up under the Lao PDR Round Table process, which brings together representatives from the government, donor agencies, international organizations, international NGOs and civil society.²¹⁷

Reflections

This example demonstrates that national MAFs can be useful in systematically identifying lagging MDGs as well as solutions to overcome constraints by bringing together national and international stakeholders to focus on common strategies and goals. Nonetheless, the financial resource needs of such ambitious plans must not be underestimated.

Conclusion

This chapter reviewed six methodologies that can be used to identify institutional bottlenecks to poverty reduction and livelihood insecurity and placed them into the context of legal empowerment of the poor.

ILD’s Diagnostic reviews may well be resource and time intensive exercises. The methodology is however very effective with regards to uncovering the large amounts of information that permit to construct clear mappings of informality in an economy. To make the step from the diagnosis stage to actual reform proposal and subsequent implementation,

214 *Accelerating Progress Towards the MDGs Innovative options for reaching the unreached—Lao People’s Democratic Republic.*

215 *Ibid.*, 44.

216 *Unlocking progress: MDG acceleration on the road to 2015—Lessons from the MDG Acceleration Framework pilot countries.*

217 *Accelerating Progress Towards the MDGs Innovative options for reaching the unreached—Lao People’s Democratic Republic*, 81.

broad and continuous stakeholder involvement, representation of vulnerable groups, focus on capacity building (of local teams, for example) and championing leadership from the highest level are key.

Legislative reviews by universities emphasise laws in the formal sense, as they appear “in the books”. As a first step in analysing how the legal and policy frameworks affect the lives of the poor and disadvantaged, it provides for a relatively cost-effective and comprehensive study that can form the basis of policy recommendations feeding into the political and legal reform process. It also has the positive side-effect of elevating considerations of legal empowerment in the academic discourse.

While valuable in their own right, Access to Justice assessments provide opportunities for including other pillars of legal empowerment in assessments, thereby taking advantage of proven assessment methodologies. Crucially, this can also be an effective way of ensuring studies relating to the other pillars integrate a Human Rights-based approach. By emphasising the perspective of the poor and otherwise marginalized, such ‘enhanced’ Access to Justice assessments can provide accurate reflections of these groups’ experience in accessing justice per se but also in the context of property rights, labour rights or business rights.

While the Doing Business Report does not explicitly focus on business regulation and law aspects as they relate to informality (or other legal empowerment dimensions), it is the methodology, if applied to the legal empowerment context, which is of interest. Embedding LEP-relevant questions into surveys and taking advantage of the DBs extensive network of (voluntary) expert/practitioners could yield important insights into regulatory and legislative barriers to empowering the poor across cities and regions and provide incentives for developing the capacities of legal aid centres, for example, to collect and submit relevant data on an on-going basis. The cost effectiveness of the DB methodology is particularly appealing.

National consultations offer a platform for discussions among stakeholders, place LEP issues on a country’s agenda and can be an effective way of building consensus on reform proposals, thereby allowing for smoother implementation of reforms that are broadly accepted and sustainable. At the same time, national consultations generate great expectations which left unmet can lead to disillusionment and damage the credibility of reformers as well as the reputation of LEP as a strategy for poverty eradication.

The MDG Acceleration Framework enables governments and development partners, within established national processes, to identify and systematically prioritize bottlenecks blocking MDG progress, including reaching the poor and marginalized, and then devise ways to overcome these bottlenecks. By breaking down silos between sectors, MDGs, and disciplines, the framework fosters an evidence-based, cross-sectoral, and problem-solving approach that can result in accelerated progress on the MDGs.

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The Importance of Public Action in Realizing Social and Economic Rights: Lessons from India's Right to Food Campaign

A.K. Shiva Kumar

Introduction

Assuring social and economic rights is fundamental to the pursuit of human development. It is also central to ending human deprivations and human suffering. India's recent experience with the 'right to food' campaign underscores the importance of strong and effective public action within a democratic framework to end human poverty. It points to the need for building a broad coalition of support as well as forging partnerships with and beyond government to include multiple stakeholders to design, refine and evolve a policy consensus. It also highlights the significance of putting in place constructive pre-legislative (and policy) processes to create public awareness, utilize evidence, dispel misconceptions, generate options and stimulate public discussions as necessary inputs into the formulation of laws and policies.

The idea of human development—broadly defined as an enhancement of capabilities, a widening of choices, and an expansion of freedoms—has had a profound impact, in recent years, on development thinking and policy. From a human development perspective, the focus of policymaking shifts from means—an emphasis on economic growth—to ends (asking whether people are enjoying more freedoms; 'to do what they want to do and be what they want to be'.²¹⁸ Similarly, poverty within the human development framework is viewed not narrowly as income deprivation, but as a denial of freedoms—economic, social, cultural and political. This in turn is traced to inadequacies and inequalities in the distribution of opportunities — between women and men, across regions, between rural and urban areas, and within communities.

The idea of human development has been considerably enriched by the human rights discourse through highlighting the importance of both moral consensus and legal obligations. Human rights and human development "share a common vision and a common purpose – to secure the freedom, well-being and dignity of all people

218 See Sen, Amartya (1999), "Development as Freedom", Oxford University Press, New Delhi. Also, for a set of papers on human development, see Fukuda-Parr, Sakiko and Shiva Kumar, A.K. (2009), "Handbook of Human Development Concepts, Measures, and Policies", Oxford University Press, New Delhi.

everywhere.”²¹⁹ From a rights perspective, the State is principally responsible for assuring universal rights. It is the State’s business to create the enabling environment and provide sufficient resources for ensuring universal access to basic social and other services. From a rights perspective, poverty represents a denial of basic entitlements – to education, health, nutrition, and other constituents of decent living.²²⁰ A rapid and equitable expansion of freedoms is therefore crucial for ending human poverty. At the same time, by highlighting the importance of accountability, transparency and the rule of law, the human rights perspective lends support to processes that encourage participation, protection and empowerment of the poor.

Rights and development: The on-going debate

Several misgivings and concerns continue to dominate policy discussions surrounding human rights and development. The *first* has to do with the universalism of human rights. Some policymakers question the idea of a set of human rights having ‘universal’ validity cutting across different religions, traditions and customs. Manifestations of this concern are frequently observed in debates surrounding women’s rights or reproductive and sexual rights. Others have questioned the usefulness of making certain rights universal when, in their view, many ‘social’ rights, such as the right to food, are best targeted towards the poor. A *second* issue concerns prioritization of rights. At one level, it is true that no one set of rights is more important than another. For instance, it cannot be argued that fulfilling social and economic rights has a greater urgency than assuring civil and political rights. However, from a practical standpoint, what happens in view of the resource constraints societies face? Do some rights get precedence over other rights? This raises a *third* issue relating to resource availability. What is the point of the State guaranteeing rights if it does not have the financial and other resources to fulfill the rights? Countries have dealt with this dilemma in different ways. Some include such rights in their constitutions without the expectation of immediately fulfilling it. In India, for instance, this is precisely why the right to education was not included as a fundamental right under the Constitution of India when it was drafted in 1949. Instead, Article 45 of the Directive Principles of State Policy, recognizing that the country at the time of Independence in 1947 did not have sufficient resources, stated that “The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.”²²¹ A *fourth* issue has to do with

219 See in particular United Nations Development Programme (1998), “Human development and human rights: Report on the Oslo Symposium 2-3 October 1998”, Organized by United Nations Development Programme, United Nations Office of the High Commissioner for Human Rights and Royal Ministry of Foreign Affairs, United Nations Development Programme, New York and United Nations Development Programme (2000), “Human Development Report 2000”, Oxford University Press, New York.

220 For a comprehensive discussion see, in particular, Commonwealth Human Rights Initiative (2001), “Millennium Report–Human Rights and Poverty Eradication: A Talisman for the Commonwealth”, New Delhi. And Centre of Development and Human Rights (2004), “The right to development: A Primer”, Sage Publications, New Delhi,

221 Only in 2002, by the 86th Constitutional Amendment was the right to education made a fundamental right.

collective responsibility for assurance of rights. If the fulfillment of rights is a collective responsibility, then who can specifically be held responsible for their non-fulfillment? Does collective responsibility soon become nobody's responsibility?

Open discussions over time have contributed to resolving many of these issues. A broad consensus has emerged on the universality of human rights. Take the case of child rights as an example. Adopting the framework of rights for assessing the well-being of children offers several advantages. The emphasis on universalism ensures that all children, regardless of caste, class, race, or religion, are assured the same rights. The framework's emphasis on non-discrimination helps to better understand concerns of exclusion faced by socially and historically disadvantaged communities. Focus on the rights of children for survival, development and protection links these rights to freedoms – freedom from hunger, freedom from fear, freedom from avoidable morbidity and so on. A human rights approach offers other advantages as well. It helps to better understand the agency of women – so critical for the well-being of children – by assessing gender equality and gender justice. Moreover, the fulfillment of child rights requires active involvement of multiple stakeholders – governments, communities, and agents inside and outside the family. By underscoring the importance of rights and corresponding duties of various actors, the children's rights perspective underscores the need for an integrated social approach that can accommodate multiple interventions along simultaneous fronts. Furthermore, the human rights argument offers a strong ethical and moral justification for interventions intended to promote the well-being of children.

Do rights have any meaning if they cannot be legally enforced? Does the fact that some human rights cannot be fulfilled today make these rights redundant? If rights are interpreted in terms of the freedoms that rights holders have, then does the fact that children can't often exercise their rights render such child rights meaningless? Amartya Sen argues that these are wrong questions to ask. He points out that human rights are different from legal rights; human rights exist whether or not makers and interpreters of law have had the opportunity to reflect these rights in actual legislation. Similarly, one should distinguish between an unrealized and a non-existing right. As a matter of fact, recognizing a right opens up the possibility and the obligation for society to do something – even if it is over time – for the fulfilment of the particular right. Sen refers to this as 'the social role of human rights in translating an ethical value into practical action aimed at promoting that ethic.' Sen also points out that requiring a person to always exercise rights in his or her best self-interest is not a practical way of thinking about freedoms. There are many freedoms where 'the idea of freedom is not parasitic on the person taking control of the actual exercise of his or her freedom.' Sen gives the example of a passenger in an airplane. The freedom to fly safely is best left to others (in this case, the pilot) who know more about its fulfilment (about flight plans and cockpit operations). Similarly, given that we live in an inter-dependent world, the freedom from illnesses such as malaria cannot be assured by the individual himself as it would depend on public health actions initiated by the community and the State.

How does one integrate human rights into effective policy making that contributes to human development? How, for instance, can a rights perspective better inform and influence policy for the realization of the Millennium Development Goals? Take the case of MDG-1, namely 'eradicate extreme poverty and hunger'. Recent Indian experience suggests that building support for a rights-based approach to development and designing appropriate interventions calls for strategic and sustained public action. This is illustrated, for instance, in the recent efforts of India's Right to Food campaign to assure food and nutritional security.

Building a coalition

The Right to Food Campaign, which began in 2001 and continues to this date, is an informal network of organizations and individuals committed to the realization of the right to food in India. The Campaign believes that the primary responsibility for guaranteeing basic entitlements rests with the State. Realizing this right requires not only equitable and sustainable food systems, but also entitlements relating to livelihood security such as the right to work, land reform and social security.²²² One of the major achievements that can be at least partially attributed to the Campaign is the introduction of hot cooked meals for school-attending children across the country. Prior to 2005, children in school received 'dry rations' (or 3 kilograms of rice or wheat) every month. Today, more than 100 million children receive hot-cooked meals in school. This has had a significant impact in terms of ending classroom hunger, enhancing attentiveness in the classroom, boosting school enrolment and bridging social distances. It has thus contributed to not only attaining the MDGs on poverty, hunger and school attendance, but has also indirectly contributed to increased gender equality and better health of children across India. Several features of the Campaign have contributed to this 'success'.

First, the Right to Food Campaign has built a broad coalition of support for the right to food. The coalition includes eminent citizens (scholars, opinion leaders, scientists, activists) as well as many other networks and campaigns that align themselves with the cause. These include, for instance, the **Bharat GyanVigyanSamiti** (BGVS), **Human Rights Law Network** (HRLN), Jan SwasthyaAbhiyan (JSA), National Conference of Dalit Organisations (**NACDOR**), **National Alliance for the Fundamental Right to Education** (NAFRE), National Alliance of People's Movements (**NAPM**), **National Campaign on Dalit Human Rights** (**NCDHR**), National Campaign for People's Right to Information (**NCPCRI**), **National Federation of Indian Women** (NFIW) and **People's Union for Civil Liberties** (PUCL). The Campaign has also welcomed the involvement of political parties and other development organizations. An effective way this has been achieved is through participation in thematic groups. For

222 See the Campaign's website accessible at <http://www.righttofoodindia.org/index.html>

example, the Citizen's Initiative for the Rights of Children Under Six (CIRCUS) has worked closely with the Campaign to promote the right to food of children below age six.²²³

The Campaign has also found support from the National Advisory Council (NAC) – an advisory body that provides policy and legislative inputs to the Government of India and focuses on social policy and the rights of disadvantaged groups. Set up as an interface with civil society, the NAC, chaired by Mrs. Sonia Gandhi, comprises 12 professionals drawn from diverse fields of development activity who serve in their individual capacities. Through the NAC, the Government has access not only to professional expertise and experience but also to a larger network of research organizations, NGOs as well as social action and advocacy groups. The Campaign has provided inputs to and interacted with the NAC which finalized details of the basic framework of a proposed National Food Security Bill in October 2010.

Generating and using evidence

Second, the Campaign has made systematic efforts to highlight problems concerning hunger and malnutrition in the country. This was completed by undertaking a wide range of activities including public hearings, rallies, protest marches, conventions, media advocacy, and lobbying Members of Parliament. For example, on April 9, 2002, several activities took place across the country as part of a national “day of action on mid-day meals”. Similarly, in May-June 2005, the Campaign facilitated the RozgarAdhikarYatra, a 50-day tour of India's poorest districts to demand the immediate enactment of a national Employment Guarantee Act. Four national conventions have been held so far in different cities: in 2004, 2005, 2007 and 2010. These efforts have helped to convert private awareness into public understanding, dispel vague perceptions, and draw attention to actual social conditions. The Campaign has also produced several easy-to-read booklets and pamphlets for mass circulation. These include the Mid-Day Meal Primer and Booklet on Mid-Day Meals in Primary Schools.²²⁴

Third, the Campaign has managed to successfully galvanize action research studies, directly and indirectly, to generate data and produce insights into the functioning of food delivery programmes. The Campaign has ensured easy access to several studies and field reports as well as surveys relating to mid-day meals undertaken by institutions across

223 The Campaign itself has a small Secretariat (consisting of three remunerated workers) that derives its mandate from the annual convention of the Right to Food Campaign, and plans its work in the light of the convention's deliberations and decisions. The Secretariat helps with the organisation of the annual convention of the Right to Food Campaign, undertakes follow-up activities after the annual convention, maintains the campaign website (www.righttofoodindia.org), circulates regular information about activities of the campaign, facilitates communication and coordination within the campaign, supports research, investigation and training, and capacity building processes and strengthening of the campaign (including training and material generation). The Secretariat is aided and supported by an Advisory Group. The Secretariat's work is funded by individual donations in rupees with no strings attached, without institutional support.

224 <http://www.righttofoodindia.org/data/wsfmdm.pdf>

the country.²²⁵ Results of public hearings are published as part of the Campaign's efforts for monitoring and evaluating the implementation of Court orders and administrative arrangements in support of the right to food. Evidence has also been effectively generated through a number of mediums including newspaper articles, research papers, television interviews etc.

Leveraging the judicial system

Fourth, the Campaign has successfully cooperated with the judiciary to extract several benefits for the poor. In April 2001, the People's Union for Civil Liberties (PUCL) filed a "writ petition" to the Supreme Court initiating public interest litigation (PIL) on the right to food arguing that foodgrains overflowing from storage facilities at the Food Corporation of India (FCI) should be used to protect people from hunger, for instance by launching food-for-work programmes, strengthening the public distribution system, and providing midday meals in primary schools. Initially, the case was brought against the Government of India, the Food Corporation of India (FCI), and six State Governments, in the context of inadequate drought relief. Subsequently, the case was extended to larger issues of chronic hunger and under-nutrition. All State Governments were added to the list of "respondents". Over time, the scope of the PIL has considerably expanded. Today, it covers a wide range of issues relating to the right to food, including the implementation of food-based schemes, urban destitution, the right to work, starvation deaths, shelters for the homeless, and even general issues of transparency and accountability. This landmark case has emerged as the longest continuing mandamus²²⁶ on the right to food in the world. Some of the major outcomes of the PIL are listed below:

Interim Orders²²⁷: The Supreme Court's "interim orders" issued on 28 November 2001 directed all state governments to provide cooked midday meals in all government and government-assisted primary schools within six months.

"The State Governments /Union Territories to implement the Mid Day Meal Scheme by providing every child in every Government and Government assisted Primary Schools with a prepared mid day meal with a minimum content of 300 calories and 8-12 grams of protein each day of school for a minimum of 200 days."

This was supposed to be completed within six months. However, most State Governments took much longer, prompting the Supreme Court to issue stern reminders from time to time. A series of follow-up orders were issued in April 2004 to speed up the implementation of earlier orders, improve the quality of mid-day meals, and address various concerns raised

225 http://www.righttofoodindia.org/mdm/mdm_surveys.html

226 Mandamus is Latin for "we order". It is a legal instrument used in Common Law countries, following the English tradition, by which a court can order a public agency or governmental body to perform an act required by law when it has neglected or refused to do so.

227 "Interim orders" refer to orders that remain applicable for the duration of the case. If and when the Supreme Court issues a final judgment and disposed of the cases, some of these orders are likely to be incorporated in the judgment.

in the Commissioners'²²⁸ reports. In October 2004, the Court noted that some progress had been made with the implementation of earlier orders on mid-day meals. However, feedback received from the States made it clear that in many cases, implementation was being held up by lack of funds. The Court directed the Central Government to provide financial assistance of "one rupee per child per school day" to meet cooking costs. The Court also clarified responsibility to monitor implementation of the mid-day meal scheme "essentially lies with the Central Government". Again, the Court stressed the urgency of the situation and directed that "every child eligible for a cooked meal under the Mid-Day Scheme in all States and Union Territories shall be provided with the said meal immediately".

By 2010, 700 "affidavits" were submitted by petitioners and respondents, 97 "interim applications" were filed, and close to 150 "interim orders" had been issued. Most interim orders consist of directions to central and state governments. This is because the prevention of hunger and starvation is "one of the prime responsibilities of the Government—whether Central or State", as the Court made clear from the very beginning. In the case of State Governments, the Chief Secretary is answerable to the Court on behalf of the government. In some circumstances (such as starvation deaths), the Court stated that the Chief Secretary himself or herself would be held "responsible" for violations of the orders. As far as the Central Government is concerned, some orders are addressed to specific departments or ministries, such as the Ministry of Rural Development, the Ministry of Women and Child Development or the Department of Food and Public distribution under the Ministry of Consumer Affairs, Food and Public Distribution. In such cases, the Secretaries of these departments or ministries are responsible for the implementation of Supreme Court orders relevant to them. In the case of other orders, the Central Government is represented in Court by a team led by the Attorney General including the Solicitor General and three Additional Solicitor Generals. Each State and Union Territory is also represented by senior counsel in the hearings.

Commissioners: On May 8, 2002, the Supreme Court appointed two Commissioners for the purpose of monitoring implementation of the interim orders. Commissioners are empowered to enquire into any violations of the interim orders and to demand redressal, with full authority of the Supreme Court. Commissioners are also expected to report to the Court from time to time, and may seek interventions going beyond existing orders if required. Further, in an order dated October 29, 2002, the Court clarified that the mandate of Commissioners include "monitoring and reporting to this Court of the implementation by the respondents of the various welfare measures and schemes." The same order also ensured funding of the Commissioners' work: "Adequate funds shall be made available to the Commissioners by the Union of India to enable them to perform [their] functions." The Commissioners can scrutinise any aspect of food-related "measures and schemes", even if they are not the object of any specific order. Other tasks of the Commissioners include analysis of secondary data to monitor the performance of State Governments, seeking responses from them on specific issues, taking up complaints from grassroots organisations and the setting up enquiry committees to look into complaints. In other

228 On the role and mandate of the Commissioners, see sub-section below that follows.

words, Commissioners have a wide mandate and enjoy considerable powers. By 2010, six detailed reports had been submitted to the Supreme Court as well as a number of other issue-specific reports addressing the non-compliance of specific orders of the Court.

Assistants, nodal officers and advisers: In October 2002, the Supreme Court directed State Governments to appoint “Assistants to the Commissioners”. The mandate of the Assistants is to “render such assistance to the Commissioners as the Commissioners may require”. Assistants to the Commissioners are to be appointed by the Chief Secretary in consultation with Commissioners. In addition, each State Government is to appoint a “Nodal Officer” for the purpose of “ensuring due implementation” of food-related schemes. The Nodal Officers are expected to “provide Commissioners full access to relevant records and provide relevant information”. Commissioners in turn have also nominated their own “Advisors” in each state to serve as a bridge between Commissioners, State Government, and various citizens’ groups. Their brief includes sending periodic reports to the Commissioners, conducting enquiries in response to local complaints, sending appeals for intervention to Commissioners whenever required, organising research and surveys, working towards a more effective monitoring and redressal system, and liaising with State Governments on behalf of the Commissioners. The Supreme Court has also issued contempt notices to Chief Secretaries and other senior officials at the behest of the Commissioners. In such cases, the Chief Secretaries have been required to present themselves personally in the Supreme Court to answer for non-compliance of Supreme Court orders.

In response to petitions by the Campaign, the Supreme Court has issued a number of directives requiring the State to initiate prompt action. Some examples are given below²²⁹:

- a. **Timely compliance:** “All such States and Union Territories who have not fully complied with the order dated 28th November, 2001 shall comply with said directions fully in respect of the entire State/Union Territory... not later than 1st September, 2004.”
- b. **No charge:** The meal is to be provided free of cost. Money for the meal is not to be collected from parents or children under any circumstances.
- c. **Priority to cooks and helpers from marginalized groups:** “In appointment of cooks and helpers, preference shall be given to Dalits, Scheduled Castes and Scheduled Tribes.”
- d. **Extension to summer vacations in drought-affected areas:** “In drought-affected areas, mid-day meal shall be supplied even during summer vacations.”
- e. **Kitchen sheds:** The Central Government was directed to “make provisions for construction of kitchen sheds” and to contribute to the cooking costs.
- f. **Quality improvements:** “Attempts shall be made for better infrastructure, improved facilities (safe drinking water etc.), closer monitoring (regular inspection) and other quality safeguards. Improvement of the contents of the meal shall be made to provide a nutritious meal to children of the primary schools.”

229 For a more complete listing, see http://www.righttofoodindia.org/mdm/mdm_scorders.html accessed on January 10, 2012

- g. Fair quality of grain:** The Food Corporation of India (FCI) is to “ensure provision of fair average quality grain” for mid-day meals. Joint inspections of the grain are to be conducted by the FCI and State Governments. “If the food grain is found, on joint inspection, not to be of fair average quality, it will be replaced by the FCI prior to lifting.”
- h. Extension to Class 10:** On 20th April 2004, the Government of India was directed to file an affidavit within three months, “stating when it is possible to extend the scheme up to 10th Standard in compliance with the announcement made by the Prime Minister.”

It is easy to see that a considerable degree of judicial activism and the understanding of the Supreme Court of its role as a protector of the constitutionally guaranteed rights of the people of India were crucial to the efforts of the Campaign. Although such a quasi-legislative and policy-setting approach has sometimes been criticized by those who see the Court as overstepping its constitutional mandate, it appears to have been accepted in practice by other state institutions. To a large extent, it has by now become part of India's constitutional practice and the Courts increasingly exercising its role in this manner. The Campaign has contributed to the judicial and legal establishment adopting an even more pro-active approach than in previous years. A rather independent, activist and highly professional judicial system may be a feature more prevalent in the Common Law countries of South Asia than in other parts of the region. Nevertheless, the Indian example demonstrates that Courts can gradually expand their constitutional role if they are supported by a broad policy consensus among policymakers and civil society.

Fifth, a strength of the Campaign has been its ability to merge legal action with local action by mobilising communities around the issues of the right to food, both to ensure accountability at the grassroots as well as nationally to agitate for greater entitlements. This combination of mobilisation, combined with effective media advocacy, has been credited for the success of the Campaign in recent years. The Campaign draws its mobilisational strength from more than 1,500 organisations, including trade unions, NGOs and community based groups. In recent years, the campaign has become more inclusive with sex workers unions, trans-gender activists, people with disabilities and others joining the Steering Committee of the Campaign.

Finding solutions

Sixth, the Campaign has done well to propose ‘solutions’ and ‘alternatives’ – not merely criticize and find fault with existing schemes and programmes. For instance, it did not merely advocate an end to the system of ‘dry rations’ that school-children were entitled to before 2005. The Campaign made a strong case for introducing hot-cooked meals in schools. Over the years, the Campaign has pointed to design flaws, emphasized the role of different stakeholders, and made suggestions to improve the efficiency and effectiveness of service delivery. In doing so, it was able to move from the political (or advocacy) to administrative zones of decision-making. Very cogent arguments were made in the Court by gathering evidence from different countries as well as from within India (in a few states

that were already serving hot meals to school children). The Campaign has been actively involved with government in spelling out the rules that should govern the implementation of the mid-day meal programme.

Seventh, the Campaign has constantly encouraged public monitoring and evaluation. Several methods have been adopted including conduct of surveys, public hearings and social audits. Public hearings offer an opportunity for local administration to listen to and address grievances of individuals and the community. For example, Vikas Sahyog Kendra (a non-governmental organization), assisted by Gram Swaraj Abhiyan, organized a public hearing on August 2, 2011 to review a number of public policies including the mid-day meals in schools in Chhatarpur block of Palamu district in the state of Jharkhand. Other public policies included (i) the public distribution system, (ii) social security schemes, (iii) the Mahatma Gandhi National Rural Employment Guarantee Scheme (MNREGS), and (iv) the Integrated Child Development Scheme. Presiding over the hearings were the State Advisor to the Commissioner to the Supreme Court, the Deputy Commissioner of Palamu and the Deputy Development Commissioner.²³⁰ These public hearings and social audits offer a platform for individuals and the community to seek grievance redressal. They are also useful in providing real time feedback to the local administration and the community, as well as in finding solutions to problems with implementation. For instance, between January- April 2008, the M.V. Foundation²³¹ facilitated a social audit of the Mid-Day Meal Scheme in 111 schools in Adilabad and Kurnool districts of Andhra Pradesh. The Social Audit team prepared and presented a detailed report in a *gram sabha*²³² specially convened for the purpose – attended on average by about 80 – 150 people consisting of parents, gram panchayat members, the school headmaster, the cooking agency persons and others from the village. The community participated enthusiastically in the gram sabha and, in most villages, questioned the headmaster and cooking agency when any discrepancy was revealed. Many constructive decisions were also taken, such as immediately shifting the rice from the cook's house to the school, minimising the role of the ration shop dealer, arranging for water facility in the school, and contributing funds for the purchase of plates and glasses for the children. In some villages, even major decisions such as replacing the cooks with more conscientious workers were taken at the community meetings. Such meetings have greatly helped to increase the community's awareness regarding the official provisions of the mid-day meal scheme. This has made communities more vigilant and supportive of the social audit team's efforts to regularly monitor the implementation of the mid-day meal scheme.

230 http://www.righttofoodindia.org/data/campaign/August_2011_public_hearing_meeting_district_officials_palamu_2_august_2011.pdf

231 The MV Foundation is a voluntary organization working on issues of child labour and children's right to education.

232 A Gram Sabha consists of persons registered in the electoral rolls of the village or group of villages comprised within the area of the Panchayat.

Looking ahead

What lessons can be drawn from the example of the Right to Food campaign for the rest of South Asia?

First, the Indian experience underscores the importance of strong and effective public action for a human rights approach to gain currency within a democratic framework. The Indian example highlights the need for a constructive pre-legislative (and policy) process to create public awareness, utilize evidence, dispel misconceptions, generate options and stimulate public discussions. This points to the significance of forging partnerships with and beyond government to include multiple stakeholders who can design, refine and evolve a policy consensus. An equally important dimension is active and sustained engagement of communities with the design, implementation and monitoring of wellthought-out interventions. This has been India's experience with the introduction of other interventions as well such as the Right to Information Act and the Mahatma Gandhi National Employment Guarantee Scheme²³³.

Second, the Indian experience draws attention to some necessary conditions for ensuring desired outcomes of such public action. The first necessary condition is a conducive and supportive external political environment in the country. A political party and government in power who were both committed to ensuring food security contributed great support for the campaign. This facilitated an open and serious dialogue with the State. The second necessary condition is the presence of competent people to drive the Campaign. The Right to Food Campaign enjoyed high credibility both with government and the public. Individuals actively involved in promoting the Campaign included eminent social scientists, activists, experts, nutritionists, educationists and other professionals. This lent enormous credibility to the voice of the Campaign as much of the advocacy efforts were backed by rich evidence and rigorous analysis. An equally important systemic contributory factor has been the high rates of economic growth enjoyed by India in recent years. This has enabled the Government of India to channel the larger public revenues generated by the economic growth towards the mid-day meal scheme and other programmes.

Third, it is easy to build broad societal consensus around some rights but not all. It was easy in the school feeding programme because it was rather non-controversial and involved children. This may not be the case with mobilizing support for other causes and rights. For example, it has been difficult to mobilize public action in support of the enforcement of several laws that affect the lives of young girls. In India, this would include the Dowry Prohibition Act, 1961, the Protection of Women from Domestic Violence Act, 2005 and the Child Marriage Restraint Act, 2006. It would be even more difficult in the South Asian context to generate support for gay, lesbian, bisexual and transgender rights.

233 The MGNREG Act 2005 provides enhancement of livelihood security, giving atleast 100 days of guaranteed wage employment in every financial year to every household, whose adult members volunteer to do unskilled manual work. For further details, see the official website accessible at http://nrega.ap.gov.in/Nregs/Home_eng.jsp#

Fourth, effective public action requires efforts from by both State and non-State actors. The first responsibility of the State is to create a culture and policy environment in society where human rights are recognized, respected and promoted. Equally important is to inculcate a rights perspective in policy making. Instances of violation of human rights, especially when they are silent and invisible, should be addressed expeditiously. It is equally important for the State to introduce new and innovative ways of carrying out assessments by encouraging instruments such as public reports, independent social audits, and public hearings. The State must also promote greater transparency and openness as fundamental to ensuring accountability.

Fifth, public action in defense of rights requires ‘nudging’ the State. To do this, we require strong networks and campaigns that champion policies and legislation to guarantee rights for the poor and disadvantaged. Often, this is not an easy task. Campaigns, like the Right to Food campaign in India, have had to invest considerable resources in generating evidence in support of their arguments, disseminating the findings, generating public discussion and communicating widely with a broad audience. These efforts have been backed by strategic forms of protests which in turn attracted the media to raise and keep alive issues in the public agenda. With the invasion of new media, we are likely to see new forms of public action as well.

To conclude, the assurance of human rights can flourish in well-functioning democracies. For this to happen in South Asia, immediate priority should be given to a close examination of accountability and transparency systems governing public administration. In this context, it would be important for every country to institute a well designed pre-legislative process that permits meaningful engagement with stakeholders before a policy or law is enacted. By seeking greater participation from a diverse set of groups and communities (especially those without voice), the outcomes of public action can be transformative and sustained.

Affirmative Action as a Way and Means of Achieving Economic and Social Rights and the MDGs

Alison Graham

Summary

The role structural discrimination and marginalization play in creating and exacerbating poverty is widely accepted, including in the Millennium Declaration. However, the Millennium Development Goals (MDGs) remained silent on this issue. By using aggregate targets, structural discrimination and marginalization essentially mask inequalities and power imbalances. This chapter looks at how affirmative action (also known as special measures) such as preferential regimes in areas of employment, housing and education can be crucial in complementing development strategies to secure people's human rights and ensure progress towards achieving the MDGs benefits everyone, not just the privileged elites. Although widely used, affirmative action is still subject to misconceptions about its use and legal dimensions. This chapter clarifies the legal ramifications of affirmative action and details specifically what a rights-based approach to affirmative action entails and what conditions affirmative action measures must fulfil to comply with human rights standards and principles. The document concludes with suggestions for the role of the United Nations Development Programme (UNDP) in securing effective affirmative action programmes that address structural discrimination and marginalisation.

1. Background: Why affirmative action?

Imbalanced power relations are partly responsible for current levels of poverty in developing and developed countries.²³⁴ Structural and systematic discrimination as well as asymmetric power relations place certain groups including indigenous peoples, women, low caste communities, migrants and non-citizens at greater risk of living in poverty.²³⁵ These groups often have limited means of providing an adequate standard of living for themselves through denied access to education, land, or employment either directly or indirectly. Unable to participate in public life, the groups are often excluded and unable to influence policies and decisions directly affecting them. Once 'fallen' into poverty, the poor are exposed to systematic stigmatization and discrimination on the grounds of their poverty, perpetuating their situation.²³⁶ People living in poverty are for instance

234 See *Claiming the Millennium Development Goals; A human rights approach*, OHCHR, 2008 p. 4

235 This link between discrimination and poverty has been observed by many of the UN special procedures on human rights especially the Special Rapporteur on Human Rights and Extreme Poverty (formerly known as the Independent Expert) and the Independent Expert on minority issues.

236 See *Report of the independent expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona, on the draft guiding principles on extreme poverty and human rights*, A/HRC/15/41 6 August 2010, para 22.

more likely to live in geographically remote areas or urban areas with few transport links, creating difficulty for physically accessing jobs, markets, resources and essential services. The poor are also more likely to lack education, access to information about their rights and public policies, making it difficult for them to receive legal entitlements and realise their economic and social rights. This essentially creates a virtually inescapable vicious circle of poverty and marginalisation.

Women face particular challenges as well. In many societies, entrenched gender discrimination limits women's access to education, employment, land, and political representation. Discrimination often confines women to working in the informal economy for casual and insufficient wages. For many women their situation deteriorates by suffering other forms of discrimination based on ethnicity, race, religion, disability, age, class or caste and/or other factors. In the Asia Pacific region, gender 'inequality persists despite robust growth and progress, and cuts even deeper for poorer or otherwise excluded groups.'²³⁷ This results in women being more vulnerable to poverty with limited access to economic opportunities and extremely low levels of political representation in some parts of Asia.²³⁸ While rapid gains have been made in school enrolment and labour force participation, the Pacific region for instance has four of the six countries in the world with no women legislators.²³⁹ In South Asia, UNDP observes large gender gaps even in basic capabilities such as education, health nutrition and employment opportunities.²⁴⁰

Unless specific measures are taken to address structural and systematic discrimination, development planning and implementation cannot benefit all. Equal treatment will reinforce power asymmetries and marginalisation, and skew realisation of the MDGs with policies and programmes benefitting the elites. This is evident by the fact that ten years into the new millennium, inequality often remains despite substantial progress in achieving the MDGs in aggregate terms. In May 2010, the High Commissioner for Human Rights noted, *'even in countries scoring major successes, large disparities still persist with millions of people left behind in the race towards achieving the MDGs'*²⁴¹. Despite progress towards achieving the MDGs, in 2009 the UNDP Nepal Annual Report recognised the variation in human development to be much greater between caste and ethnic groups as opposed to regions and sub-regions with *Dalits* having a substantially lower life expectancy and per capita income in comparison to other caste groups.²⁴²

237 See *Power Voice and Rights: Asia Pacific Human Development Report*, UNDP 2010

238 *ibid.*

239 See *Power Voice and Rights: Asia Pacific Development Report*, UNDP 2010 p24

240 See *Power Voice and Rights: Asia Pacific Development Report*, UNDP 2010 p34

241 See speech of the High Commissioner for Human Rights Seminar on the Millennium Development Goals and human rights organised by the Government of the Netherlands on 28 May 2010

242 According to UNDP, Terai *Dalits* have the lowest life expectancy (61.3) and adult literacy (27.3) rates in all social groups. This contrasts sharply with the position of the higher caste (Brahmin, Chettri) of the Terai. They are ranked first with a life expectancy of 63.9 years, an adult literacy rate of 83.8% and an average of 6.4 years of schooling. The average per capita income of *Dalits* was NRs. 10,000.00, compared to national average of NRs. 15,000.00 and that of Brahmin Chhettri NRs. 18,400.00. Source: UNDP Nepal, Nepal Human Development Report 2009, *State Transformation and Human Development*

Where entrenched inequality exists between different groups, States must address structural issues to bring everyone up to a level playing field, otherwise inequality will continue. Governments can do this by using ‘affirmative action’ or ‘special measures’²⁴³. Affirmative action is generally regarded as temporary special measures allowing justifiable preferential treatment to correct past and present forms as well as impacts of discrimination. Affirmative action can reflect the full span of legislative, executive, administrative, budgetary and regulatory instruments, at every level in the State apparatus, as well as plans, policies, programmes and preferential regimes in areas such as employment, housing, education, culture, and participation in public life for disfavoured groups.²⁴⁴ Special measures can be: political such as quotas for political representation for women or certain underrepresented ethnic or religious groups; and/or socio economic such as quotas to remedy, for example, the disproportionate under-representation of certain marginalised groups in schools, employment and social housing, as well as targeted development interventions to certain types of applicants.²⁴⁵ Examples of such measures include grants to help certain communities living in poverty acquire land for settlement (South Africa), and quotas for various disadvantaged groups, under which members can enter institutions of higher education with lower examination grades (India). Grants and quotas can be mandatory or voluntary and be directed to public or private bodies.

Reflecting the particular challenges faced by women, there is a separate MDG on women representation and empowerment. A strategic priority listed by the Task Force on Education and Gender Equality is, ‘to increase women’s share of seats in national parliaments and local government bodies.’²⁴⁶ However, affirmative action for women must go beyond this if progress towards all MDGs is to benefit women across the board. UNDP administrator Helen Clark noted ‘where we see progress towards the MDGs lagging the most is often where the needs and status of women and girls are accorded low priority.’²⁴⁷ Without affirmative action, girls will still be denied basic human rights such as the right to education, health, work that allows them to have an adequate standard of living and a life in dignity. The Organisation Economic Co-operation and Development (OECD) similarly notes that ‘while there has been significant progress in some areas, on-going

243 Some of the treaty monitoring bodies such as the Committee on the Elimination of Racial Discrimination use the term ‘special measures’ while others such as the Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Discrimination against Women use the term ‘affirmative action’. Under no circumstances however should affirmative action be considered or called ‘positive discrimination’. As the CERD Committee states ‘the term ‘positive discrimination’ is, in the context of international human rights standards, a contradictio in terminis and should be avoided See CERD General Comment No. 32 *The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, August 2009, para 12

244 See *General Recommendation No. 32 The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, Committee on the Elimination of Racial Discrimination Seventy-fifth session, August 2009 para 13

245 See *Affirmative action: a global perspective*, Global Rights, 2005

246 See *Claiming the Millennium Development Goals; A human rights approach*, OHCHR, 2008 P26

247 See *Power Voice and Rights: Asia Pacific Development Report*, UNDP 2010, p. v

gender inequality continues to hamper momentum on all the goals not just MDG 3.²⁴⁸ The Committee on the Elimination of Discrimination against Women (CEDAW Committee) has frequently called on State parties to introduce a broad range of temporary special measures (affirmative action) in accordance with CEDAW's article 4, paragraph 1, including quotas, to improve the representation of women in politics, at all levels of decision-making, and in non-traditional fields of employment.²⁴⁹

Reflecting many different types of inequality and imbalances, such as caste based hierarchal systems, regional imbalances, patriarchal societies, mass immigration, and discrimination against indigenous communities, affirmative action in Asia has taken many different forms. For example, India has adopted a reservation system to address the impact of its caste system. The 'reservation system' reserves places for members of scheduled castes and tribes in public employment, education and political affairs. In 1980, for instance, the Backward Classes Commission recommended a total of 49.5% of federal government jobs be set aside for scheduled castes, scheduled tribes and other backward classes.²⁵⁰ In Malaysia, the imbalance between the Malay (the majority) indigenous people (*Bumiputra*)²⁵¹ and the Chinese and Indian immigrant communities gave rise to the Malaysian New Economic Policy (NEP). This is regarded as affirmative action towards the majority Malay population and requires companies for instance to set aside 30% of their corporate equity for ethnic Malays.²⁵² Similarly, 30% of Government construction contracts were required to come from Malay firms. Malaysian universities were also required to reserve 'a reasonable proportion of places' for ethnic Malay students and faculty members.²⁵³ In Sri Lanka, affirmative action was initially limited to university admissions only and targeted towards preferential treatment of the majority (Sinhalese) group of students. However, in the 1970s they were transformed to a regional quota system cutting across ethnic and religious identities.²⁵⁴

2. Human rights framework: Equality, non-discrimination and affirmative action

The legality of affirmative action under international human rights law stems from recognising substantive non-discrimination and equality as core human rights principles.

248 See *Gender Inequality and the MDGs: What are the Missing Dimensions?* Organisation for Economic Cooperation and Development, September 2010

249 See for instance Report of the Committee on the Elimination of Discrimination against Women Twentieth session (19 January-5 February 1999) Twenty-first session (7-25 June 1999), A/54/38/Rev.1

250 See *Affirmative action: a global perspective*, Global Rights, 2005 p. 22

251 Bumiputra status is also legally afforded to non-Muslim Malay indigenous groups, which make up a majority in the Sabah and Sarawak states located on Borneo.

252 See *Affirmative action: a global perspective*, Global Rights, 2005 p. 26

253 See *Affirmative action: a global perspective*, Global Rights, 2005 p. 26

254 See de Silva. K. M., *Affirmative Action Policies: The Sri Lankan Experience* in Ethnic Studies Report, Vol. XV, No. 2, July 1997. Available at: http://www.ices.lk/publications/esr/articles_jul97/Esr-kmdesilva.PDF

States are obligated not only to ensure equality and non-discrimination as a right but also as a reality. For example, as well as being allowed equal access to school, entrenched discrimination may prevent children from religious and ethnic minorities, or as in Nepal and India the lower castes, from being accepted by schools. In Nepal, for instance, NGOs have noted that *Dalits* often, once at school, suffer such discrimination and stigmatising behaviour that they are forced to drop out.²⁵⁵ In India UNICEF also noted other factors include the distance to schools. Often due to entrenched discriminatory practices, *Dalit* communities often live in remote areas, away from the main villages and schools.²⁵⁶ In these cases, the concept of substantive equality requires a temporary system of preferences to be implemented. Equal or uniform treatment amongst all caste groups would only perpetuate the structural imbalances.

States obligations to take affirmative action are recognized under a number of different human rights treaties. The Human Rights Committee, the body charged with monitoring the implementation of the International Covenant on Civil and Political Rights, recognises that, *“the principle of equality sometimes requires States’ parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population.”*²⁵⁷ The *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) requires ‘the adoption of special measures by States parties when the circumstances warrant, such as in the case of persistent disparities is an obligation stemming from Article 2, paragraph 2 of the ICERD²⁵⁸ and goes further and above the general positive obligation of States to secure human rights on a non-discriminatory basis to persons and groups subject to their jurisdiction. Its monitoring committee, the Committee on the Elimination of Racial Discrimination, (CERD Committee) clarified that special measures are not an exception to the principle of non-discrimination but are *‘integral to its meaning and essential to the Convention project of eliminating racial discrimination and advancing human dignity and effective equality.’*²⁵⁹

Affirmative action and economic, social and cultural rights: Through its work in applying and interpreting the *International Covenant on Economic, Social and Cultural Rights*, the Committee on Economic, Social and Cultural Rights (CESCR) has well established the need for affirmative action to realise substantive non-discrimination and equality²⁶⁰,

255 See *Dalits’ access to education International Dalit Solidarity Network* briefing paper: Available at http://idsn.org/fileadmin/user_folder/pdf/New_files/Key_Issues/Education/DALIT_EDUCATION_IDSnbriefingpaper.pdf

256 *Social exclusion of Scheduled Caste Children from Primary Education in India*, UNICEF, India, 2006.

257 See *General Comment No. 18: Non-discrimination*, Human Rights Committee 10 November 1989 .

258 See the Concluding Observations of the Committee on the Elimination of Racial Discrimination on USA, August 14 2001

259 See CERD General Comment No. 32 *The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, August 2009, para 34

260 This is evident in the CESCR’s General Comments and Concluding Observations on the behaviour of State parties and whether they are in compliance with the Covenant.

a fundamental principle in realising economic, social and cultural rights.²⁶¹ In its General Comment on the right to education, the CESCR stated, “the adoption of special measures intended to bring about *de facto* equality for men and women and for disadvantaged groups is not a violation of the non-discrimination [principle].”²⁶²

Beneficiaries of affirmative action: Under international human rights law, the groups of persons that can benefit from affirmative action goes beyond particular racial or ethnic groups to any clearly identifiable group that faces systematic discrimination on account of their common characteristics.²⁶³ While the CERD Committee designates ‘racial or ethnic groups or individuals requiring ... protection’ (Article 1, paragraph 4), and ‘racial groups or individuals belonging to them’ (Article 2, paragraph 2), as the beneficiaries of special measures’ it specifies that the measures shall in principle be available to any group or person covered by Article 1 of the Convention, which mandates the Convention to cover “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin.”²⁶⁴ In addition, other treaty bodies recognise the necessity and legality of special affirmative action towards other traditionally marginalised groups such as persons with disabilities²⁶⁵ and indigenous peoples.²⁶⁶ Under human rights law, the identification

261 See Article 2, ICESCR

262 See *General Comment No. 13, The right to education (Art.13)*, Committee on Economic, Social and Cultural Rights, 8 December 1999, para 32.:

263 This is recognised by Special Rapporteur who states ‘Affirmative action is always directed to a certain target group composed of individuals who all have a characteristic in common on which their membership in that group is based and who find themselves in a disadvantaged position. Although this characteristic is often innate and inalienable, such as gender, colour of skin, nationality or membership of an ethnic, religious or linguistic minority, it does not necessarily always have to be so. As such, past and present affirmative action programmes have been concerned with women, blacks, immigrants, poor people, disabled persons, veterans, indigenous peoples, other racial groups, specific minorities’ For further discussion on this please see *final report of the special rapporteur on the concept and practice of affirmative action*, Mr Marc Bossuyt, E/CN.4/sub.2/2002/21, 17 June 2002, para 8

264 See *International Convention on the Elimination of All Forms of Racial Discrimination* (1965), article 1.

265 General Comment 5 of the Committee on Economic, Social and Cultural Rights builds on this idea in the context of people with disabilities, noting that the Covenant: Requires Governments to do much more than merely abstain from taking measures which might have a negative impact on persons with disabilities. The obligation in the case of such a vulnerable and disadvantaged group is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities.

266 In a report on Guatemala’s compliance with the ICESCR, the CESCR recommends affirmative action measures to benefit indigenous communities. Specifically, the CESCR stated that: All legislative and other reforms should take into account the need to promote equality and reverse the devastating effects of discrimination against the indigenous populations, in particular through affirmative action. See E/C.12/1/Add., 28 May 1996, para 27. Similarly, the CESCR recently applauded Brazil’s establishment of “affirmative action programs for Afro-Brazilians, in particular women.” See E/C.12/1/Add.87.

of an individual as belonging to a group should be based on self-identification by the individual concerned, unless a justification exists to the contrary.²⁶⁷

Affirmative action and women: Article 4 of the *Convention on the Elimination of Discrimination Against Women* explicitly specifies that the 'adoption by States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the present Convention.' Its monitoring body, the Committee on the Elimination of Discrimination against Women (CEDAW), further recognises that the '*application of temporary special measures in accordance with the Convention is one of the means to realise *de facto* or substantive equality for women rather than an exception to the norms of non-discrimination and equality.*'²⁶⁸

3. Designing a rights-based approach to affirmative action

From a human rights perspective, the temporary system of justified preferences should not be confused with States' positive obligations to realise human rights for all such as establishing social protection programmes. However, in reality the two initiatives are often confused. CEDAW for instance expressed concern about Vietnam's apparent lack of clarity about the difference between temporary **special** measures that are aimed at accelerating *de facto* (or substantive) equality of women and general social policies that are adopted to implement the Convention.²⁶⁹ These are not temporary but are a permanent part of a State's artillery for ensuring compliance with human rights in a sustainable long term framework.

As essentially a system of justifiable preferences to advance the situation of a particular group, the use of affirmative action is governed by a number of core principles and limitations that ensure compliance with international human rights law. Affirmative action must be designed to overcome barriers facing particular disadvantaged groups in enjoying their rights and 'not lead to the maintenance of separate rights for different racial groups.'²⁷⁰ The length of time required for implementation may vary in light of the objectives as well as the means utilised to achieve the goals and gathering the results of

267 See CERD General Comment No. 32 *The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, August 2009, para 34

268 See CEDAW General Recommendation No. 25 on article 4, paragraph 1 of the *Convention on the Elimination of all forms of Discrimination Against Women*, on temporary special measures para 31

269 See Paragraph(s) 10 CEDAW/C/VNM/CO/6 (CEDAW, 2007)

270 'The notion of inadmissible 'separate rights' must be distinguished from rights accepted and recognised by the international community to secure the existence and identity of groups such as minorities, indigenous peoples and other categories of person whose rights are similarly accepted and recognised within the framework of universal human rights.' See CERD General Comment No. 32 *The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, August 2009, para 26

applying the goals. However, affirmative action initiatives are temporary and '*must not be continued after the objectives for which they have been taken have been achieved*'.²⁷¹

More specifically, to meet these broad requirements, when designing affirmative action programmes, policies and measures, States must ensure the programmes are: legal, legitimate, appropriate and proportionate; temporary; participatory; and a result of fair and transparent decision-making.

Legal:

Within the constitution or national legislation provisions, States must recognise substantive equality and allow for the adoption of temporary special measures as a means of realising *de facto* equality.²⁷² It must be clear that affirmative action measures are a means of correcting entrenched discrimination and do not provide a set of special rights for a particular group, as was the case of apartheid in South Africa. They must also be distinct from the general positive obligations of a State to fulfil human rights. For example, post-apartheid, the South African Constitution (1996) guarantees equality among persons, and explicitly permits affirmative action. According to Chapter 2, Section 9(2), "To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."²⁷³ The Canadian Constitution similarly guarantees equality among citizens and permits affirmative action by recognising that this non-discrimination and equality guarantee "does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."²⁷⁴

On several occasions, human rights monitoring bodies have criticised States for not having a provision allowing affirmative action to be taken in pursuit of substantive equality. In 2007, CEDAW, for instance, expressed concern that although Thailand's 1997 Constitution allows for preferential treatment of certain groups, 'no provision is contained in laws and regulations for temporary special measures aimed at accelerating the *de facto* equality of women.'²⁷⁵ CEDAW concluded that as a result 'no such measures are being adopted to increase women's participation in decision-making bodies on an equal basis with men, except in selection of commissioners for National Human Rights Commission and members of Village and Urban Fund Committee.'²⁷⁶ In 2007, CEDAW was similarly

271 See CERD General Comment No. 32 *The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, August 2009, para 27

272 See CEDAW General Recommendation No. 25 on article 4, paragraph 1 of the *Convention on the Elimination of all forms of Discrimination Against Women*, on temporary special measures, para 31

273 See *Affirmative action: a global perspective*, Global Rights, 2005 p 23

274 See *Affirmative action: a global perspective*, Global Rights, 2005 p 27

275 See Paragraph(s) 21 CEDAW/C/THA/CO/5 (CEDAW, 2006)

276 Ibid

concerned that in Maldives, temporary special measures were neither provided in law nor used by the State as a policy to accelerate the achievement of *de facto* equality between women and men in any area of CEDAW.²⁷⁷

In several countries, constitutions have gone beyond providing the legal framework for allowing affirmative action to suggesting or even specifying the recipients of such affirmative action and the nature of such actions. In Malaysia, for instance, the Constitution specifically references affirmative action may be needed towards the indigenous Malay population. Its Article 8(5) c makes it clear that the Constitution does not prohibit “any provision for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service.”²⁷⁸ Part XVI of the Indian Constitution details the affirmative action, or “reservation,” program for Scheduled Castes and Scheduled Tribes including the reservation of seats for Scheduled Castes and Scheduled Tribes in different political bodies such as the House of the People.²⁷⁹ The beneficiary groups of these provisions are listed in “schedules” (i.e. annexes) to the Constitution. In Fiji the Constitution provides general principles as well as the structure of its administration.²⁸⁰ For example, it established mechanisms for monitoring any affirmative action programme.²⁸¹ However, inserting such detailed provisions into the Constitution itself is not necessary. Often States have used Acts or Executive Orders to introduce affirmative action programmes. As Cottrell and Ghai note, in the USA, affirmative action was introduced by an Executive Order of the President whilst in Australia, the Public Service Act (1999) provides for the promotion of ethnic and gender diversity in the workplace.²⁸² In fact one can argue that specifying too many details in a constitution could lead to more problems adapting programmes and beneficiaries to contemporary problems and issues.

Legitimate, appropriate and proportionate:

Affirmative action measures must have the ‘**sole purpose**’ of ensuring equal enjoyment of human rights and fundamental freedoms and must be appropriate and proportionate to the situation requiring a remedy.

277 See Paragraph(s) 15 CEDAW/C/MDV/CO/3 (CEDAW, 2007)

278 The Constitution of Malaysia available at: <http://confinder.richmond.edu/admin/docs/malaysia.pdf>

279 See part XVI of the Constitution of India available at: http://en.wikisource.org/wiki/Constitution_of_India/Part_XVI

280 See Cottrell, J., and Ghai, Y., *Constitutionalising Affirmative Action in the Fiji Islands*, The International Journal of Human Rights, Volume 11, Numbers 1-2, March 2007 , pp. 227-257(31). The Constitution of the Fiji Islands is available at http://en.wikisource.org/wiki/Constitution_of_the_Fiji_Islands

281 See Chapter 5, Section 44 Social justice and affirmative action of the Constitution of the Fiji islands, available at http://en.wikisource.org/wiki/Constitution_of_the_Fiji_Islands

282 See Cottrell, J., and Ghai, Y., *Constitutionalising Affirmative Action in the Fiji*, The International Journal of Human Rights, Volume 11, Numbers 1-2, March 2007 , pp. 227-257(31)

Legitimacy: The reference to ‘sole purpose’ limits the scope of acceptable motivations for special measures within human rights law. While it is not necessary to prove ‘historic’ discrimination in order to validate a programme of special measures,²⁸³ there must be persistent or structural disparities and *de facto* inequalities resulting from the circumstances that continue to deny vulnerable groups and individuals the advantages essential for the full development of the human personality.

Appropriateness: The measures must be suitable to remedy the imbalances. States must consider and must be able to demonstrate how the measures promote the advancement, development and protection of groups and individuals concerned.²⁸⁴ They must be orientated towards correcting present disparities and preventing further imbalances from arising.²⁸⁵ This, however, has not always been clear when such measures have been applied and implemented at the country level and there is a risk that such measures serve client based political purposes aimed at securing the electoral support of a particular social group. Human rights monitoring bodies have frequently noted States’ lack of clarity on the purpose of imposed special measures.²⁸⁶

Proportionality: The action must be proportionate to the problem and the aim. For example, would it be proportionate if problems for certain groups accessing education were sought to be remedied by preferential treatment in employment and housing opportunities? Answering this question requires a comprehensive examination of exact factors impeding access to education. Human rights treaty monitoring bodies have reiterated affirmative action must be carefully designed and implemented on the basis of need.

Ensuring each of these key elements requires a realistic appraisal of the needs and concerns of individuals and communities. This has also been reiterated frequently by the CERD Committee, calling on Fiji to ‘engage in a data-gathering exercise to ensure that **special** measures are designed and implemented on the basis of need.’²⁸⁷ In turn, this requires an adequately resourced data collection system. For example, the Committee on the Rights of the Child called on Pakistan to ensure that that the ‘Child Protection Monitoring and Data Collection System is provided with adequate resources to systematically and comprehensively collect quantitative and qualitative data for the entire country, disaggregated by sex, age and rural and urban area ... with emphasis on those who require **affirmative social actions** due to disadvantages and disparities.’²⁸⁸

283 See CERD General Comment No. 32 *The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, August 2009, para 22

284 See CERD General Comment No. 32 *The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, August 2009, Part V

285 See CERD General Comment No. 32 *The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, August 2009, para 22

286 For instance when considering Vanuatu’s periodic report CEDAW was concerned about the State’s lack of clarity of purpose of such measures. See Paragraph(s) 20 CEDAW/C/VUT/CO/3 (CEDAW, 2007)

287 See Paragraph(s) 17 CERD/C/FJI/CO/17 (CERD, 2008)

288 See Paragraph(s) 21, CRC/C/PAK/CO/3-4 (CRC, 2009)

States need to gather relevant disaggregated (by amongst others sex, ethnicity, caste) data on the general situation in the country to identify patterns of inequality and reasons for such inequality.²⁸⁹ The data must identify who is currently benefiting from what and who is losing out. Is it just one group or multiple groups that need assistance? Are there more vulnerable sub-groups within a particular group? Is it all women in a society or just those belonging to particular ethnic, racial or religious groups? Another example is amongst the *Dalit* castes in Nepal. While often regarded as a homogenous group, the *Dalit* caste group has a number of sub groups that are particularly vulnerable and marginalised. One example is the *Badi* community who are traditionally perceived as being sex workers and discriminated against accordingly, both by other *Dalit* communities and sub castes, and other caste and ethnic groups. Only diligent and thorough analysis of sufficiently disaggregated data allows affirmative action measures to be appropriately targeted and effective.

States must use this information to design appropriate and proportionate programmes. Governments must consider what system is best fit to meet the goals of ensuring equality. Will it be a blanket system where groups selected will benefit from all programmes or will it be more selective and determined on a group-by-group and programme-by-programme basis? Does it need to be graduated with different groups benefitting to different degrees? How will States address the situation of sub-groups within the group, both in terms of those who are particularly vulnerable and those who represent the elite of the groups?²⁹⁰ Should there be specific affirmative action for the *Badi* caste within more general affirmative actions designed to meet the needs of the *Dalit* caste? Given the myriad of different factors and dynamics that generate inequality, designing appropriate and proportionate affirmative action programmes is not easy and these questions are essentially the tip of the iceberg. This underscores the importance of the process by which affirmative action is decided, implemented and reviewed.

Temporary:

Affirmative action programmes cannot be permanent. Any affirmative actions must be terminated when equality between the beneficiary groups and others has been sustainably achieved. The question of timing is crucial if substantive equality is to be achieved. If the programmes are withdrawn too late, they risk resulting in separate and special rights for particular groups of people, and could lead to tensions between different communities. If they are withdrawn too quickly, they are exacerbating the vulnerability of particular groups of people which could lead to tensions between different communities. States have applied the temporary requirement in different ways. The Indian Constitution of 1949, for instance, specifies that 'the reservation of seats for the Scheduled Castes and the Scheduled Tribes in the House of the People and in the Legislative Assemblies of

289 See CERD General Comment No. 32 *The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, August 2009, Part V

290 For a discussion on this, please see Galanter, M. *The Structure and Operation of an Affirmative Action Programme: an Outline of Choices and Problems*, Conference on Affirmative Action

the States' shall cease to have effect on the expiration of a period of fifty years from the commencement of this Constitution.²⁹¹ However, even when such timelines or deadlines exist they cannot be absolute and must be accompanied by adequate monitoring using disaggregated data to see whether equality has yet been sustainably achieved. It may be the case, for instance, that affirmative action programmes should be concluded earlier or in fact extended.

The human rights community has observed the notion of 'adequate advancement' as contained in Article 1, paragraph 4 of the *Convention on the Elimination of Racial Discrimination* (CERD) requires programmes to be goal-directed.²⁹² States should therefore establish goals and timetables and the means to regularly monitor, evaluate and assess the impact or progress of reaching the desired goals. This has been reiterated frequently by human rights monitoring bodies. For example, the CERD Committee asks States to include information on available mechanisms for monitoring and evaluation within periodic reports.²⁹³ The Committee has also frequently requested States to establish goals and timetables to regularly evaluate the impact of such measures to ensure they lead to desired goals and not to the maintenance of unequal or separate rights for different ethnic groups after the objectives for which they were taken have been achieved.²⁹⁴ In 2002, the Committee called on Fiji to introduce an effective monitoring mechanism to ensure programmes conform to fundamental rights guaranteed by the Constitution and CEDAW's concept of temporary **special** measures.²⁹⁵

In practice, States have employed different monitoring mechanisms. In Fiji, for instance, Section 44 of the Constitution requires 'the administering department or other agency must monitor the efficacy of a program established under this section by reference to the specified performance indicators' and that 'the Minister must make an annual report to Parliament on the results revealed by the monitoring.'²⁹⁶ Cottrel and Ghai however

291 See Part XV of the Constitution of India, available at http://en.wikisource.org/wiki/Constitution_of_India/Part_XVI

292 See General Recommendation No. 32 of the Committee on the Elimination of Racial Discrimination *The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, August 2009

293 See General Recommendation No. 32 of the Committee on the Elimination of Racial Discrimination *The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, August 2009, Part V

294 CEDAW for instance called on the Philippines to establish concrete goals and timetables and take sustained measures, including temporary **special** measures, in accordance with art. 4, paragraph 1 CEDAW and CEDAW's general recommendation 25 on temporary **special** measures, and monitor impact of measures taken, track trends over time, take necessary corrective measures and provide in next report detailed information about results achieved See Paragraph(s) 24 CEDAW/C/PHI/CO/6 (CEDAW, 2006). See also the Concluding Observations on Samoa in Paragraph(s) 53 A/60/38(SUPP) (CEDAW, 2005) and CEDAW's concluding observations on Fiji in Paragraph(s) 17 CERD/C/FJI/CO/17 (CERD, 2008)

295 See Paragraph(s) 49 A/57/38(SUPP) (CEDAW, 2002)

296 See Chapter 5, Section 44 Social justice and affirmative action of the Constitution of the Fiji Islands, available at http://en.wikisource.org/wiki/Constitution_of_the_Fiji_Islands

suggest further monitoring by the national human rights commission is needed given that 'affirmative action may involve acts which would otherwise be unconstitutional as violating the Bill of Rights'.²⁹⁷ They give the example of Canada where the Human Rights Commission is charged with auditing employment equity (in both public and private).²⁹⁸

Participatory:

States' parties should ensure special measures are designed and implemented on the basis of prior consultation with affected communities. The importance of including meaningful participatory mechanisms in the design, implementation and monitoring of affirmative action programmes has been frequently emphasised by human rights treaty monitoring bodies. In 2003, the CERD Committee called on Fiji to precede any adoption of affirmative action programmes with consultations involving all ethnic communities.²⁹⁹

Participation forms a key part of the right to take part in public affairs. Targeted groups may already be excluded from political processes and in the development and implementation of legislation and policies affecting their lives. Not engaging in effective dialogue/communication would add to further marginalisation and exclusion. Effective participation in design, implementation and monitoring is vital for ensuring the relevance and effectiveness of affirmative actions and to prevent tensions from competing groups.

Participation must be meaningful. It must be factored into the design process early with appropriate mechanisms that take into account problems and possible barriers to participation such as languages, geographic and/or social remoteness, exclusion, and power dynamics both within particular communities (for instance power imbalances between male and female members), and between different concerned groups.

Fair and transparent decision making:

The idea of preferential treatment for certain groups of society can ignite new or reinforce existing tensions. Therefore, States must ensure a fair and transparent process. Information and reasoning behind decisions for implementing affirmative action programmes must be clearly communicated and accessible to affected groups.

297 See Cottrell, J., and Ghai, Y., *Constitutionalising Affirmative Action in the Fiji*, The International Journal of Human Rights, Volume 11, Numbers 1-2, March 2007 , pp. 227-257(31)

298 Ibid.

299 See Paragraph(s) 16 CERD/C/62/CO/3 (CERD, 2003)

4. Ensuring effective implementation of affirmative action programmes: The importance of public awareness

States must ensure effective implementation of any affirmative action legislation, programme and policy is in conformity with human rights law. While the programme itself may vary in being voluntary or mandatory, targeted towards private or public bodies, successful implementation to a large degree depends on public support. Affirmative action measures are often not very popular amongst the general public, and they can be viewed as unfairly favouring one group of people over another. In many situations, affirmative action may not be enough to overcome significant negative stereotyping resulting in implementation problems.

The importance of raising public awareness as part of State obligations has been raised several times by human rights monitoring bodies concerned about the implementation of affirmative action measures in particular countries.³⁰⁰ For example, CEDAW has called on Laos to familiarize all relevant officials with the concept of temporary **special** measures (affirmative action) described in article 4, paragraph 1, of CEDAW and as interpreted in the Committee's General Comment.³⁰¹ CEDAW similarly called on Maldives to pursue its efforts to introduce temporary special measures (affirmative action) in developing awareness-raising programmes and training for parliamentarians on provisions of CEDAW; such training should also clarify, in particular, the purpose of temporary **special** measures (affirmative action).³⁰²

While human rights mechanisms essentially devolve States to decide how to raise public awareness, governments must tailor public awareness campaigns to target different populations. This includes access to media, uneven levels of education, resources of targeted populations, possible linguistic barriers and geographic remoteness.

300 CEDAW for instance called on Bhutan to raise public awareness about the importance of temporary **special** measures in accelerating the process of gender equality See Paragraph(s) 16 CEDAW/C/BTN/CO/7 (CEDAW, 2009).

301 See Paragraph(s) 16 CEDAW/C/LAO/CO/7 (CEDAW, 2009)

302 See Paragraph(s) 21 CEDAW/C/BHR/CO/2 (CEDAW, 2008)

The case of Indonesia³⁰³

According to the Asia Pacific Human Development report women's representation in the Indonesian Parliament 'has been up and down'. The Report observed that despite affirmative action measures for some years, 'the proportion of women in Indonesia's parliament was dismal' hovering around 10 per cent for a number of years. Between 1999 and 2004 the percentage of women in the lower house was 9%, increasing by approximately 25% to 11.3% from 2004 to 2009. However, from 2009 to present the number of female members of the Lower House (DPR) increased by 63% to 18% and in the newly constituted upper house (the House of Regions or DPD) where only individuals may be candidates the number of female members increased by 77 to 27.3% members.

While women representation is still below what it should be, recent increases represent an important development, which UNDP attributes to public awareness rather than quotas. With democratization beginning in 1998, the movement for women's representation picked up momentum and visibility and the Election Law passed in 2004 required all political parties to apply a 30 per cent quota for women to their candidate list. However, while considered 'an historic achievement', this provision 'lacked teeth', and UNDP noted that only a few parties adhered to it. The new election law passed in 2008 combined a 30 per cent quota for party lists with a 'zipper' system whereby for every three candidates fielded by political parties, at least one had to be a woman. However, in late 2008 this quota was effectively dismantled by the Constitutional Court in a ruling that required the election to be decided wholly by the popular vote.

Amidst this setback, however, the affirmative action debate generated greater interest in the issue of women's representation, and galvanized the efforts of different stakeholders. Civil society organizations launched activities to spread awareness of the importance of having a gender-balanced parliament. These efforts were backed by a number of political parties and some government agencies, such as the State Ministry on Women's Empowerment, the Ministry of Home Affairs, and the General Election Commission. UNDP and bilateral donors also actively supported efforts of Indonesian stakeholders through civil society voters' education initiatives, media campaigns, and public consultations among political parties, academics and civil society. The results even took activists by surprise. Many more parties took the 30 per cent quota seriously, even in the absence of legislation. As many as 70 per cent of the 38 parties competing in the 2009 election nominated women for more than 30 per cent of their candidates.

The Indonesian experience proves that often quotas are not enough. They must also be accompanied by a focus on increasing real public support for women's representation, which even after the quotas were effectively dismantled ensured effective female political representation.

5. UNDP and Affirmative Action

The following sections examine concrete actions and possible entry points for UNDP to undertake affirmative action initiatives. They are by no means an exhaustive list but are instead designed to provoke further discussion within UNDP about regarding how it can address some of the imbalances and marginalisation preventing persons from enjoying progress made towards achievement of the MDGs.

Where are its entry points?

UNDP's strategic plan acknowledges 'poverty reduction is at the centre of United Nations work in development'³⁰⁴ and commits UNDP to supporting countries in 'accelerating inclusive growth to ensure equitable, broad based human development.'³⁰⁵ In working towards this, UNDP cannot ignore the well-established links between discrimination and poverty if progress towards MDGs is to be inclusive and benefit all.

UNDP is strongly committed to adopting a human rights based approach to development. In January 1998, UNDP issued a policy statement on integrating human rights with sustainable human development. Since then, UNDP has explicitly recognised that 'human development and human rights are interrelated, inter-dependent and indivisible' and 'human rights norms provide a framework for equality and non-discrimination that, when objectively applied, ensures the benefits of human development reach even the most disadvantaged people.'³⁰⁶ UNDP has also committed itself to promoting and strengthening the UN human rights machinery at both the global and country levels.³⁰⁷

Affirmative action is not justified but instead, required by international human rights law with both the ICESCR and the ICCPR specifying affirmative action or special measures are needed to establish substantive or *de facto* equality.

6. What can UNDP do?

Advocacy: UNDP can use States' commitments under human rights law and various UN human rights mechanisms to engage with governments about the possibility of implementing affirmative action. UNDP can also work towards translating various human

303 For further details see *Asia-Pacific Human Development Report Power, Voice and Rights A Turning Point for Gender Equality in Asia and the Pacific* UNDP 2010, page 93.

304 See *UNDP Strategic Plan, 2008-2011: Accelerating global progress on human development*, DP/2007/43, para 66

305 See *UNDP Strategic Plan, 2008-2011: Accelerating global progress on human development*, DP/2007/43, para 66

306 See *Human Rights in UNDP: Practice note*, UNDP April 2005 p 6

307 See *Human Rights in UNDP: Practice note*, UNDP April 2005 p 17

rights recommendations of UN human rights mechanisms into local languages and disseminate them through its unique and extensive partnerships.

Human rights treaties recognise the importance of affirmative action (special measures) in achieving substantive equality. Many monitoring bodies such as the CERD Committee, the CEDAW Committee and the CESCRC Committee have called on countries in the Asia Pacific region to take affirmative action. Examples of recommendations include the CESCRC recommending India to continue making use of **affirmative action** measures to promote active political participation of women.³⁰⁸ CEDAW similarly called on Sri Lanka to 'take all necessary measures to increase representation of women in politics and public life at local, provincial and national levels, including through implementation of temporary **special** measures (affirmative action), in accordance with art. 4, paragraph 1 CEDAW.³⁰⁹

Both the Universal Periodic Review (UPR) mechanism and the special procedures are important sources for development practitioners to use when addressing structural imbalances causing poverty. Many of the special procedures have called on States to undertake affirmative action programmes. The Special Rapporteur on freedom of the region and/or belief similarly called on Laos to address the limited access of religious minorities to higher education, by 'extending **affirmative action** schemes, which already exist in education policy for members of ethnic minorities, to religious minorities.'³¹⁰ During the Universal Periodic review of Bangladesh, Brazil similarly recognized the importance of affirmative actions to guarantee access of ethnic minorities to higher education and to government recruitment.³¹¹

Using the recommendations not only helps address inequality in concerned States, it also helps strengthen and promote UN human rights machinery at both the global and country levels, which UNDP has explicitly committed to doing.³¹²

Diagnosing the problem:

UNDP could play a significant role in helping governments collect and analyse disaggregated data to capture the dynamics of development and poverty. This information can help diagnose the problem and determine a solution by identifying who benefits from what and the reasons behind who is being left behind. This information is crucial if the Government wishes to design legitimate, appropriate and proportionate affirmative action programmes.

308 See Paragraph(s) 57 E/C.12/IND/CO/5 (CESCRC, 2008)

309 See Paragraph(s) 279 A/57/38(SUPP) (CEDAW, 2002)

310 See Paragraph(s) 69, Report of the Special Rapporteur on Freedom of Region and Belief, A/HRC/13/40/Add.4 2010)

311 See A/HRC/11/18, 5 October 2009

312 See *Human Rights in UNDP: Practice note*, UNDP April 2005 p 17

Create effective participatory measures in the design and monitoring of programmes:

UNDP could take advantage of its significant experience in promoting the participation of different groups of people in different systems to help States develop effective participatory measures for affected persons in the design, monitoring and evaluation of affirmative programmes including the initial vulnerability assessment.³¹³

Promoting implementation of programmes through training and awareness-raising:

The proven strength and experience of UNDP in human rights training could be applied to specific training on the importance and implementation of affirmative action. In Timor-Leste, from April to June 2009, UNDP in partnership with the UN Office of the High Commissioner for Human Rights undertook a “Human Rights Capacity Building of the Provedoria for Human Rights and Justice” (PDHJ) to strengthen the human rights capacity of the PDHJ and to ensure its effectiveness in developing and implementing human rights programmes. Amongst its outputs was to strengthen the human rights knowledge and skills of staff.³¹⁴ Similar programmes could be built and developed for officials responsible for implementing affirmative action projects in partnership with relevant organisations. Moreover, UNDP’s networks and partners provide a considerable advantage in helping raise awareness about the value of proposed and existing affirmative action programmes.

313 See for instance <http://hrba.undp.sk/index.php/assessment-analysis-and-planning/participatory-mechanisms>

314 See Project Update: Human Rights Capacity Building of the Provedoria for Human Rights and Justice, UNDP, July 2009. Available at [http://www.tl.undp.org/undp/what%20we%20do/Democratic%20Governance/Provedor%20Project/Provedoria%20project%20doc%20\(updated\).pdf](http://www.tl.undp.org/undp/what%20we%20do/Democratic%20Governance/Provedor%20Project/Provedoria%20project%20doc%20(updated).pdf)

National Human Rights Institutions

Allison Corkery

Introduction

With the 2015 deadline for the Millennium Development Goals (MDGs) rapidly approaching, the likely picture across the Asia Pacific region looks mixed, 'with some disappointing failures, some narrow misses, and some striking successes'.³¹⁵ As the economically fastest growing region in the world, significant progress has been made on poverty reduction, although its size means the region is still home to a significant majority of the developing world's deprived people.³¹⁶ In addition, the region is still lagging on other goals and challenges created by disparities of wealth,³¹⁷ endemic corruption, gender discrimination, natural disasters, religious conflict and resurgent nationalism all underscoring the need to strengthen the MDGs by pursuing them through a human rights framework.

The potential synergies between the MDGs and human rights are widely recognised by civil society, UN agencies and even governments, who affirmed that 'respect for and promotion and protection of human rights is an integral part of effective work towards achieving the MDGs' at the MDG Summit held in New York in September 2010.³¹⁸ However, translating this recognition into changes in the practice of development actors has presented challenges. Actors in the human rights field have generally advocated for a 'human rights based approach' to the MDGs,³¹⁹ which, broadly speaking, focuses on four key areas: (1) targeting marginalised and excluded groups; (2) facilitating community participation in decision-making; (3) prioritising human rights in policy choices and resource allocation; and (4) ensuring accountability and remedies for human rights violations.

National human rights institutions (NHRIs) are frequently cited as a key element in a human rights based approach to the MDGs.³²⁰ However, the rationale for this claim is

315 * The author would like to thank Pip Dargan, Chris Sidoti and Victoria Wisniewski Otero for their invaluable feedback in reviewing this chapter. ESCAP, ADB & UNDP, *Paths to 2015: MDG Priorities in Asia and the Pacific*, 2011, p.3.

316 Ibid., at p.8.

317 For most countries in region the Gini coefficient, the standard measure of inequality, is not only high but has been increasing. Ibid., at p.10.

318 UNGA, 'Keeping the promise: united to achieve the Millennium Development Goals', Draft Resolution referred to the High-level Plenary Meeting of the General Assembly at its sixty-fourth session, 17 September 2010, UN Doc. A/65/L.1, at para.53.

319 See e.g., UNDP, *Human Rights and the Millennium Development Goals: making the link*, 2007; OHCHR, *Claiming the Millennium Development Goals: a human rights approach*, 2008; Amnesty International, *From Promises to Delivery: putting human rights at the heart of the Millennium Development Goals*, 2010.

320 See e.g., Alston, P, 'A Human Rights Perspective on the Millennium Development Goals', Paper for the Millennium Project Task Force on Poverty and Economic Development, 2005. See also, UNDP, above at p.27; OHCHR, above at p.15; Amnesty International, above at p.12.

rarely explained and there has been little attention given to comparative strengths and weaknesses that NHRIs might have as actors engaged in promoting a human rights based approach to the MDGs. This chapter seeks to fill this gap. To begin, it looks at the evolution of NHRIs in the Asia Pacific region. The document also examines how NHRIs in the region have exercised mandated functions on economic, social and cultural rights in ways contributing to one of the four aspects of a human rights based approach outlined above; concluding the potential added value NHRIs bring to the MDGs is the series of 'bridging' roles they play helping to strengthen mutually reinforcing aspects of the MDGs and human rights. Nevertheless, expectations on NHRIs must be realistic therefore the final section identifies challenges facing NHRIs in addressing economic, social and cultural rights, before suggesting ways UNDP can support NHRIs.

Setting the Scene: National human rights institutions in the Asia Pacific

National human rights institutions (NHRIs) are broadly defined as quasi-governmental, administrative institutions (neither judicial nor law-making) with an 'on-going, advisory authority in respect of human rights'.³²¹ In the Asia Pacific, NHRIs remain a relatively new phenomena; a trend that began in the early 1990s. At the start of that decade, only Australia, New Zealand and the Philippines established NHRIs. By the end, Fiji, India, Indonesia, Palestine and Sri Lanka had joined them. Over the next five years, the number of NHRIs in the region grew substantially, with institutions established in Malaysia, Mongolia, Nepal, South Korea, Thailand, Jordan, Afghanistan, Qatar, the Maldives and Timor-Leste. More recently, the commission in Bangladesh commenced its work after a lengthy formation process and a commission was established in Myanmar, though it is still in the early stages of development and does not currently meet the internationally recognised criteria for NHRIs. Japan, Palau, Papua New Guinea, Samoa, Taiwan and Vanuatu are exploring steps to establish institutions and there is support for considering such an institution among various actors in China.

The growth of NHRIs in the Asia Pacific—a region whose size, diversity and political dynamics have hampered efforts to set up pan-regional human rights infrastructure—suggests that, in contrast to other regions, national leaders have preferred to respond to human rights concerns by 'alter[ing] domestic political structures'.³²² However, the

321 Parlevliet, M, 'National Human Rights Institutions and Peace Agreements: establishing national institutions in divided societies', International Council on Human Rights Policy Working Paper, 2006, at p.2. Available at: <http://www.ichrp.org/en/projects/128>.

322 Cardenas, S, 'National Human Rights Commissions in Asia', in *Sovereignty under Challenge: How Governments Respond*, Montgomery J. D. & Glazer, N. eds., 2002, at p.30. See also, Muntarbhorn, V, 'In Search of a Rights Track: evolving a regional framework for the promotion and protection of human rights in the Asia Pacific region', OHCHR Discussion Paper, 2005. It should also be noted that sub-regional human rights mechanisms represent another potential trend in the region. In 2009, for example, the Association of South East Asian Nations (ASEAN) established an Intergovernmental Commission on Human Rights.

motivations for and contexts in which NHRIs in the region have been established vary significantly. To begin with, a broad correlation can be seen between democratisation and the establishment of NHRIs. The establishment of a human rights commission was a major outcome of democratic reform in the Philippines and Thailand; with both commissions strongly entrenched in new constitutions.³²³ In other cases such as Indonesia, Malaysia and Maldives, the establishment of an NHRI preceded later democratic reform; indicating NHRIs can operate relatively effectively under authoritarian or semi-authoritarian systems.³²⁴ Finally, reflecting the trend internationally, countries transitioning from conflict have also established NHRIs in an effort to prevent a return to the atrocities of the past, leading some commentators to describe NHRIs as the 'hallmark of democratic legitimacy' for countries transitioning from conflict.³²⁵ The peace agreement in Afghanistan provided for the establishment of a national human rights institution,³²⁶ as did the mandate of the United Nations Transitional Administration in East Timor (UNTAET).³²⁷

Despite the vastly different political and social contexts where NHRIs in the region have been established, there is notable uniformity in their form. This may be explained by well documented influence the international community has had in promoting the establishment of NHRIs.³²⁸ In the Asia Pacific, governments adopted a regional framework for technical cooperation on human rights in 1998. Known as the Tehran Framework, it was built on four 'pillars', namely to develop: national human rights institutions; national human rights action plans; human rights education; and the realisation of economic, social and cultural rights and the right to development.³²⁹ Of the four pillars, the establishment of NHRIs in the region has been considered the greatest success.³³⁰

More significantly, perhaps, NHRIs in the region have themselves mobilised to form a robust transnational network. Established in 1996, the Asia Pacific Forum of National Human Rights Institutions (APF) is a membership organisation of NHRIs. It 'provides a framework for national human rights institutions to work together and cooperate on a

323 Eldridge, P, 'Emerging Roles of National Human Rights Institutions in Southeast Asia', *Pacific Review*, Vol.14 2002, at p.209.

324 For example, following its establishment, KOMNAS-HAM issued a 'flow of critical commentary' on military and police actions, including a 'hard-hitting' report on extensive killings in East Timor prior to Indonesia's surrender of the territory. Eldridge, above at pp.209, 218.

325 Mertus, J, *Human Rights Matters: local politics and national human rights institutions*, 2009, p.4.

326 *Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions*, at para.12. Viewed 4 November 2011 at: http://www.usip.org/files/file/resources/collections/peace_agreements/pa_afghan_12052001.pdf.

327 UNSC, *Security Council Resolution 1272 on the situation in East Timor*, UN Doc. S/RES/1272, 1999, para.8.

328 See e.g., Cardenas, C, 'Emerging Global Actors: the United Nations and National Human Rights Institutions', *Global Governance*, Vol.9, 2003; Pegram, T, Diffusion Across Political Systems: the global spread of national human rights institutions, *Human Rights Quarterly*, Vol.32, 2010.

329 Muntarbhorn, above note 8, at p.8.

330 Ibid.

regional basis through a wide range of services, including training, capacity building and staff-exchanges'.³³¹ It currently has 15 full members and three associate members.

Membership to the APF is based on an institution's compliance with the Paris Principles, international standards requiring an institution to be established by constitution or legislation; that it be independent and enjoy functional and structural autonomy; that its membership reflect the principle of pluralism; that it have a broad mandate to protect and promote human rights; that it receive adequate funding; that it be accessible; and that it interact with national civil society organisations, as well as regional and international bodies.³³² Through activities such as facilitating technical assistance, advising on compliance with the Paris Principles and promoting education and training opportunities, the APF contributes to establishing 'acceptable standards and patterns of behaviour... helping socialise states into the NHRI fold'.³³³ The desirability of having an institution that enjoys international legitimacy has a 'flow on' effect, which can help gain 'traction' for encouraging states to amend existing or proposed legislative provisions, organisational structures and operational areas to strengthen their compliance with the Paris Principles.³³⁴

The Paris Principles also set out a number of functions that NHRIs are expected to play. These can broadly be divided into six categories: research and advice; education and promotion; monitoring; investigating; conciliating and providing remedies; cooperating with other national and international organisations; and interacting with the judiciary.³³⁵ In the words of the Paris Principles, these functions either 'promote' or 'protect' human rights. Sonia Cardenas' classification of these functions provides further insight regarding how these functions make NHRIs unique institutions.

Promotional functions, which Cardenas describes as 'constitutive', aim to influence behaviour or 'transform the identity' of the state or social actors by diffusing international human rights norms at the national level.³³⁶ Such functions are generally targeted at either: (1) empowering the population, particularly those who are marginalised or vulnerable, to know their rights and how to claim their rights; or (2) increasing duty bearers' awareness

331 APF Website, 'About the APF'. Viewed 16 November 2011 at: <http://www.asiapacificforum.net/about>.

332 The Principles Related to the Status of National Institutions for the Promotion and Protection of Human Rights were adopted by the First International Workshop on National Human Rights Institutions, convened in Paris in 1991 under the auspices of the U.N. They were subsequently adopted by the U.N. General Assembly in 1993. National Institutions for the Promotion and Protection of Human Rights, G.A. Res. 48/134, Annex, U.N. Doc. A/RES/48/134 (Dec. 20, 1993).

333 Mertus, above note 11, at p.129.

334 Muntarbhorn, above note 8, at p.14.

335 Burdekin, B, 'National Human Rights Institutions in the Asia-Pacific Region', Raoul Wallenberg Institute of Human Rights and Humanitarian Law Manual, at p.17.

336 Cardenas, *Emerging Global Actors*, above note 14, at p.27.

of their obligations and their ability to respect, protect and fulfil human rights in their activities.³³⁷

Protection functions, which she describes as 'regulative', are focused on 'eliciting conformance' with international norms and rules. They relate to government, to the judiciary, or are undertaken by the institution independently. Though of course varying from institution to institution, government-related activities can include institutions advising on human rights issues; encouraging treaty ratification and assisting the state in its reporting obligations; contributing to the development of national action plans for human rights; and reviewing existing or proposed legislative or administrative provisions. In relation to the judiciary, NHRIs can assist victims to seek legal redress; refer cases to competent tribunals; or participate in legal proceedings as *amicus curiae*. Functions undertaken independently can include reporting on the national human rights situation or on specific human rights issues; conducting national inquiries; and submitting parallel reports to international human rights mechanisms.³³⁸

National institutions and economic, social and cultural rights: An emerging focus in the Asia Pacific?

Writing in 2003, Balakrishnan Rajagopal considered the question: do NHRIs strengthen convergence between human rights and development? He concluded 'available evidence suggests extant models of national institutions narrowly focus on promoting a limited set of civil and political rights to the comparative neglect of economic, social and cultural rights'.³³⁹ Even OHCHR has described the work of NHRIs in relation to economic, social and cultural rights as 'uneven and sporadic'.³⁴⁰ Given most institutions in the region were established in a context where civil and political rights had been suppressed, sometimes violently, a bias towards these rights might not be so surprising.

Nevertheless, economic, social and cultural rights have long been on the agenda of the APF. This has provided a regional platform through which NHRIs have increasingly committed to strengthening their capacity and increasing their action and effectiveness in this area. For example, within the context of the Tehran Regional Framework, workshops on economic, social and cultural rights were held in Manila in 2000 and in Hong Kong in 2001. These workshops sought to promote a better understanding of how to interpret

337 Corkery, A & Wilson, D, 'National Human Rights Institutions and Economic, Social and Cultural Rights', in *Contemporary Issues in the Realization of Economic, Social and Cultural Rights* (forthcoming).

338 Cardenas, *Emerging Global Actors*, above note 14, at pp.25-26.

339 Rajagopal, B, *International Law from Below: Development, Social Movements and Third World Resistance*, 2003, at p.225.

340 OHCHR, 'Economic, Social and Cultural Rights: a Handbook for National Human Rights Institutions', Professional Training Series No. 12, 2005, at p.viii.

economic, social and cultural rights standards in the Asia Pacific region and to identify practical strategies for NHRIs to address economic and social rights.³⁴¹

In 2005, participants at an international roundtable on national institutions implementing economic, social and cultural rights held in New Delhi agreed to more specific actions to address economic and social rights such as establishing units or focal points; developing new and innovative strategies, including gathering information through community dialogue; developing particular strategies to address the rights of vulnerable groups; assessing the enforceability of economic and social rights, including through judicial procedures; and encouraging the development of national plans that implement economic and social rights.³⁴² Importantly, participants recognised the link between economic, social and cultural rights and the MDGs, advising NHRIs to:

*Ensure the Millennium Development Goals process is consistent with State obligations under international human rights instruments and that implementation is undertaken from a rights-based perspective.*³⁴³

A focus on economic, social and cultural rights has been observed at the sub-regional level. In South East Asia, the NHRIs of Indonesia, Malaysia, the Philippines, Thailand and Timor-Leste have established a formal cooperation framework including a joint project to promote participatory processes focusing on economic and social rights.³⁴⁴

In parallel, the right to development has been an emerging area of focus for NHRIs in the region. Coinciding with the 25th anniversary of the Declaration on the Right to Development, it was a thematic area addressed at the most recent Annual Meeting of the APF. The meeting's concluding statement noted:

*[T]he right to development can guide NHRIs responses to contemporary challenges. NHRIs have a unique role to play in promoting and implementing the right to development while carrying out their respective mandates.*³⁴⁵

341 E.g. making use of existing mechanisms; monitoring both violations and progressive realisation; reviewing laws, policies, judicial decisions and national action plans; looking at the State's willingness versus its ability; and determining and comparing the current status of rights enjoyment with standards, benchmarks and indicators. APF Website, 'Economic, Social and Cultural Rights'. Viewed 16 November 2011 at: <http://www.asiapacificforum.net/services/training/regional-workshops/economic-social-cultural-rights> and HURIGHTS Website, 'Regional Workshop on Promoting and Protecting Economic, Social and Cultural Rights'. Viewed 16 November 2011 at: <http://www.hurights.or.jp/archives/focus/section2/2000/12/regional-workshop-on-promoting-and-protecting-economic-social-and-cultural-rights.html>.

342 *International Round Table on National Institutions Implementing Economic, Social and Cultural Rights, New Delhi, India, 29 November to 1 December 2005, the New Delhi Concluding Statement*. Viewed 20 April 2011 at http://www.nhri.net/pdf/RT_New_Delhi_Conclusions_011205.pdf.

343 Ibid., at para. I(f)).

344 See ASEAN NHRI Forum, *Promoting ESCR and the Right to Development*, <http://www.aseannhrforum.org/en/joint-projects/escr.html> (lasted viewed May 5, 2010).

345 *Sixteenth Annual Meeting & Biennial Conference of the Asia Pacific Forum of National Human Rights Institutions, Bangkok, Thailand, 6 to 8 September 2011, Concluding Statement*, para.17. Viewed 16 November 2011 at: <http://www.asiapacificforum.net/about/annual-meetings/16th-thailand-2011>.

Growing momentum on addressing economic, social and cultural rights, especially in the context of development, can also be seen at the national level. Numerous NHRIs in the region have incorporated economic, social and cultural rights into their institutional structures by establishing focal points, committees or working groups or by dedicating staff to this area. In its General Comment No.10, the Committee on Economic, Social and Cultural Rights considered how NHRIs could carry out their mandated functions in relation to economic and social rights, advising that NHRIs should:

- promote educational and information programmes to enhance awareness and understanding of economic, social and cultural rights, for both the general public and for particular groups such as the public service, the judiciary, the private sector and the labour movement;
- scrutinise existing laws and administrative acts, as well as draft bills and other proposals to ensure they are consistent with the International Covenant on Economic, Social and Cultural Rights;
- provide technical advice, or undertake surveys in relation to economic, social and cultural rights;
- identify national-level benchmarks against which the realisation of Covenant obligations can be measured;
- conduct research and inquiries on the extent to which particular economic, social and cultural rights are being realised, either nationally or in relation to particular communities;
- monitor compliance with specific rights recognised under the Covenant; and
- examine complaints alleging infringements of applicable economic, social and cultural rights standards.³⁴⁶

A number of NHRIs in the Asia Pacific region have exercised these functions in innovative ways, supporting the realisation of a human rights based approach to the MDGs.

Targeting marginalised and excluded groups

Though the MDGs contain no explicit obligation to reduce socio-economic disparities, development actors have increasingly recognised the need to tackle inequalities in order to accelerate progress towards the MDGs. Equality and non-discrimination are core principles of international human rights law and so form a key element of a human rights based approach to the MDGs. NHRIs have exercised different functions, in particular their reporting function, to highlight uneven progress on the MDGs and to uncover hidden disadvantages faced by particular groups when looking at national averages.

In Malaysia, for example, the Human Rights Commission (SUKAHAM) partnered with UNDP Malaysia and the Economics Faculty at the National University of Malaysia to disaggregate data used in the 2005 MDG Report in order to uncover 'red pockets' of poverty and shape

³⁴⁶ Committee on Economic, Social & Cultural Rights, *General Comment No. 10 The role of national human rights institutions in the protection of economic, social and cultural rights*, 14 December 1998, UN Doc. E/C.12/1998/25, para.3.

ethnic differentials in social, health and economic outcomes. The disaggregated data shows the geographically remote indigenous communities of Sabah, and Sarawak had internal poverty rates as high as 20%, which is disproportionate compared to the national average of 5%. Over the next 18 months, SUHAKAM and UNDP carried out advocacy activities in a variety of fora, including formal submissions to the Economic Planning Unit as it developed the Ninth Malaysian Five Year Development Plan. The plan was the first to specifically address the plight of indigenous peoples and included ‘ambitious poverty and equity targets’. As a result, novel budgetary allocations have been made to the Sarawak and Sabah regions.³⁴⁷

Facilitating community participation in decision-making

A second element of a human rights based approach to the MDGs is citizens’ right to meaningfully participate in developing, implementing and monitoring the policies, programmes and strategies enacted to meet the MDGs. This, in turn, increases legitimacy of the MDG agenda at the national level. As Amnesty International stresses, States must also fulfil a number of other rights and duties for the right to participate to be meaningful. These include rights to freedom of expression and association and access to information, as well as the duty to facilitate conditions where human rights defenders can work.³⁴⁸

The Commonwealth Guidelines on Best Practice for National Institutions highlights facilitating citizens’ participation in public affairs as a key activity for NHRIs. Specifically, the guidelines advise that NHRIs should:

*work towards facilitating public awareness of government policies relating to economic and social rights and encourage the involvement of various sectors of society in the formulation, implementation and review of relevant policies.*³⁴⁹

Some NHRIs have focused on facilitating participation in development processes, in particular at the community level. For example, between 2008 and 2010 the Commission on Human Rights Commission of the Philippines (CHRP) and New Zealand Human Rights Commission (NZHRC) conducted a two-year bilateral project. The project used a community development approach to assist three indigenous communities in the Philippines to identify and prioritise human rights issues and implement plans to address them. Economic, social and cultural rights issues were raised by all three communities, including concerns such as high levels of illiteracy; loss of livelihoods; malnourishment of children; and lack of professional health workers, health centres and medicine.³⁵⁰ At the end of the project, the Mayor of a municipality where one of the communities

347 HuriLINK Website, ‘Malaysia—Detail’. Viewed 16 November 2011 at: http://www.hurilink.org/malaysia_detail.php

348 Amnesty International, above note 5, at p.10.

349 Reference!

350 See CHRP & NZHRC, *Building Human Rights Communities: the experience of three indigenous peoples in the Philippines*, 2010.

resided observed, 'people are participating more in the council's consultative processes' and committed to adopting the human rights priorities, identified by the community, in council's annual plan and investment plan.³⁵¹

Prioritising human rights in policy choices and resource allocation

The crucial link between resources and results has been made explicit in the MDG agenda in recent years, for example in contact of the Global Strategy for Women and Children's Health. OHCHR notes that while a human rights based approach to the MDGs does not dictate what policies should be adopted or how resources should be allocated, it does provide a framework for assessing the reasonableness of such choices. In particular, by showing whether a particular policy or resource decision will:

- result in other human rights being violated;
- cause an absolute decline in the realisation of rights, contravening the principle of non-retrogression;
- be adequately directed towards realising human rights and ensuring equality, including gender equality; or
- provide adequate resources and allow sufficient policy space.³⁵²

As noted above, NHRIs perform a range of advisory functions to government. Through these functions they assess laws, policies, practices and budgets against this framework.

To begin with, NHRIs have exercised their advisory role to ensure the national legal framework provides clear, legally binding, standards on economic, social and cultural rights. At a fundamental level, this includes advocating constitutional protections for these rights. For example, in Nepal, economic, social and cultural rights are protected in the Interim Constitution and the National Human Rights Commission advocates for their continued protection, as the process of agreeing on a final constitution progresses.³⁵³ More broadly, NHRIs review proposed laws and policies in development-related areas, such as social protection, livelihood security and poverty reduction to determine compliance with human rights principles and standards. For example, in 2010 the Afghan Independent Human Rights Commission (AIHRC) reviewed a draft bill on the protection of destitute persons and families. AIHRC provided comments and recommendations aimed at improving legislation in accordance with international human rights standards. These recommendations were largely accepted and incorporated into the final law.³⁵⁴

351 Ibid., at p.13.

352 OHCHR, *Claiming the MDGs*, above note 5, at p.12.

353 Interview with Commissioner Gauri Prahm, Geneva, Switzerland, 18 May 2011.

354 AIHRC, (2010/2011) *First Quarterly Report*, p.7. Viewed 14 November 2011 at: [www.aihrc.org.af/2010_eng/Eng_pages/Reports/First%201389%20Quarterly%20Report%20\(English\).pdf](http://www.aihrc.org.af/2010_eng/Eng_pages/Reports/First%201389%20Quarterly%20Report%20(English).pdf)

Second, it has been suggested that recommendations from NHRIs can help governments strategize the prioritisation of development objectives to meet the MDGs.³⁵⁵ In some cases, an institution will be given an explicit mandate to do this. In the Philippines, for example, CHRP is the convener of committee on implementing the country's development plan.³⁵⁶ In other cases, policy guidance can come from a country's human rights action plan. Several countries in the region have adopted such plans, with NHRIs playing a key role in their development.³⁵⁷ Recommendations made in the context of specific investigations can also guide policy. In India, for example, the National Human Rights Commission (NHRC) developed a 'National Action Plan to Operationalise the Right to Health Care' in 2004. The plan contained extensive recommendations for reforming the health sector, such as enacting a public health services act; defining a list of essential services to be offered at each tier of the health system; increasing the central government's budgetary provisions for public health to 3% of GDP; and setting up a health services regulatory authority.³⁵⁸

Specifically, NHRIs can identify and encourage states to adopt national targets and indicators for framing development policies reflecting their obligations to progressively realise economic, social and cultural rights. Recognising concerns raised by human rights actors about global targets set by the MDGs,³⁵⁹ OHCHR suggests States:

- adapt current indicators to human rights: e.g. disaggregate data to show marginalisation;
- add complementary indicators to measure existing MDG targets: i.e. include indicators measuring the efforts a state has taken as well as outcomes it has achieved; or
- identify additional indicators for new targets.³⁶⁰

In this light, the National Human Rights Commission of Nepal convened a working group on economic, social and cultural rights in 2009 made up of representatives from the various national commissions, government, civil society and OHCHR. Through consultations with local, national and international stakeholders, the working group identified indicators for the rights to food, housing, health, education and work that would be applicable to the national context.³⁶¹ A user guide for the indicators was released in September 2011 and the commission expects the indicators to 'actively assist policy makers in the formulation of improved plans, programmes and policies to improve the enjoyment of these fundamental human rights in Nepal'.³⁶²

355 UNDP, *Making the Link*, above note 5, at p.26.

356 Interview with Loretta Rosales, Chairperson, Geneva, Switzerland, 19 May 2011.

357 Burdekin, above note 21, at p.91.

358 See NHRC Website, 'Recommendations of National Action Plan to Operationalise the Right to Health Care. Viewed 14 November 2011 at: <http://www.nhrc.nic.in/dispArchive.asp?fno=874>.

359 See Amnesty International, above note 5, at pp.8-10.

360 OHCHR, *Claiming the MDGs*, above note 5, at p.10.

361 NHCR, *Indicators for Monitoring Economic, Social and Cultural Rights in Nepal*, 2011, p.3.

362 NHRC, Human Rights Newsletter, Vol.7 , Issue 3/4, Sept – Oct 2011, p.3.

Finally, NHRIs can also evaluate whether resources allocated to sectors relevant to the MDGs, such as agriculture, education, health, water and sanitation, the environment, land and housing, employment and infrastructure reflect the government's obligation to allocate maximum available resources to economic, social and cultural rights. For example, in Jordan the National Centre for Human Rights conducted an initial study reviewing the budgetary allocations for health, education and employment between 2000 – 2010. The study raised issues about downward trends in spending, which the Centre recommended be the subject of further research.³⁶³ To date, budget analysis has been an underutilised tool by NHRIs. However, it is encouraging that other institutions in the region, such as the Human Rights Commission of the Maldives and the Mongolian Human Rights Commission, have expressed interest in conducting this kind of work in the future.³⁶⁴

Ensuring accountability and remedies for human rights violations

At the international level, monitoring states' efforts to meet the MDGs is generally limited to voluntary reports submitted by states themselves for a largely external audience, which, Amnesty International notes, 'lack an in depth assessment of progress' and are not updated with sufficient frequency.³⁶⁵ As a consequence, the concept of accountability 'often equated with monitoring and evaluation', is not always particularly strong.³⁶⁶ For this reason, accountability mechanisms built into the human rights system can provide important oversight of activities undertaken to meet the MDGs.

In terms of national accountability, NHRIs' quasi-judicial function has been frequently highlighted as a key redress mechanism in the context of a human rights based approach to the MDGs.³⁶⁷ Indeed, a significant number of complaints received by NHRIs concern development-related rights violations. In India, for example, NHRC reported that in 2010 it investigated complaints on environmental pollution, facilities in hospitals, development-related displacement, and the denial of education.³⁶⁸ Beyond individual complaints, NHRIs' investigatory function make them uniquely placed to look into systemic or structural dysfunctions that create, perpetuate or exacerbate rights violations and inhibit progress towards the MDGs. Some institutions have exercised this function by conducting national

363 NCHR & UNDP, *The actual Expenditure of the Jordanian Government Budgets on Education, health and Employment, an evaluative study: 2000-2010*, 2011, Executive Summary, pp.7-8.

364 Email correspondence dated 31 October 2011 and 4 November 2011, respectively.

365 Amnesty International, above note 5, at p.11.

366 OHCHR, UNICEF & Norwegian Centre for Human Rights, *Human Rights and MDGs in Practice: A review of country strategies and reporting*, 2010, p.29.

367 See note 6 above.

368 NHRC, *Activities of the National Human Rights Commission of India for the year 2010-2011*, 2011, para.13. Viewed 16 November 2011 at: <http://www.asiapacificforum.net/about/annual-meetings/16th-thailand-2011>

inquiries.³⁶⁹ Again, the Indian commission provides an example of this kind. In 2004, NHRC conducted a series of public hearings around the country on access to health care. At the hearings, individuals and groups who had suffered denials of the right to health care—in particular denials resulting from structural deficiencies—could present their cases before a panel made up of a commissioner and state level public health officials.³⁷⁰ The hearings informed the commission's action plan on the right to health, discussed above. In Malaysia, SUHAKAM currently has an inquiry underway on land rights of indigenous peoples. In the Maldives, the Commission is committed to commencing an inquiry on education for children with disabilities next year and the Palestinian Commission is also looking at carrying out an inquiry next year on employment for people with disabilities.

In addition to being accountability mechanisms in their own right, NHRIs are able to strengthen other national mechanisms. For example, they may advise regulatory bodies in sectors relevant to the MDGs on how to integrate human rights standards into their reviews or they may make amicus interventions to guide courts on how to interpret and appropriately apply international human rights instruments. Where the legal system allows, NHRIs may pursue public interest litigation themselves. In Mongolia, for example, the commission took a case to the Supreme Court in 2002 involving thousands of rural and nomadic citizens who had migrated to Ulaanbaatar and a number of other provincial capitals. The migrants were charged a substantial 'resettlement fee' to register for basic services, which the majority were unable to pay.³⁷¹ The commission argued the fee was unconstitutional, as it infringed migrants' rights to freedom of movement, residence within the country and access to social welfare. The Court agreed, annulling the resolution of Ulaanbaatar City Council who imposed the fee. Following the decision, other provincial councils voluntarily annulled similar resolutions and migrants have since been able to register for services.³⁷²

NHRIs also play a key role in terms of international accountability. Independent information provided by an NHRI can carry considerable authority either to corroborate or challenge the state's interpretation of its performance. At the same time, states should, theoretically, be more receptive to international critique if it is underpinned by information gathered by an official process at the national level. Further, as international mechanisms lack comprehensive follow up procedures at the national level, NHRIs are also an important part of promoting implementation of their recommendations.

369 See Burdekin, above note 21, at pp.87-90. The Australian Human Rights Commission pioneered this methodology and has conducted many national inquiries over the past 30 years, most of them on economic, social and cultural rights issues (e.g. on child homelessness, mental illness, rural and remote education).

370 NHRC Website, 'Public Hearings on Access to Health Care Delivery System'. Viewed 16 November 2011 at: <http://www.nhrc.nic.in/dispatch.asp?fno=796>

371 The case was brought following an 'extensive investigation' by the commission, which documented how the inability to pay the resettlement fees impacted access to basic services such as education, health, employment and social security. Burdekin, above note 21, at p.82.

372 Email correspondence, dated 9 November 2011.

In practice, international human rights mechanisms have not to date played a prominent role systemically monitoring states' efforts to meet the MDGs,³⁷³ and NHRIs' interaction with the UN human rights system in relation to economic, social and cultural rights is still maturing. Nevertheless, some institutions in the region, including New Zealand, Afghanistan, Australia, Korea, and the Philippines, have submitted information to the Committee on Economic, Social and Cultural Rights in recent years and the Committee has increasingly included references to NHRIs in its concluding observations. Likewise, a number of special procedure mandate holders have noted positive engagement with NHRIs on economic, social and cultural rights, particularly in the context of country visits.

A particular mechanism NHRIs have actively engaged in at the international level is the universal periodic review (UPR) process. In 2010 and 2011 the institutions of Australia, the Maldives, Mongolia, Nepal, Thailand and Timor-Leste made submissions on their country's human rights record. These reports generally did not comment on the country's MDG performance explicitly. However, economic, social and cultural rights issues featured prominently. As well as reporting on the level of enjoyment of particular rights (e.g. literacy and school enrolment rates for marginalised groups³⁷⁴), the reports frequently commented on gaps or weaknesses in laws, policies and programmes (e.g. the lack of inter-ministerial cooperation to control the quality of supplies for school feeding programs³⁷⁵) and made recommendations for addressing these.

A number of economic, social and cultural rights issues raised by NHRIs in their reports were taken up by members of the Human Rights Council in their interventions during debate on the country's report and were subsequently reflected in recommendations to the government; which were frequently accepted by the government. To ensure the accepted recommendations are actually implemented, a number of NHRIs in the region have convened committees to monitor progress. For example, SUHAKAM reported on the implementation of Malaysia's UPR recommendations to the Human Rights Council in September 2011. The report acknowledged progress on a number of economic, social and cultural rights issues, while also highlighting areas that require further attention.³⁷⁶

The institutional significance of national institutions

NHRIs in the Asia Pacific have been subtly 'redefining the state's agenda' in relation to economic, social and cultural rights; creating 'new rules' for state agencies to follow; holding governments to account for their actions, and 'shifting social expectations' about

373 Amnesty International, above note 5, at p.14.

374 National Human Rights Commission of Nepal, National Women Commission of Nepal & National Dalit Commission of Nepal, *The Report of the NHRI of Nepal on the UPR Processes*, 2010, para.31.

375 PHRJ, *Joint submission of the Office of the Provedor for Human Rights and Justice and civil society organisations in Timor-Leste*, 2011, para.9.

376 SUHAKAM, *Information presented by the Human Rights Commission of Malaysia to the Eighteenth Session of the Human Rights Council*, 6 September 2011, UN Doc. A/HRC/18/NI/1.

what is appropriate and acceptable governmental behaviour.³⁷⁷ In this way, NHRIs fulfil what can be described as a series of ‘bridging’ roles.³⁷⁸ Taken together, these bridging roles uniquely place NHRIs to advance economic, social and cultural rights, with a view towards strengthening synergies between human rights and the MDGs.

First, NHRIs bridge the divide between the national, regional and international human rights systems, having formal recognition in all arenas. Their national legislative basis provides a legally defined relationship with the state—one which gives them specific duties and powers in relation to international human rights law. Because NHRIs take UN human rights instruments as their core frame of reference, a ‘triangular’ relationship exists between international human rights systems, the state and the NHRI, with information flowing to and from each point.³⁷⁹ NHRIs could help increase the prominence of the MDGs on the international human rights agenda by encouraging states to address the MDGs in reports to the UN human rights instruments, as well as by explicitly linking activities to the realisation of specific MDGs in their own reports to these instruments.

Second, NHRIs bridge the divide between government and civil society.³⁸⁰ Thus, as Okafor and Agbakwa argue, the value of an NHRI comes not just from ‘what it does’, but also from ‘what other agents are able to do with it.’³⁸¹ Again, the fact that NHRIs take human rights treaties as their core mandate is ‘strategically vital’ in this respect. On the one hand it bolsters them against attempts to co-opt human rights by the state. On the other hand, it limits ‘extreme definitions of human rights’ by civil society groups that risk provoking conservative reactions.³⁸² In this light, NHRIs in the region have convened effective interactions between duty bearers, civil society and rights holders about the MDGs. SUHAKAM, for example, co-organized a High-Level Policy Dialogue on ‘A Human Rights Perspective on MDGs and Beyond’ with UNDP in 2005, creating space for different actors to voice their concerns about issues and challenges as well as brainstorming recommendations related to the MDGs in Malaysia.³⁸³ This ‘convening’ role will again be crucial ensuring genuine local participation for defining a human rights based development agenda post-2015.

Third, NHRIs bridge the artificial divide between civil, political, economic and social rights; both in the NHRI mandate and in practice. NHRIs are regularly required to deal with issues

377 Cardenas, above note 8, at p.31.

378 See Corkery and Wilson, above note 23.

379 Carver, R, ‘A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law’, *Human Rights Law Review*, Vol.10, 2010, p.20.

380 See Smith, A, ‘The Unique Position of National Human Rights Institutions: A Mixed Blessing?’, *Human Rights Quarterly*, Vol.28, 2006.

381 Okafor, O. C. & Agbakwa, S, ‘On Legalism, Popular Agency and “Voices of Suffering”: the Nigerian National Human Rights Commission in context’, *Human Rights Quarterly*, Vol.24, 2002, pp.688-689.

382 Eldridge, above note 9, at p.210.

383 SUHAKAM & UNDP, *High Level Policy Dialogue “A Human Rights Perspective on MDGs and Beyond”: new development targets, Manila, Malaysia, 26 July 2005, Proceedings*. Viewed 16 November 2011 at: http://www.undp.org.my/uploads/Human_Rights_Perspective_on_MDGs.pdf

that 'defy conventional divisions' between civil and political and economic and social rights.³⁸⁴ This makes NHRIs well placed to uncover and respond to barriers that may limit citizens' enjoyment of their economic, social and cultural rights or their participation in development processes. For example, in the Philippines community development project, one community reported fear of harassment and extra-legal and unresolved killings by armed groups and state agents at checkpoints hindered their ability to transport products,³⁸⁵ affecting their livelihoods. Similarly, in its UPR submission, the Human Rights Commission of Thailand raised concerns about the fact that community leaders rallying against industrial projects were facing threats.³⁸⁶

Finally, NHRIs bridge what might be seen as the 'tactical divide' in human rights between 'naming and shaming', reactive, violations based or oppositional approaches, and proactive monitoring and advisory approaches. As seen in the above discussion, NHRIs generally work with a broader set of 'tools' than the judiciary or civil society groups. In India, for example, the commission was able to uncover dysfunctions in the health sector through public hearings, and make concrete recommendations for addressing those shortcomings. In this way, NHRIs can offer states both incentives for and disincentives against adopting a human rights based approach to the MDGs.

Engaging national institutions on economic, social and cultural rights: Challenges and opportunities

High expectations have been placed on NHRIs to overcome governments' resistance to the international human rights system in the Asia Pacific. Nevertheless, ensuring states meet their obligations to recognise and implement economic, social and social rights remains 'one of the greatest challenges confronting NHRIs in the Asia Pacific region.'³⁸⁷ The degree of success an institution will achieve depends on a number of legal, political, financial and social factors affecting the institution both internally and externally.

To begin with, an institution should have a clear mandate and defined powers to address economic, social and cultural rights. However, despite the strong focus on economic and social rights in the 'Asian values' discourse, few states in the region have enacted strong, legally enforceable, constitutional provisions on economic and social rights, instead defining them as directive principles guiding government policy.³⁸⁸ This has a flow on effect for the work of the country's institution. The Committee on Economic, Social and Cultural Rights has noted while the establishment of an NHRI is one step a state can take

384 Ibid, at 76.

385 CHRP & NZHRC, above note 36, at p.15.

386 NHRC, *Human Rights Situation in Thailand: paper by the National Human Rights Commission of Thailand submitted to the UN Human Rights Council under the UPR Process*, para.16

387 Burdekin, above note 21, at p.84.

388 E.g. in Thailand, economic and social rights are covered under 'Directive Principles of Fundamental State Policies', which are not justiciable.

to progressively realise the Covenant's rights, this role 'has too often either not been accorded to the institution or has been neglected or given a low priority by it'.³⁸⁹ The Commonwealth Secretariat nevertheless counsels NHRIs to:

*employ all available means to respond to inquiries related to the advancement of economic, social and cultural rights, whether or not [their] enabling statute or national constitutions recognise [such] rights as justiciable.*³⁹⁰

NHRIs in the region have indeed done this. In India for example, the commission is mandated to address rights 'embodied in the International Covenants *and enforceable by courts in India*'.³⁹¹ Although the only rights enforceable in Indian courts are 'fundamental rights' enshrined in the Constitution, the commission has followed the Supreme Court's interpretation of the right to life as encompassing a broader range of economic and social rights. In the Philippines, the CHRP only has powers to investigate human rights violations 'involving *civil and political rights*.' The Supreme Court ruled this to be an exclusion of economic, social and cultural rights.³⁹² However, the CHRP has adopted a system of 'investigative monitoring', enabling it to respond to a large number of complaints concerning economic and social rights by drawing on its other powers.³⁹³

Secondly, an institution requires organisational capacity to deal with economic, social and cultural rights. According to OHCHR, many NHRIs lack an 'understanding of the legal nature and content of economic, social and cultural rights'.³⁹⁴ Staff may recognise the importance of indivisibility and interdependence of rights. However, they may be insufficiently trained to deal with economic, social and cultural rights issues. On top of this, building institutional capacity on development-related issues may be given a lower to priority compared to building capacity on more urgent 'core' protection issues, such as torture, summary executions, arbitrary detention and disappearances.³⁹⁵

Accordingly, while many NHRIs have successfully influenced public policy in the political sphere, their voices have been less prominent in the socio-economic sphere. Engaging in debates affecting employment, health, housing, social security, and education requires knowledge of how these issues manifest. However, complex social arrangements, legal systems, and economic structures give rise to violations in the context of economic and

389 CESCR, above note 32.

390 Commonwealth Secretariat, *National Human Rights Institutions: Best Practice*, 2001, p.33.

391 Section 2(d) of the *Protection of Human Rights Act 1993* (emphasis added).

392 Quisumbig, P, 'The Protection Role of the Philippines Human Rights Commission', in Ramcharan, B ed. *The Protection Role of National Human Rights Institutions*, 2005, p.161.

393 Ibid. Section 18 of the Constitution also grants the CHRP a number of other powers relating to human rights more broadly, including 'to monitor the Philippine government's compliance with the international treaty obligations on human rights', which does include the Covenant on Economic, Social and Cultural Rights.

394 OHCHR, *Handbook*, above note 26, at viii.

395 See UNDP & OHCHR, *Toolkit for Collaboration with National Human Rights Institutions*, 2010, p.86. Viewed 14 November 2011 at: <http://www.ohchr.org/Documents/Countries/NHRI/1950-UNDP-UHCHR-Toolkit-LR.pdf>.

social rights. These are often not easily attributed to one-off incidents or particular duty bearers. For example, the Commonwealth Secretariat counsels NHRIs to:

advise the government on the development and implementation of economic policies to ensure economic and social rights of people are not adversely affected (e.g. structural adjustment programmes and other aspects of economic management).

In practice, knowledge regarding the impact of economic and fiscal policies on rights—beyond a basic understanding of how the economy works and how public finance is organised—varies significantly from institution to institution, depending on availability of resources and staff expertise. While NHRIs in the region have sought to contrast governments' corporatist, state-capitalist or neoliberal development models with a more egalitarian vision, their recommendations have not always been in tune with the country's economic realities. For example, in a background paper on the role of NHRIs on the Asian economic crisis of the late 1990s, the APF quoted an analysis concluding:

*It is clearly premature to analyse the impact of the crisis on poverty or on the distribution of income and wealth in any of the severely affected ASEAN economies.... While few serious commentators doubt there will be a sharp fall in household incomes... it is far from clear how the decline will affect different regions, and different socio-economic groups.*³⁹⁶

The discussion paper asked, in these circumstances, how well equipped are NHRIs to contribute to the formulation of responses to these claims? What do NHRIs' own statistics, experience and contacts have to say about actual impacts of a crisis or some systemic problem underlying violations of economic and social rights? Do NHRIs have data that can be used to quantify the consequences and identify the groups particularly affected? The paper concluded it was unclear whether or not NHRIs would be sufficiently equipped to formulate a response to this complexity; an issue of equal relevance in the context of the MDGs.

In the context of the MDGs, conceptual challenges in operationalising a human rights based approach go beyond NHRIs. As Philip Alston emphasises, hesitating to use a human rights framework is 'deeply entrenched' and development actors resisting change towards a human rights based approach is based on more than ignorance.³⁹⁷ The reason for this stems, in part, from the fact that a human rights based approach is not prescriptive. It does not provide clear answers. This is especially true in debates about macro-economic policy.

In Asia, 'more conventional economic policies for promoting growth in the short-to-medium term are still often centre-stage', with an emphasis on macroeconomic stability, trade liberalisation, foreign investment, infrastructure, privatisation and commercialisation; the

396 APF, *Theme Paper: National Human Rights Institutions and Economic, Social and Cultural Rights*, presented to the Fourth Annual Meeting of the APF, 1999, p.9. Viewed 14 November 2011 at: http://www.asiapacificforum.net/about/annual-meetings/4th-philippines-1999/downloads/thematic-issues/esc_rights.pdf.

397 Alston, above note 6, at p.47.

assumption being benefits will 'trickle down'.³⁹⁸ The challenge for advocates of a human rights based approach to the MDGs is to articulate, with a reasonable degree of certainty, an alternative macro-economic framework allowing for more resources to be allocated to the social sector. However, as NHRIs' advisory functions are generally spelt out in very broad terms, most have not developed the 'skill set' required to engage in this area.

An institution's ability to engage with key stakeholders on complex debates will also depend on the dynamic of its external relationships. Anne Smith describes these relationships as moving 'downwards' to partners, beneficiaries and supporters and 'upwards to government', parliament and funders.³⁹⁹ By virtue of their 'unique' place between government and civil society, the central challenge for NHRIs, as Smith articulates, is to guard their independence, but at the same time maintain constructive relationships with both.

To begin with, it is important to remember NHRIs generally lack powers to enforce recommendations. This means when the interest of a government department is not to implement recommendations, they simply won't. For this reason, it is necessary for NHRIs to foster 'government goodwill' to facilitate their work.⁴⁰⁰ As discussed above, entrenched resistance to a human rights based approach to the MDGs can make calling for such a paradigm shift difficult to complete.

Further, the fact that (for the most part) NHRIs are government funded creates an ongoing tension maintaining the conceptual space from which to critique 'the hand that feeds you'.⁴⁰¹ Managing this dynamic is complex and underfunding is persistent.⁴⁰² In some cases, institutions have faced budget cuts after criticizing the government and the current global financial crisis has provided a convenient veil for such action.⁴⁰³

For institutions receiving support from international agencies or bilateral donors, there is risk that the institution's planning may be driven by external priorities. The experience of the PHRJ in Timor-Leste illustrates such challenges. The Provedor's office has received assistance from the World Bank, the United Nations Integrated Mission in Timor-Leste, UNHCR, OHCHR, USAID and others. However, the fact that donors differ in their priorities has reportedly fragmented the Provedor's activities.⁴⁰⁴ More broadly, the international community, especially OHCHR, has tended to prioritise support to NHRIs to address 'core'

398 OHCHR et al, *Human Rights and MDGs in Practice*, above note 52, at p.26.

399 Smith, above note 66, at p.906.

400 Eldridge, above note 9, at p.222.

401 Smith, above note 66, at p.920.

402 OHCHR, *Survey on National Human Rights Institutions: report of the findings and recommendations of a questionnaire addressed to NHRIs worldwide*, 2009, p.15. Nearly half of the survey respondents in all regions (and slightly higher in Africa) indicated that their budget is insufficient.

403 Asian NGO Network on National Human Rights Institutions (ANNI), *Report on the Performance and Establishment of National Human Rights Institutions in Asia*, 2011, p.181.

404 HURIGHTS Website, 'Ombudsman for Human Rights: The Case of Timor-Leste', Viewed 16 November 2011 at: <http://www.hurights.or.jp/asia-pacific/047/02.html>.

protection issues.⁴⁰⁵ This has arguably perpetuated a bias towards civil and political rights, compared to economic, social and cultural rights.

It is important external support to NHRIs not 'reorient accountability upward, away from the grassroots, supporters and staff'.⁴⁰⁶ Cooperative relationships with civil society groups, recognised in the Paris Principles as integral to NHRIs' legitimacy, are essential if NHRIs are to effectively promote a participatory approach to the MDGs. Nevertheless, such relationships can be quite complex in practice. On one hand, NHRIs depend on civil society to build pressure for the implementation of recommendations. At the same time, NHRIs must remain independent from NGOs if they are to be an effective channel through which the community's grievances can be brought to the attention of the government. As a result of this duality, it is not uncommon for NHRIs and NGOs to differ in their opinions about the appropriate role for the NHRI.

Philip Alston rightly raises the concern that calls for participation in the MDG process risk becoming hollow and tokenistic if they do not spell out what this means in practice.⁴⁰⁷ In the Asia Pacific region, NHRIs and civil society sought to articulate practical channels for participation in the Kandy Programme of Action, adopted in 1999. The Declaration calls for the adoption of processes and mechanisms ensuring NHRIs engagement in transparent, inclusive and substantive consultation with NGOs.⁴⁰⁸ While a number of NHRIs have established such mechanisms and processes,⁴⁰⁹ NGOs in the region have expressed concern that NHRIs sometimes remain 'cosmetic' and have urged serious consideration be given to how such mechanisms and processes (which should themselves be established in a participatory manner) can be real and relevant.⁴¹⁰

More and more, UNDP has provided crucial support to NHRIs. In January 2008, 94 UNDP country offices reported active working relationships with NHRIs, providing resources, capacity, and expertise—including legal and management expertise. In many cases, this occurred in partnership with OHCHR in conglomeration with an international or relevant

405 OHCHR Website, 'OHCHR and NHRIs'. Viewed 16 November 2011 at: <http://www.ohchr.org/en/countries/nhri/pages/nhrimain.aspx>.

406 Smith, above note 66, at 922.

407 Alston, above note 6, at pp.50-51.

408 *Workshop on National Institutions and Non-Governmental Organisations: Working in Partnership, Kandy, Sri Lanka, 26 to 28 July 1999, Kandy Programme of Action*, para.2.1.

409 Respondents to the OHCHR Survey indicated that they had undertaken activities to improve or enhance relationships with civil society such as meetings, forums and roundtables with civil society, as well as joint projects undertaken by the institution with NGOs and civil society groups. Above note 88, at p.36.

410 ANNI, *Review of Kandy Program of Action 1999: Towards a Kandy Plus Program 2011, statement to the 1st Biennial Conference of the Asia Pacific Forum of National Human Rights Institutions, Bangkok, Thailand, 7 to 8 September 2011*, paras. 6 (vii) and 7(i).

regional network of NHRIs.⁴¹¹ This engagement is expected to increase with the launch of a toolkit for UN country teams on collaborating with NHRIs in December 2010. Greater engagement by UNDP is a significant opportunity and has the potential to strengthen NHRIs' capacity to engage in governments' development agendas and poverty reduction strategies, including in relation to infusing the MDGs with a human rights based approach. Importantly, UNDP support can help build NHRIs' internal capacity and strengthen external relationships with stakeholders.

In relation to an institution's internal capacity, UNDP can engage with countries taking steps to establish an institution, in collaboration with its partners, to ensure it is given a strong and specific mandate to both promote and protect economic, social and cultural rights. It can also play a key role by strengthening the internal capacity of existing institutions. This might include encouraging NHRIs to more explicitly focus on the MDGs, for example when reporting to international human rights mechanisms. UNDP may also train NHRIs to use supplementary methodologies and working methods—including building competency in fact-finding; community consultation; collecting and analysing primary and secondary data; and analysing economic, including budgetary, information—to monitor economic, social and cultural rights and evaluate MDG related initiatives.⁴¹²

Importantly, UNDP can help NHRIs identify how to holistically integrate economic, social and cultural rights issues, including the MDGs, into their strategies and work plans. This could include assisting NHRIs when carrying out capacity needs assessments, which UNDP, OHCHR and APF have been doing in the Asia Pacific since 2008. Such assessments support APF member institutions to identify current capacities with room for growth, in order to fulfil the NHRI mandate by promoting and protecting human rights at the national level. To date, these assessments have been conducted with the NHRIs of Afghanistan, Jordan, Malaysia, Maldives, Mongolia, Palestine and Thailand.⁴¹³ It might also include assisting an institution to seek greater harmonisation among its donors. In Palestine, for example, bilateral donors to the Independent Commission for Human Rights have signed a Joint Financial Agreement, enabling the commission to align activities and projects over the

411 Helen Clark, UNDP Administrator, *Address to the 23rd Session of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, Geneva, Switzerland, 23 March 2010*. Viewed 14 November 2011 at: http://content.undp.org/go/newsroom/2010/march/helen-clark-address-to-the-committee-for-the-protection-and-promotion-of-human-rights.en?sessionId=a_uQBb7raV47.

412 See Corkery, A, 'National Human Rights Institutions as Monitors of Economic, Social and Cultural Rights', Center for Economic and Social Rights Working Paper, 2010. Viewed 17 November 2011 at: <http://www.cesr.org/downloads/NHRIs%20as%20Monitors%20of%20ESC%20Rights.pdf>

413 See APF Website, 'Capacity Assessments – Asia Pacific Forum'. Viewed 17 November 2011 at: <http://www.asiapacificforum.net/support/capacityassessment>.

next three years to its strategic plan.⁴¹⁴ This is a commendable initiative that should be replicated in the region.

In relation to an institution's external relationships, UNDP is uniquely placed to help coordinate an 'inter-institutional' approach to strengthening a country's democratic institutions. As noted above, NHRIs are but one of a number of national accountability mechanisms. Parliament, the courts, the media, and civil society must also be functioning. However, international assistance tends to focus on a particular mechanism, without focusing on improving the relational dynamics between them.

Most importantly, by virtue of UNDP's mandate to mainstream human rights into development activities, UNDP is in a strong position to support NHRIs build relationships outside the human rights and good governance fields. At the national level, entry points for UNDP might include building relationships with government ministries in finance, planning or infrastructure so NHRIs are a recognised stakeholder involved in the planning cycle for development plans or poverty reduction cycles. At the international level, one entry point might be to support NHRIs meaningful participation in the development of a country's United Nations Development Assistance Framework (UNDAF), as suggested by the toolkit.⁴¹⁵ Another entry point might be to promote linkages between NHRIs' reporting functions and MDG-related reporting, such as proposed 'compacts' between country governments and all major development partners recommended by the Commission on Information and Accountability for Women's and Children's Health.⁴¹⁶

Conclusion

Despite being relative newcomers in the field, NHRIs in the Asia Pacific have established themselves as unique actors within the human rights system. The position of NHRIs between the state and civil society has enabled them to subtly redefine the government's agenda; shift expectations about government behaviour; domesticate international standards; and hold governments to account for their actions. The ability of NHRIs to 'bridge' gaps between national and international human rights systems, between government and civil society, between civil and political and economic, social and cultural rights, and between reactive and proactive approaches to economic, social and cultural rights means NHRIs have a key role to play strengthening synergies between human rights and the MDGs.

414 ICHR Website, 'ICHR Signs Joint Financial Agreement'. Viewed 17 November 2011 at: <http://home.ichr.ps/en/2/20/619/The-Independent-Commission-for-Human-Rights-Signs-Joint-Financial-Agreement-with-Donors%E2%80%99-Consortium-for-future-Cooperation-towards-the-Prote-The-Independent-Commission-for-Human-Rights-Signs-Joint-Financial-Agreement-with-Donors%E2%80%99-Consortium-for-future-Cooperation-towards-the-Protection-and-Promotion-of-Human-Rights-in-Palestine.htm>.

415 UNDP & OHCHR, *Toolkit*, above note 81, at p.83

416 Commission on Information and Accountability for Women's and Children's Health, *Keeping Promises: Measuring Results*, 2011, p.14. Viewed 17 November 2011 at: http://www.who.int/topics/millennium_development_goals/accountability_commission/Commission_Report_advance_copy.pdf

As the discussion in this chapter showed, NHRIs in the region have carried out mandated functions advancing each of the key elements of a human rights based approach to the MDGs. They have highlighted the situation of marginalised and excluded groups in their reports. They have facilitated community participation in decision-making. They have advised government by prioritising human rights in policy choices and resource allocation, including setting targets to measure progress. They have ensured accountability and remedies for rights violations, as a redress mechanism in their own right and through other mechanisms such as the courts.

Nevertheless, NHRI activity in the area is still emerging. NHRIs have not always met high expectations placed on them to guide governments towards a human rights based approach to development. However, this has not generally been because of any fundamental weakness in NHRIs' mandates. More often, it is because of institutional weakness, competing priorities, limited resources or a lack of expertise and effective working methods. While NHRIs can build on the analytical capacity developed in relation to civil and political rights and to some extent, overcome institutional weaknesses, identifying appropriate supplementary methodologies and approaches for addressing economic, social and cultural rights and allocating priority to their implementation is crucial. UNDP has a key role to play in this respect. Alongside supporting NHRIs in the development of their internal capacity to holistically address the full spectrum of rights, UNDP can aid NHRIs by strengthening relationships with national and international development partners.

The MDGs and Human Rights: An Indigenous Peoples Perspective

*Rajat Khosla***

1. Background and Context

There are over 370 million indigenous peoples from 90 countries, living in all regions of the world. While they constitute 5 per cent of the world's population, indigenous peoples account for 15 per cent of the world's poor. Indigenous peoples are disproportionately represented among the poor and extremely poor, their levels of access to adequate health and education services are well below national averages, and they are especially vulnerable to the consequences of environmental degradation.⁴¹⁷

Indigenous peoples have unique cultures and distinct world views. Their development needs and aspirations may differ from the mainstream population. The indigenous peoples approach to development is based on principles of respect for and preservation of land, natural resources and all elements of the natural environment; consensus in decision-making; mutual respect for peoples' values and ideology, including sovereignty over land, resources and the environment under natural law.⁴¹⁸ Additional emphasis is placed on recognition as distinct peoples, and development must encompass the social, cultural, political and institutional dimensions of their identity and rights. This is not based on economic or monetary value, but on a holistic approach incorporating collective, spiritual and cultural values, shaped and informed by indigenous priorities on development. Equal worth and dignity of indigenous peoples can only be assured by recognition and protection of their individual and collective rights.

The dominant development discourse does not adequately respond to these aspirations and needs of indigenous peoples. Major development projects often do not take into account fundamental interests of indigenous peoples and result in violations of their human rights. Full, meaningful and effective participation of indigenous peoples in development is generally not considered.⁴¹⁹ Many argue this interpretation of development

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417 SPFII, "Indigenous Peoples and the MDGs", UN Chronicle, No.4, 2007.

418 Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, UN Doc.E.CN.4/2003/90, 2003, para 29.

419 Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, UN Doc. E.CN.4/2003/90, 2003, para 29.

is responsible for deteriorating the state of indigenous peoples, pushing them further into marginalization and poverty.⁴²⁰

The Millennium Development Goals (MDGs) constitute an unprecedented commitment of world leaders to address key development priorities through a set of specific goals and targets to eradicate extreme poverty and hunger, ensure all boys and girls complete primary school, promote gender equality, improve the health of mothers and children, reverse the spread of HIV/AIDS, protect the environment, and create a global partnership for development. In many developing countries, the MDG framework has brought different social groups to work towards the common development agenda.

Globally, indigenous peoples are severely affected by poverty yet they have not been given enough attention in MDG-related processes.⁴²¹ Indigenous peoples have the right to benefit from the MDGs and fulfil aspirations contained in the UN Millennium Declaration to the same extent as others. However, in majority of countries where indigenous peoples live, they are lagging behind other parts of the population in the achievement of these goals.⁴²² The United Nations Permanent Forum on Indigenous Issues (UNPFII) recently observed that “indigenous issues are often absent from Millennium Development Goals and poverty reduction processes and from the Millennium Development Goals reports and poverty reduction strategy papers.” The Permanent Forum further emphasised that, “unless the particular situation of indigenous peoples is adequately taken into account, some Millennium Development Goal processes may lead to accelerated loss of lands and natural resources for indigenous peoples, and thus their means of subsistence and their displacement, as well as to accelerated assimilation and erosion of their culture.”⁴²³

This chapter draws out connections between each MDG goal and the UN Declaration on the Rights of Indigenous Peoples, and provides some recommendations for policy and practice change to promote the rights of indigenous peoples and accelerate the achievement of the MDGs.

2. The United Nations Declaration on the Rights of Indigenous Peoples

On 13 September 2007, the Declaration on the Rights of Indigenous Peoples was adopted by an overwhelming majority of the UN General Assembly⁴²⁴. The Declaration is the most

420 World Bank, Conference on Poverty and Indigenous Peoples, Keynote Address by Victoria Tauli-Corpuz, Chair, UN Permanent Forum on Indigenous Issues, 2006, p.5.

421 MRG, *Minority and Indigenous Peoples Rights in the Millennium Development Goals*, 2003.

422 Report on the fourth session of the UN Permanent Forum on Indigenous Issues, UN Doc. E/C.19/2005/9, 2005, para 4.

423 Ibid., para 5.

424 144 states in favour, 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine). Australia and Colombia have since endorsed the Declaration.

recent and comprehensive instrument addressing the rights of indigenous peoples, and was drafted and debated for more than twenty years before being adopted by the General Assembly in 2007. It is the only international human rights instrument adopted with substantive participation and consent of indigenous peoples from all continents of the globe.

The Declaration recognises the rights of indigenous peoples to live in dignity, to maintain and strengthen their own institutions, cultures, laws and traditions and to pursue self-determined development, in keeping with their own needs and aspirations.⁴²⁵ It does not accord any new rights to indigenous peoples; it reiterates and reaffirms internationally recognized rights and places them in the context and reality of indigenous peoples. The Declaration was adopted to address the historic injustices and centuries of colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests.⁴²⁶

The right of indigenous peoples to exist as distinct peoples has been reiterated in the Declaration. The Declaration provides guidance to States in the development of a cooperative relationship with indigenous peoples living within their boundaries, to promote and protect their human rights, including their right to a distinct identity as peoples.

Article 1 of the Declaration specifies that indigenous peoples have the right to full enjoyment, as a collective and as individuals, of all human rights under international human rights law. Article 1 prohibits discrimination against indigenous peoples and promotes their full and effective participation in all matters of concern. Article 3 recognises the right to self-determination of indigenous peoples, and their right to freely pursue political status as well as freely pursue economic, social and cultural development.

The Declaration is a landmark legislation that signifies a shift in attitudes and understanding on indigenous issues, providing a remarkable tool to ensure greater recognition of the rights of indigenous peoples to determine their own priorities for development, and the MDGs are specific indicators that can move this process forward.

To achieve full realisation of the rights contained in the Declaration, countries need to adopt participatory approaches to indigenous issues, based on effective consultations and partnerships with indigenous peoples.

3. Rights of Indigenous Peoples and MDGs

Development according to indigenous peoples has a more holistic connotation, including rights to lands, territories and resources. Rights and aspirations are often not integrated

425 UN Declaration on the Rights of Indigenous Peoples, UN Doc. A/Res/61/295, 2007.

426 Ibid., preamble.

into policies and programmes aimed at achieving the MDGs.⁴²⁷ Unless the particular situation of indigenous peoples is adequately taken into account, some MDG processes may further marginalize them. The UNPFII has emphasized ignoring indigenous peoples, or meeting the targets at the expense of further loss of their lands, territories and natural resources, the poverty of indigenous peoples will be further aggravated.⁴²⁸

The MDGs can be met more effectively by including the human rights and needs of indigenous peoples.⁴²⁹ At the High-level Plenary Meeting of the General Assembly in 2010 on the MDGs, States reaffirmed their commitment to take concerted, positive steps to ensure respect for all human rights and fundamental freedoms of indigenous people on the basis of equality and non-discrimination, recognizing the value and diversity of distinctive identities, cultures and social organization.⁴³⁰ However, challenges remain. This section examines MDGs from the perspective of rights of indigenous peoples.

3.1. Poverty, hunger and indigenous peoples (Goal 1)

Approximately 370 million people in the world identify themselves as indigenous. These people belong to more than 5000 indigenous groups in some 90 countries.⁴³¹ It is estimated that whereas indigenous peoples represent 5 per cent of the world's population, they represent 15 per cent of the world's poorest people.⁴³² Despite being among the world's poorest, indigenous peoples in many countries may not be included in one-half of the people lifted from extreme poverty by 2015.⁴³³ Furthermore, there are specific groups who are particularly disadvantaged. As pointed out by the UNPFII in its 3rd Session in 2006:

"Indigenous women throughout the world are among the most marginalized groups, suffering discrimination not only on the basis of gender, but also on the basis of race, culture and class as well [...]. Top down and paternalistic approaches to development have provided a social and economic environment whereby indigenous women have suffered from the effects of poverty, the breakdown of traditional social mechanisms and institutions, violence and militarization, dislocation and migration, and the depletion of their natural environment and resources".

Indigenous poverty is multi-dimensional, highlighting the process of impoverishment caused by dispossession of indigenous peoples from ancestral lands, loss of control over their natural resources and indigenous knowledge, forced assimilation into mainstream

427 UN Department of Economic and Social Affairs, *Resource Kit on Indigenous Peoples' Issues*, 2008, p.23.

428 Ibid., p.31.

429 Background Note for the International Expert Group Meeting on the Millennium Development Goals, Indigenous Participation and Good Governance, New York, 11-13 January 2006, UNPFII/2006/WS.3/7.

430 UN General Assembly, Outcome Document of the High level Meeting of the General Assembly, 2010, para 55.

431 <http://www.un.org/esa/socdev/unpfii/en/mdgs.html>

432 UN Department of Economic and Social Affairs, *Resource Kit on Indigenous Peoples' Issues*, 2008, p.10.

433 MRG, *Minority and Indigenous Peoples Rights in the Millennium Development Goals*, 2003.

society and integration into the market economy.⁴³⁴ Conventional economic indicators used to measure poverty do not always reflect true extent of indigenous poverty.⁴³⁵ There is a need to incorporate indigenous peoples' own definitions and indicators of poverty in the PRSPs. Further, lack of up-to-date, disaggregated data on indigenous peoples is increasingly recognized as a major obstacle in addressing indigenous poverty. Therefore, a need exists to develop culturally sensitive indicators in partnership with indigenous peoples. In recent years, UNPFII has promoted the development of indicators in terms of well-being, poverty and sustainability of indigenous peoples. As a result, in the last four years a project was undertaken by SPFI and other UN agencies – IFAD, CBD – together with indigenous peoples' organizations to establish such indicators through a participatory process. A global synthesis report was presented at the seventh session of the UNPFII and efforts to test and further these indicators continue.⁴³⁶

Article 1 of the UNDRIPs emphasizes that “Indigenous peoples have the right to full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.”⁴³⁷ The recognition of indigenous peoples as distinct peoples and the respect for their individual and collective human rights, rights to lands and territories and sustainable use of natural resources are crucial for reducing poverty among indigenous peoples. Participation of indigenous peoples in designing and formulating PRSPs as well as in the implementation and monitoring processes should therefore be ensured.⁴³⁸

Some indigenous groups are facing greater vulnerability because of threatened access to ancestral lands.⁴³⁹ This denial of access to lands because of large development projects, migration, climate change and war has dwindled natural resources leading to malnutrition and food insecurity. In many indigenous cultures, indigenous peoples fish or hunt for food as part of a practice, custom or tradition. This is an integral part of the distinct indigenous culture. For example, the Inuit and the Saami's food source and livelihood depends on specific fish and reindeer. Pastoralists of East Africa rely on ranging cattle as an integral custom, source of food and means of income.⁴⁴⁰ The importance of people's control over natural resources appears in many instruments (the ICESCR, ICCPR) and specific reference to the rights of indigenous peoples in relation to natural resources pertaining to their lands is found in the ILO Convention 169. Further, the Declaration of Atitl'an, adopted at

434 Joji Carino, “Indigenous Peoples, Human Rights and Poverty”, *Indigenous Perspectives*, vol 7 No.1, p.37.

435 World Bank, Conference on Poverty and Indigenous Peoples, 2006, p.3.

436 Note on SPFI's work on Indicators Regarding Indigenous Peoples' Well-Being, Poverty and Sustainability, 22/9/2009, (on file with author).

437 See also Article 23

438 Report on the fourth session of the UN Permanent Forum on Indigenous Issues, UN Doc. E/C.19/2005/9, 2005, p.6.

439 Pooja Ahluwalia, “The right to food and to water”, in Margot Salomon ed., *Economic, Social and Cultural Rights: A Guide for Minorities and Indigenous Peoples*, MRG 2005, p.18.

440 Ibid., p.19.

the first Indigenous Peoples' Global Consultation in 2001 on the right to food and food security, has also articulated the cultural aspect of food, water and means of subsistence.

Many studies confirm that poverty and extreme poverty among indigenous communities can be traced back to colonization and the continued and systematic discrimination and denial of recognition of individual and collective rights of indigenous peoples.⁴⁴¹ Internal colonization perpetuated by states aimed at assimilating indigenous groups undermined their autonomy and local sovereignty and further perpetuated poverty among these groups.⁴⁴² Legislations, such as those relating to land and natural resource management, have ignored indigenous peoples systems and practices and have contributed to the chronic poverty among indigenous peoples.⁴⁴³

At the 2010 High-level Summit, States agreed to accelerate progress on challenges faced by indigenous peoples in the context of food security. In this regard, States agreed to take special actions to combat the root causes of the disproportionately high level of hunger and malnutrition among indigenous peoples.⁴⁴⁴ In some countries there are initiatives underway to restore land and resource rights amongst indigenous peoples. For instance, in India, one of the first projects dealing with securing land and resources rights was the Orissa Tribal Development Project. It had a component for land surveying which regularized tilling of lands with slopes above 10 degrees. Land settlement schemes led to the distribution of 17,175 dongar (hill) lands to the 6837 tribals. Titles were provided to the spouses and these were registered in the names of wife and husband. The collective rights of the Orissa tribe over community and forest land were also recognized. This was completed even before passage of the Panchayat Raj Act in 1996. This Act gives the rights of ownership of minor forest products to the respective Gram Sabhas and is inclusive of all the reserved forest areas since it is applicable to all scheduled areas.⁴⁴⁵

3.2. Achieve universal primary education (Goal 2)

The rate of illiteracy among indigenous peoples is usually higher than other groups.⁴⁴⁶ Accessing quality education is particularly difficult for indigenous children. There are several interrelated obstacles such as distance to schools, differences in lifestyles, nomadic and semi-nomadic communities, discrimination, violence, extreme poverty and

441 Joji Carino, "Indigenous Peoples, Human Rights and Poverty", *Indigenous Perspectives*, vol 7 No.1, p.37.

442 Victoria Tauli-Corpuz, *Indigenous Peoples and the Millennium Development Goals*, Civil Society Perspectives on MDGs, Tebtebba, 2005, p.64. See also, MDGs Reports and Indigenous Peoples: A Desk Review, 2006-2008, available at <http://www.un.org/esa/socdev/unpfii/en/publications.html>

443 Ibid., p.65.

444 UN General Assembly, Outcome Document of the High level Meeting of the General Assembly, 2010, para 70 (w)

445 Victoria Tauli-Corpuz, *Good Practices on Indigenous Peoples' Development*, 2006, p.48.

446 Ibid., p. 62.

exclusion.⁴⁴⁷ Furthermore, isolation is a major obstacle preventing indigenous peoples from enjoying their right to education.⁴⁴⁸ According to UNPFII, any efforts to achieve MDG 2 are likely to fail if impartial and effective implementation of culturally sensitive educational programmes and curricula addressing the needs of indigenous peoples are not undertaken.⁴⁴⁹

UDHR, ICERD, ICESCR, CRC, UNESCO Convention on Elimination of Discrimination in Education, and ILO Conventions reiterate MDG 2; “Achieve universal primary education: ensure all boys and girls complete primary school”, This is especially important for indigenous children. Education is one of the most important tools for combating prejudice and discrimination. However, national curricula reinforces stereotypes and frequently ignores the cultures, treaties and spiritual values of indigenous peoples.

Historically, the formal education system has been used as a means for forced assimilation and the system has an important role to play. Indigenous peoples have fewer years of schooling and less access to education and vocational training compared to the majority of the population. Further, indigenous educational systems are often not recognized at the same level as the mainstream system. Indigenous educational systems have generally been disregarded by the mainstream system. To remedy this, indigenous peoples are seeking to have their cultures and histories accurately portrayed in curricula, improve access to education provide teaching in their own languages and develop their own schools and universities.⁴⁵⁰

According to the CRC:

*The education of indigenous children contributes both to their individual and community development as well as to their participation in the wider society. Quality education enables indigenous children to exercise and enjoy economic, social and cultural rights for their personal benefit as well as for the benefit of their community. Furthermore, it strengthens children's ability to exercise their civil rights in order to influence political policy processes for improved protection of human rights. Thus, the implementation of the right to education of indigenous children is an essential means of achieving individual empowerment and self-determination of indigenous peoples.*⁴⁵¹

Indigenous world views, perspectives and history are invisible from text books and school curricula.⁴⁵² Bi-lingual education, especially in the mother-tongue, is considered

447 Report on the fourth session of the UN Permanent Forum on Indigenous Issues, UN Doc. E/C.19/2005/9, 2005, para 47.

448 Ibid., para 48(j).

449 Ibid., para 47(d).

450 UNDG, *United Nations Development Group Guidelines on Indigenous Peoples' Issues*, 2008, p.19.

451 UNCRC, General Comment 11: individual and collective aspects of right to education.

452 Victoria Tauli-Corpuz, *Indigenous Peoples and the Millennium Development Goals*, Civil Society Perspectives on MDGs, Tebtebba, 2005, p. 63.

indispensable for effective learning of indigenous children and for reduction of dropouts.⁴⁵³ Specialists agree that early schooling in both native mother tongue and the official language of state is of great benefit to indigenous children, who may become proficient in the vehicular language of the wider society without losing their vernacular idiom.⁴⁵⁴ In many countries, however, school administrations are not designed to handle indigenous bilingual education effectively. The indigenous right to education in native languages is therefore not being adequately implemented and requires attention for realization of MDG 2.

There is a need to endorse inter-cultural education to ensure equal access for indigenous children to quality and culturally appropriate primary education as stipulated in the CRC and UNDRIP.⁴⁵⁵ There is also a need to increase substantially state budgetary allocation to meet MDG 2 for indigenous children. To tackle these issues, the UNPFII in its fourth session (2005) recommend that States: "Establish effective arrangements for the participation of indigenous parents and community members in decisions regarding the planning, delivery and evaluation of education services for their children, including in the design and implementation of indigenous education at all levels, including developing appropriate teaching materials and methods".

A study on lessons learned and challenges to achieve the implementation of the right of indigenous peoples to education, observed examples of important existing legal provisions include those giving recognition to pluralistic systems of education, equal importance to traditional ways of teaching and learning, indigenous peoples' control over their own curricula and learning institutions, and adequate financial and infrastructure support for the implementation of these initiatives.⁴⁵⁶ Such legislations have led to the establishment of indigenous learning centres benefitting communities and allowing indigenous organisations to secure financial support from their respective Governments or interested donors.

Examples of important existing education legislations include recognizing the integration of indigenous perspectives and languages into mainstream education, culturally appropriate curricula, mother-tongue-based bilingual education, intercultural education and the effective participation of indigenous peoples in designing education

453 Report on the fourth session of the UN Permanent Forum on Indigenous Issues, UN Doc. E/C.19/2005/9, 2005, para 47(c).

454 Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, UN Doc. E/CN.4/2002/97, 2002, para 64.

455 UNDRIP Art 14

456 Examples from submissions received include the Basic Education Act 2001 and Executive Order No. 356 of 2004 (Philippines), First Nations Jurisdiction over Education Act 2006 and First Nations Education Act 2007 (Canada), the Education Act of Norway, the National Education Act (Argentina) and the Constitutions of Mexico, Bolivia (Plurinational State of), Colombia and Ecuador.

programmes.⁴⁵⁷ Policies of complementary education for indigenous peoples permit the implementation of intercultural education in all schools and colleges with the aim of moving towards multiculturalism and the recognition of the diversity of peoples.⁴⁵⁸

3.3. Promote gender equality and women empowerment (Goal 3)

Indigenous women face multiple forms of discrimination, based on gender, race/ethnicity and poverty.⁴⁵⁹ Violent conflicts and militarization further affect the lives of indigenous women as well as their families and communities, causing violations of human rights and displacement from ancestral lands.⁴⁶⁰ Indigenous women are one of the most marginalized groups in many countries, being victims of serious acts of discrimination and flagrant violations of fundamental rights.⁴⁶¹

In certain communities, indigenous women have often been kept in a situation of dependency. They are often marginalized, refused access to land or subjected to other forms of discrimination. For instance, in a patriarchal society, a woman has to leave her natal home after marriage and work for her husband and his family. Consequently, parents are reluctant to send their daughters to school or to pursue higher education because this is not considered beneficial or productive. Each time that these situations are reproduced gender disparity in educational attainment of indigenous men and women increases.⁴⁶²

In indigenous communities, women have taken on the great responsibility of transmitting traditional knowledge, skills, and intangible heritage from one generation to the next. However, when foreign values are introduced, this conception is severely affected or even destroyed. As a result, there is a negative impact on the relationship between men and women, as well as on women's role within their communities. There has been improvement in the ratio of girls to boys in primary schools among indigenous peoples but the rate of dropouts and repetitions remain higher among girls. At the secondary school level, there are widespread disparities whereby families prioritize the education of indigenous boys over girls.⁴⁶³ While indigenous women and girls are important as traditional knowledge holders, they have at the same time been particularly disadvantaged in formal education systems.⁴⁶⁴

457 The General Law on Education and General Law on Linguistic Rights of Indigenous Peoples (Mexico); the Policy on complementary education for indigenous peoples (Colombia); section 6 (2) of the Constitution of South Africa; and the bilingual education policy of Australia.

458 UN Expert Mechanism on the Rights of Indigenous Peoples 2nd Session 2009, A/HRC/EMRIP/2009/2, 26 June 2009, para 55-56

459 IANGWE, *Indigenous Women and United Nations: Good practices and lessons learned*, 2006.

460 Report on the third session of the UN Permanent Forum on Indigenous Issues, UN Doc. E/C.19/2004/23, 2004, para 13.

461 Ibid., para 41.

462 SPFII Briefing Note, Gender and Indigenous Peoples Education.

463 Diana Vinding, *Perspectives from Communities in Bolivia, Cambodia, Cameroon, Guatemala and Nepal*, ILO, 2006.

464 UNDG, *United Nations Development Group Guidelines on Indigenous Peoples' Issues*, 2008, p.19.

In Bangladesh, for instance, indigenous women are traditionally regarded as occupying a lower social standing than men. The status level for women is low in terms of right to inheritance, legal and political rights, decision-making powers and other spheres. One of the most acute problems faced by indigenous women is the denial of access to customary owned land. This adds to gender-based discrimination in many ways. Land scarcity among indigenous communities generally affects women more adversely than indigenous men. The inheritance laws of most indigenous peoples, including the most numerous groups such as Chakma and Santhal, tend to be discriminatory against women. The notable exceptions are in the case of Khasi in greater Sylhet and the Mandi or Garo in the plains, and to a lesser extent, the Marma in the southern Chittagong Hill Tracts.

The denial of indigenous women's substantive participation in political spheres further reinforces their low status in society and their substantive invisibility in the eyes of policymakers.⁴⁶⁵

The UNDRIP and the Beijing Declaration stress the need to address the vulnerable situation of indigenous women.⁴⁶⁶ Indigenous women, while sharing many concerns in the areas of poverty, human rights, and economic and social development with other women throughout the world, also offer a distinct and important perspective on these issues, which should be a central premise for the design of policies and programmes for implementation of MDG 3.

MDGs provide a strategic framework for achieving gender equality and the empowerment of women, including indigenous women.⁴⁶⁷ It is also important to fully integrate gender perspectives into the implementation and monitoring of objectives associated with the Millennium Declaration and the MDGs.⁴⁶⁸

3.4. Reduce child mortality, improve maternal health, combat HIV/AIDS, malaria and other diseases (Goals 4, 5, 6)

There are significant disparities between the health of indigenous people and that of non-indigenous populations in many countries around the world.⁴⁶⁹ Indigenous people tend to die younger and generally live in poorer health than other population groups. In some jurisdictions, they are more likely to have chronic disorders such as diabetes, high blood pressure or arthritis, and are more prone to substance abuse, depression and other mental disorders. HIV/AIDS and other sexually transmitted diseases are spreading

⁴⁶⁵ UNDP Bridging the Gap, 2007, p.30

⁴⁶⁶ UNDRIP Art 22

⁴⁶⁷ Report on the fifth session UN Permanent Forum on Indigenous Issues, UN Doc. E/C.19/2006/11, 2006, para 45.

⁴⁶⁸ Ibid., para 46.

⁴⁶⁹ Report on the International Decade of the World's Indigenous People to the Fifty-fourth World Health Assembly (WHO document A54/33).

rapidly in indigenous communities. This is a trend fuelled by factors including social and economic exploitation of indigenous women, as well as a lack of access to health-related information. Infant, child and maternal mortality rates in many indigenous communities are significantly higher compared to non-indigenous groups.⁴⁷⁰

Indigenous peoples' wellbeing cannot be measured using health indicators such as disease and treatment. For indigenous peoples, wellbeing is distinct and includes physical, emotional, mental, and spiritual health. Social determinants therefore play a crucial role determining indigenous health. These determinants include cultural factors, such as loss of language, loss of connectivity to the land, and other factors primarily linked to indigenous identity.⁴⁷¹

Some governments have adopted policies focusing on "closing the gap" with respect to disparities in human development indicators between indigenous and non-indigenous peoples. The impact of these initiatives so far has been low. 40% of the indigenous population in Latin America lacks access to basic health services, and major differences between health rates among indigenous and non-indigenous populations persist. Indigenous children continue to display extraordinarily high malnutrition rates.⁴⁷²

Health of indigenous peoples is affected by multiple factors such as low income levels, low availability of safe water, scarcity of food, poor sanitation and a lack of access to health services. One of the main threats to indigenous' health is the destruction of their habitat which provides spiritual and material sustenance. According to the WHO, acculturation and the loss of cultural cohesion also have a deleterious impact on health.⁴⁷³ Discrimination, as well as costs, may also prevent indigenous people from seeking basic health care, which is especially problematic in context of the HIV/AIDS crisis. In some cases, indigenous peoples have purposefully isolated themselves in an attempt to maintain traditional cultures and practices.⁴⁷⁴

Lack of reliable data exists with respect to the true level of HIV infection among indigenous peoples. Relationship to land, poverty, geographical isolation, marginalization, different demographics, different understanding of health and medicine and low levels of participation in political and policymaking processes, are considered by UNAIDS as key factors affecting the impact of HIV epidemic on indigenous populations. The absence of reliable data about HIV infection in indigenous populations has made it more difficult for concerns about the impact of the HIV epidemic on indigenous populations to be given priority in national and international policy agendas.

470 Report of the Special Rapporteur on the right to the highest attainable standard of health, UN Doc. A/59/422, 2004.

471 M King et al., "Indigenous health part 2: the underlying causes of the health gap", *Lancet* vol 374 Issue 9683, p.76-85.

472 Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, UN Doc. A/HRC/4/32, 2007, para 62.

473 Ethel Alderete, *The Health of Indigenous Peoples*, WHO, 1999, p.13.

474 Vital Bambazne, "Dimensions of Poverty and Well-Being among Indigenous Peoples in Africa", World Bank Conference on Poverty and Indigenous Peoples, 2006, p.9

In relation to indigenous peoples, ILO Convention No. 169 stresses community-based health services should be planned and administered in cooperation with concerned peoples, taking into account traditional preventive care, indigenous healing practices and nonconventional medicines. The UN Special Rapporteur on the Right to Health has specifically called for governments and other actors to ensure participation in the formulation, implementation and monitoring of health policies and programmes. UNDRIPs Article 23 explicitly connects health to self-determination. Participation of indigenous peoples in decisions affecting indigenous health entails greater respect for the use of traditional medicines and healing practices on the part of formal health systems, training of indigenous health workers, use of indigenous languages in transmitting health information, and creating accountability for policy and programmes affecting health, including displacement of communities from their land.⁴⁷⁵

Indigenous women around the world are suffering from serious deterioration of health conditions within their own communities. The rate of maternal mortality is alarmingly high among indigenous women. The health needs of indigenous women are particular to their ethnicity and gender. Also, these needs may be different those of other women and male members of indigenous communities.⁴⁷⁶ Inadequate and limited access to health services, lack of culturally appropriate approaches to health care, lack of outreach clinics in remote areas, deteriorating quality of air, water and land due to unchecked industrial development are a few factors contributing towards a downward trend. Changes in traditional, social, cultural and political institutions have led to a loss of traditional health practices, erosion of culturally appropriate health rules and diminished codes of behaviour which have been instrumental for ensuring gender-sensitive approaches to health.⁴⁷⁷

Full participation of indigenous peoples in the management of health services in their communities, better access to modern diagnostic processes and treatments as well as use of traditional healing and culturally appropriate reproductive health services are considered steps to improving the health of indigenous peoples. Reproductive health services for indigenous peoples must be improved in terms of coverage and quality, including information, pre and post natal care, and emergency obstetric care.⁴⁷⁸

According to UNDRIPs and international human rights law, indigenous people have the right to specific measures for improving access to health services and care as well as the underlying determinants of health. These services should be culturally appropriate, taking into account traditional preventive care, healing practices and medicines.⁴⁷⁹

475 Alicia Ely Yamin, "Health Rights" in Margot Salomon ed., *Economic, Social and Cultural Rights: A Guide for Minorities and Indigenous Peoples*, MRG 2005, p. 42.

476 UNDG, *United Nations Development Group Guidelines on Indigenous Peoples' Issues*, 2008, p.22.

477 Report on the third session of the UN Permanent Forum on Indigenous Issues, UN Doc. E/C.19/2004/23, 2004, para 87-88.

478 UNDG, *United Nations Development Group Guidelines on Indigenous Peoples' Issues*, 2008, p.19.

479 Report of the Special Rapporteur on the right to the highest attainable standard of health, UN Doc. A/59/422, 2004. Para 58.

The 2005 *Social Justice Report* considered progress towards achieving improvements in the health status of Aboriginal and Torres Strait Islander peoples. According to the report, both chronic and communicable diseases are recorded at much higher rates in Aboriginal and Torres Strait Islander communities than in non-Indigenous communities. Chronic conditions include heart disease, diabetes and cancers. The causes of chronic conditions are believed to include: poor foetal and child health; poor diet throughout the lifecycle; smoking and alcohol misuse; a lack of access to primary health care (which is important in the detection and early prevention of chronic conditions); and social stress. Communicable diseases, such as trachoma and tuberculosis, are linked to overcrowding and poor sanitation in living conditions.

The report points out that a major health inequality exists insofar as Aboriginal and Torres Strait Islander peoples do not have equal opportunity to be as healthy as non-Indigenous Australians in two key areas: primary health care and health infrastructure. Aboriginal and Torres Strait Islander peoples do not enjoy equal access to primary health care and health infrastructure including safe drinking water, supplies of healthy food, effective sewerage systems, rubbish collection services and healthy housing. Without effectively addressing underlying causes of health inequality, disease or condition-focused programs are unlikely to result in sustainable changes.

The report makes key recommendations for achieving Aboriginal and Torres Strait Islander health equality within a generation. Importantly they require the governments of Australia to commit themselves towards achieving equality of health status and life expectation between Aboriginal and Torres Strait Islander and non-Indigenous people within 25 years.⁴⁸⁰

3.5. Ensure environment sustainability (Goal 7)

Land rights, access to land and control over land resources are central to indigenous peoples throughout the world, making MDG 7 crucial for survival. The 1992 UN Conference on Environment and Development identified indigenous peoples a major stakeholder in Agenda 21. However, indigenous peoples' rights regarding the environment and natural resources have frequently been overridden by governments, transnational corporations or multilateral agencies.

Indigenous people take a holistic approach to environment, according to which there is an interrelatedness of social and ecological balance and health. According to indigenous groups, the environment cannot be reduced to one of eight development goals under the MDGs. Indigenous groups argue that natural resource management is not just MDG 7, rather, it underpins achievement of all MDGs.⁴⁸¹ This was reiterated in a statement by the International Indigenous Forum on Biodiversity, according to which:

⁴⁸⁰ Social Justice Report, 2005

⁴⁸¹ Joji Carino, *Indigenous Peoples, Human Rights and Poverty*, Indigenous Perspectives, Vol. 7, 2005, p.40.

The Global Indicators and targets developed so far focus on the status and trends of biodiversity health. However, these global biological and environmental indicators must be complemented by human and social indicators which duly reflect critical human development factors affecting biodiversity.

Although indigenous peoples have demonstrated their close relationship with the environment makes them the world's best environmental guardians, the strong environmental movement emerging after World War II made no reference to indigenous peoples. For many years, efforts focused more on how nature could be protected from damaging interventions by human activities as opposed to the impact of environmental degradation on human beings.⁴⁸²

As a result, projects and programs, having a serious impact on indigenous lands and resources, have been implemented without the Free Prior and Informed Consent of indigenous peoples. These projects and programmes include commercial agriculture such as mono-cropping, tree plantations, oil palm plantations and others; development and operation of large scale mining; construction and operation of large dams, and water privatization policies.⁴⁸³

Land has material, cultural and spiritual dimensions for indigenous peoples and, through their profound understanding, indigenous peoples sustainably managed their territories for generations. In order to survive as distinct peoples, indigenous peoples and their communities must be able to own, conserve and manage their territories, lands and resources on the basis of collective rights. Therefore, protection of collective right to lands, territories and natural resources must be given priority.⁴⁸⁴ Indigenous women and men both offer unique perspectives by taking into account traditional knowledge and awareness of environment. Indigenous peoples' societies generally view gender as complimentary and egalitarian, where each role is defined but complimentary to each other. For instance, indigenous men may focus on cultivation and indigenous women may plant and gather foods. Therefore, both roles are necessary and complimentary in the holistic relationship of the family/community. Traditionally, both indigenous women and men had equal access to lands, animals and resource use, which was extremely beneficial to the collective. However, since the integration and assimilation influences of dominant cultures, and the ideal of individual ownership, indigenous peoples, in particular women, experience fewer opportunities to access their natural resource and lands. Gender relations within indigenous communities have been changing alongside the transformation of their own environment, especially in the face of colonization.⁴⁸⁵

482 UN, *State of World's Indigenous Peoples* 2010, p.83.

483 International Work Group for Indigenous Affairs, Goal 7: Ensure Environmental Sustainability, available at <http://www.iwgia.org/sw16048.asp>

484 UN Department of Economic and Social Affairs, *Resource Kit on Indigenous Peoples' Issues*, 2008, p.14-16.

485 UNFPII Briefing note Gender and Indigenous Peoples Environment, available at <http://www.un.org/esa/socdev/unpfi/en/women.html>

Indigenous peoples have been at the frontline of the climate change crisis. For example, Inuit people have been affected by large-scale melting in traditional Arctic territories. This was also the subject of a recent petition lodged by the Inuit Circumpolar Conference with the Inter-American Commission on Human Rights against the United States of America.⁴⁸⁶ The reduction of water reserves throughout the world has also threatened the survival of indigenous of indigenous populations.⁴⁸⁷

The UNDRIP (articles 25 and 26) and ILO's Convention No. 169 (article 14) both recognize the right of indigenous peoples to own and control traditional lands and, to differing degrees, the right of indigenous people to own, use and manage natural resources on those lands. Several other articles within the Declaration also recognize a number of related rights, including the right to free and informed consent prior to approval of interventions affecting their lands.

However, this recognition has not been translated into betterment of conditions for indigenous peoples. In the name of development or free trade, mining, oil and gas developments, plantations etc., encroach on indigenous peoples' lands and territories, making life and survival increasingly difficult.⁴⁸⁸ The *UNDG Guidelines on Indigenous Peoples* (2008) note: "Indigenous peoples' lands have been disproportionately affected by national development activities because they often contain valuable natural resources including timber, minerals, biodiversity resources, water and oil, among others". It is feared by many that unless efforts are made to integrate indigenous peoples perspectives, the programmes and policies aimed at meeting the targets laid down for the MDGs could in fact have harmful effects on indigenous peoples.⁴⁸⁹

Peru also witnessed violent clashes between indigenous groups and the government due to legislation approved by the government allowing mining, logging, and large scale farming in the rainforest. The Peruvian rainforest is the vastest stretch of Amazon outside Brazil. As the Earth's largest rainforest, the Amazon plays a critical role safeguarding global climate. This crucial global ecosystem has been threatened in recent decades by industrial activity in the region. It is feared this will have detrimental effects on the Peruvian rainforest and its people. It will also have repercussions for the global climate. The legislation has been declared unconstitutional and is being debated again in the Peruvian Congress.⁴⁹⁰

The UNDRIP recognizes in the preamble that "respect for indigenous knowledge, cultures and traditional practices contribute to sustainable and equitable development and proper management of the environment."⁴⁹¹ Until recently, conservation policies and practices

486 Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, UN Doc. A/HRC/4/32, 2007, para 50.

487 Ibid., para 51.

488 International Workgroup on Indigenous Affairs, *sustainable development and Indigenous Peoples*, 2007.

489 UN Department of Economic and Social Affairs, *Resource Kit on Indigenous Peoples' Issues*, 2008, p.16.

490 www.ens-newsservice.com/en

491 UNDRIP, preamble, 2007

failed to fully understand and appreciate the rights and roles of indigenous peoples in the management, use and conservation of biodiversity. Today, however, indigenous peoples' traditional knowledge and practices, which were formerly undervalued and ignored, are considered important and necessary contributions to the conservation of biodiversity. Yet this knowledge is under severe threat of being eroded, lost or misappropriated.⁴⁹²

At the COP meeting, a programme on Reducing Emissions from Deforestation and Forest Degradation (REDD) was launched by the Norwegian government, pledging to spend NOK 3 billion annually to support developing countries fighting deforestation and reducing global CO₂ emissions. The REDD programme, too, has been met with criticism. It makes no reference to the rights of indigenous peoples and it is argued indigenous rights will be undermined by a centralized, top-down management of forests.

Concerns regarding the Forest Carbon Partnership Facility and REDD were also raised at the Seventh Session of the UN Permanent Forum on Indigenous Issues in May 2008, with the theme being climate change. Recommendations related to adaptation and mitigation initiatives were made emphasizing all actions being implemented with the participation or consent of indigenous peoples and in accordance with the UN Declaration.⁴⁹³ At the High-level Summit in 2010, States undertook a commitment to continue pursuit of a more efficient and coherent implementation of the three objectives regarding the Convention on Biological Diversity and address implementation gaps, where appropriate, including fulfilment of commitments significantly reducing the rate of loss of biodiversity, including by preserving and maintaining knowledge, innovations and practices of indigenous and local communities; and continuing ongoing efforts towards elaborating and negotiating an international regime on access and benefit sharing.⁴⁹⁴ Goal 7, more than any, demands recognition of indigenous peoples as valuable partners, not only for the achievement of 2015 targets but also in devising sustainable adaptation strategies to combat climate change.

3.6. Global partnership for development (Goal 8)

MDG 8 focuses on addressing the structural causes of poverty, emphasizing fulfilment of other goals depends on the success of creating global partnerships for development. Indigenous peoples are subjected to external factors such as national development plans, international trade agreements, market dynamics etc.⁴⁹⁵ The impact of trade agreements and debt burdens on indigenous peoples is often overlooked. For example, trade agreements and investment in natural resources may displace indigenous peoples from

⁴⁹² State of World's Indigenous Peoples, p.100

⁴⁹³ Ibid., 118

⁴⁹⁴ UN General Assembly, Outcome Document of the High level Meeting of the General Assembly, 2010, para 77 (e).

⁴⁹⁵ Diana Vinding, *Perspectives from Communities in Bolivia, Cambodia, Cameroon, Guatemala and Nepal*, ILO, 2006.

their traditional lands and territories. The specialized livelihoods of some ethnic groups may be adversely affected by trade liberalization. Good governance, a key commitment under Goal 8, means respect for and participation of indigenous peoples.⁴⁹⁶

Large infrastructure, extractive processes and even conservation projects have been harmful for indigenous peoples.⁴⁹⁷ Further, in addition to the direct negative impacts of large development projects, the debt burden is another major factor contributing to exacerbation of indigenous peoples' poverty. To generate foreign exchange for payment of foreign debt, governments often extract natural resources for export, resulting in unsustainable exploitation of indigenous peoples' territories and resources.

It is crucial to ensure indigenous peoples are protected from adverse effects of aid programmes. Development partners, through aid programmes and dialogue with governments, could play an important role in protecting rights and interests of indigenous peoples. The development co-operation should aim towards strengthening the right and capacity of indigenous peoples to "self-development". This implies integrating concern for indigenous peoples as a cross-cutting aspect at all levels of development co-operation.⁴⁹⁸

This has been attempted recently in China. Eight UN agencies are implementing a multi-agency MDG project on culture-based development for ethnic minorities under the UN-China Culture and Development Partnership Framework (CDPF). The project is funded by the Spanish MDG Achievement Fund acknowledging the importance of culture as a cross-cutting theme as well as utilizing culture as a driving force in the field of development. The CDPF recognises the need to reach China's ethnic minorities in culturally sensitive and appropriate ways, where cultural diversity is acknowledged as part of the "common heritage of humanity ... as necessary for humankind as biodiversity is for nature".⁴⁹⁹ Cultural rights of all ethnic minorities were recognised in the Law on Regional National Autonomy (2001) and in the eleventh five-year plan on the development of public affairs for ethnic minorities, which forms part of China's eleventh five-year plan (2007).⁵⁰⁰

3.7. Mutual benefits

While the MDGs represent high-level political commitments, rights of indigenous peoples as recognized under UNDRIPs are entitlements with corresponding obligations upon States. The different nature of two sets of standards can be a source of strength.

496 MRG, *Minority and Indigenous Peoples Rights in the Millennium Development Goals*, 2003.

497 Joji Carino, "Indigenous Peoples, Human Rights and Poverty", *Indigenous Perspectives*, vol 7 No.1.

498 ILO, *Indigenous and Tribal Peoples' Rights in Practice*, 2009, p.119.

499 2002 *UNESCO Universal Declaration on Cultural Diversity*, p. 3.

500 *Ibid.*, p.4.

3.7.1 How can MDGs reinforce the realization of UNDRIPs

Raise awareness: MDGs represent high-level political commitments which can be used to strengthen the rights of indigenous peoples provided under UNDRIPs. MDGs therefore provide an opportunity to raise awareness regarding the rights of indigenous peoples.

Monitoring: MDG benchmarks can be used for measuring the realization of rights of indigenous peoples. MDG targets can provide the basis for assessing State compliance with rights protected under UNDRIP. On the other hand, measuring will also ensure national level programming, in accordance with the MDGs, is respectful of the rights of indigenous peoples.

Political commitment: Given the international and growing national mobilization behind MDGs, they can provide a political process based on political commitments made at the highest level, through which rights of indigenous peoples can be claimed.

Resources: National and international efforts around MDGs have led to mobilization of resources that can be applied to implementation of the rights protected under UNDRIP.⁵⁰¹

3.7.2. How can UNDRIPs reinforce the realization of MDGs

Focus on excluded and marginalized: MDGs aim at achieving reduction in poverty and human development over a period of time. However, some of the MDG targets are not sufficiently focused on the poorest groups in society such as indigenous peoples. An approach based on the rights of indigenous peoples focuses on the realization of rights for all including indigenous peoples.

Holistic approach: Achieving MDG targets is not possible without addressing root causes of poverty such as discrimination and powerlessness. Programming based on the rights of indigenous peoples takes a holistic approach by considering the social, political and legal framework underpinning rights and duty holders.⁵⁰²

Participation: While MDGs focus on results, an approach based on the rights of indigenous peoples reminds policymakers that processes are equally important. In particular a human rights-based approach seeks to both assist in the participatory formulation of needed policy and legislative framework, and to ensure that participatory and democratic processes are institutionalized locally and nationally.⁵⁰³

Accountability: Accountability mechanisms for MDGs are weak. A human rights-based approach sensitive to rights of indigenous peoples supports the monitoring of State

501 UNMC, *The Millennium Development Goals and Human Rights*, 2008, p.9-10.

502 UNOHCHR, *Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation*, 2006, p.16.

503 Ibid., p.17.

commitments, through independent and public assessment of State performance, and holds those who have a duty to act accountable, ensuring effective remedies where rights are violated.⁵⁰⁴ The adoption of the Optional Protocol to the ICESCR which provides for an individual and collective complaints procedure further strengthens accountability with respect to rights of indigenous peoples.

4. Implementation of MDGs and Rights of Indigenous Peoples

For implementation of the MDGs whereby indigenous peoples' own vision, perspectives and strategies of self-determining development within a framework of human rights, State parties should:

4.1. Recognize indigenous peoples and their rights

4.1.1. Recognize indigenous peoples (issue of identity)

Indigenous peoples are invisible in the MDGs.⁵⁰⁵ The recognition of indigenous peoples as distinct peoples and the respect for their individual and collective human rights, rights to lands and territories and sustainable use of natural resources are crucial for reducing widespread poverty amongst indigenous communities.⁵⁰⁶

Over the last few years, several countries have introduced constitutional reforms and adopted legislations recognising distinct indigenous identities. However, in most cases, those reforms have not been able to eliminate discrimination against indigenous peoples. In some cases, the very existence of indigenous peoples is not recognized in constitutions and laws and they are even denied citizenship.⁵⁰⁷

Non-recognition of indigenous peoples and their customary land rights of indigenous peoples has resulted in loss of control over land and natural resources for indigenous peoples. Ambiguities within the legal situation of indigenous peoples and communities are of concern to indigenous peoples around the world.⁵⁰⁸ In Africa, for instance, the Amazigh people, who inhabit several countries of North Africa, demand legal recognition and respect of their cultural and social rights as an indigenous people. Within the framework of constitutional review, the Ogiek, a hunter-gatherer people of Kenya, are claiming recognition as a distinct indigenous minority. The Maasai pastoralists are considered to be an indigenous minority in several East African countries and their legal recognition varies in different States.

504 UNMC, *The Millennium Development Goals and Human Rights*, 2008, p.11.

505 MDGs Reports and Indigenous Peoples: A Desk Review, 2006-2008, available at <http://www.un.org/esa/socdev/unpfii/en/publications.html>

506 Report on the fourth session of the UN Permanent Forum on Indigenous Issues, UN Doc. E/C.19/2005/9, 2005, para 14.

507 UNDG, *United Nations Development Group Guidelines on Indigenous Peoples' Issues*, 2008.

508 Communications addressed directly to the Special Rapporteur between July and October 2001.

The Special Rapporteur on the situation of indigenous peoples emphasised women and children as being particularly affected by the lack of citizenship documents because they become more vulnerable to exploitation. Indigenous women suffer terribly from violence occurring in many indigenous lands.⁵⁰⁹ Therefore, the challenge is to bring about development with a strong social and cultural dimension, promoting respect for basic human rights of indigenous peoples, integrating their views on development visions. Recognition of indigenous people's identity is considered as the first step in that regard.⁵¹⁰

4.1.2. Explicitly recognize and integrate rights of indigenous peoples in policies and programmes for implementation of MDGs

Indigenous peoples are entitled to a full range of rights established under international law, such as non-discrimination, participation in public life, and the right to maintain distinctive identities, cultures, languages and ways of life. The right of indigenous peoples to self-determination is increasingly expressed through self-governing or autonomous arrangements. Both ILO's Convention No. 169 and the UNDRIPs recognize indigenous peoples' right to own and control their lands and, to differing degrees, recognize their rights to own, use and manage natural resources on their respective lands. According to the Declaration, States should establish mechanisms to guarantee these rights.

The right to development is understood in this context to imply the right of indigenous peoples to decide the kind of development that takes place on their lands and territories in accordance with their own priorities and cultures.⁵¹¹ The UNDRIPs calls upon States to consult with indigenous peoples to obtain their free, prior and informed consent to approval of any project affecting lands and resources.⁵¹² ILO Convention No. 169 underlines the right of indigenous peoples to be consulted in relation to developments that may affect them.⁵¹³

4.1.3. Problem of disaggregated data

Disaggregated data on the conditions of indigenous peoples is limited and it is therefore difficult to develop and implement policies to address discrimination. The UNPFIs and several UN agencies have recommended data be disaggregated specifically for indigenous peoples. Data provides a key tool for the planning and execution of programmes and projects and the monitoring and evaluation of the achievement of the MDGs. However, there are several inconsistencies that inhibit data with respect to indigenous peoples. There is no standard or agreed upon definition of "who are indigenous peoples" and "who

509 Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, UN Doc. E/CN.4/2002/97, 2002, p.30-31.

510 UNDRIP Art 25 and 26.

511 UNDRIPs Article 23.

512 UNDRIPs Article 32.

513 UNDG, *United Nations Development Group Guidelines on Indigenous Peoples' Issues*, 2008.

are not considered as indigenous peoples". Data and information are often not sufficiently disaggregated. Furthermore, development indicators do not always reflect indigenous peoples' experiences and perspectives, but are instead based on systems created by mainstream societies, which are not always relevant for assessing indigenous peoples' particular context and experiences. Indigenous peoples are often not consulted in the decision-making process related to the collection and disaggregation of data that directly concerns them.⁵¹⁴

There is therefore a need to adapt and disaggregate MDG targets to ensure rights of indigenous peoples are given sufficient attention. There is also a need to add complementary indicators to measure existing targets, where needed, and to ensure rights of indigenous peoples are adequately highlighted.

4.2. Promote greater equality and empower indigenous peoples

According to international human rights standards, indigenous peoples, as all human beings, are entitled to enjoy all human rights and fundamental freedoms including both civil and political rights and economic, social and cultural rights. Indigenous peoples have the right to equal treatment and to benefit, as any other citizen of the State in which they live, from economic development and other progress. These rights apply to all indigenous peoples, i.e. men and women, children and adults alike.

In practice, however, indigenous peoples have often not been treated equally and face social exclusion.⁵¹⁵ Dominant sections of society consider indigenous people inferior, and often deny them equal opportunities with respect to livelihood and education. Further, indigenous women continue to suffer from multiple forms of discrimination, both as women and as indigenous individuals. They are subjected to extreme poverty, trafficking, illiteracy, lack of access to ancestral lands, non-existent or poor health care and to violence in the private and the public sphere. This violence is exacerbated when indigenous communities find themselves in the midst of conflict and women become the target of violence with political motives, when going about their daily work, such as fetching wood or collecting water for the family. Ensuring indigenous peoples have equal opportunities requires States to take special or positive measures to compensate for historic injustices and disadvantages. The purpose of special positive measures is to bring living conditions of indigenous peoples to the same level as those of others in society. The objective should aim for development reflecting indigenous peoples' vision, perspectives and strategies of self-determining development within the framework of respect for basic human rights and fundamental freedoms.⁵¹⁶

514 Edilberto Loazia, "Data and Indicators for Indigenous Issues", World Bank Conference on Poverty and Indigenous Peoples, 2006, p.10.

515 Vital Bambazne, "Dimensions of Poverty and Well-Being among Indigenous Peoples in Africa", World Bank Conference on Poverty and Indigenous Peoples, 2006, p. 9.

516 Victoria Tauli-Corpuz, "A Framework for Advocacy in Support of Indigenous Peoples' Visions, Perspectives and Strategies for Self-Determining Development", in UNDP, *Indigenous Peoples and the Human Rights-Based Approach to development: Engaging in Dialogue*, 2007, p.96.

In an innovative move, the United Nations Development Programme, the central Chinese government and a cosmetic firm named Jala Group, have recently launched an initiative offering support and guidance to Mosuo women for launching and maintaining successful businesses. The focus of this initiative is to provide management skills to organize a workforce and make products by providing training workshops. The programme aims to help the community build a sustainable, culture-based ethnic minority business model, reduce poverty and instil a sense of pride among Mosuo women toward for culture that will inspire them to protect it.⁵¹⁷

4.2.1. Respect for individual and collective rights of indigenous peoples

Various international treaties protect individual and collective rights of indigenous peoples. These rights are indispensable for their existence, well-being and holistic development as peoples. Policies and programmes designed for implementation of MDGs could result in violation of rights of indigenous peoples. A large developmental project aimed at achieving MDGs for instance could result in the violation of rights of indigenous peoples. Therefore, a need exists for respecting the rights of indigenous peoples while designing developmental programmes and policies.

The collective rights of indigenous peoples include recognition of distinctive histories, languages, identities and cultures and the collective right to lands, territories and natural resources they have traditionally occupied and used, as well as the right to collectively held traditional knowledge. In establishing and fulfilling collective rights for indigenous peoples, the international community has affirmed such rights should not conflict with existing international human rights norms but complement them, i.e., the implementation of collective human rights should not adversely affect the implementation of individual rights.

4.3. Participation and representation (free, prior and informed consent)

Indigenous peoples are often unable to participate fully in public life and are rarely present in decision-making bodies of the State. In order to address this situation and promote social inclusion and political participation, Governments are increasingly revising laws and introducing special measures to combat prevailing discrimination and improve opportunities for indigenous peoples. These measures include targeted programming, special grants for education, consultative mechanisms and reserved seats in decision-making bodies, including national parliaments.

The Second International Decade of World's Indigenous People called for promoting full and effective participation of indigenous peoples in decisions which directly or indirectly affect their lifestyles, traditional lands and territories, cultural integrity as indigenous peoples with collective rights or any other aspect of their lives, considering the principle

517 Zhou Wa, *An end to matriarchy?*, China Daily, 27 Sept 2011.

of free, prior and informed consent.⁵¹⁸ The rights to participation and to free, prior and informed consent are an integral part of a human rights-based approach. The principle of free, prior and informed consent of indigenous peoples to development projects and plans affecting them, is emerging as a standard to be applied for promoting and protecting their rights in the development process.⁵¹⁹ This principle should be respected and used as a methodology whenever designing programmes and projects that directly or indirectly affect indigenous peoples, as defined in the context of a human rights-based approach. According to UNPFII, FPIC should be sought sufficiently in advance of commencement or authorization of activities, taking into account indigenous peoples' own decision-making processes in all phases of a project. Information should be accurate and communicated in an accessible and understandable form, including translation into languages widely understood by indigenous peoples. Information should be distributed in a format that takes into account oral traditions of indigenous peoples and their languages. Consent to any agreement should be interpreted as implying indigenous peoples have a relative understanding of the terms of agreement.⁵²⁰

For indigenous peoples, being part of the decision making process is fundamental to meeting development challenges—in particular, the achievement of the MDGs. Participation and free, prior and informed consent are therefore key to realizing the rights of indigenous peoples and the MDGs.⁵²¹ Articles 18 and 19 of the UNDRIPs emphasize the principles of participation and free, prior and informed consent. Article 6 of ILO Convention No. 169 speaks of “consultation with the peoples concerned” to be “carried out in good faith and in a form appropriate to the circumstances ... with the objective of achieving agreement and consent to the proposed measures”. Para 1 of OP 4.10 of World Bank provides the borrower must engage in FPIC with indigenous peoples for Bank-financing relative to indigenous peoples.

Further, the UNPFII has called for increased and improved participation by indigenous women in activities related to a broad range of themes, including the following: (a) Legal processes, including the creation of mechanisms to enable indigenous women to take advantage of available juridical instruments and encouraging the appointment of qualified indigenous women to decision-making positions; (b) Governance and decision-making structures at all levels ensuring equal access of indigenous women to decision-making and governmental bodies; (c) Economic and social development, including development processes such as the common country assessment, the United Nations Development Assistance Framework, and poverty reduction strategy papers; (d) Human rights processes such as reporting to the Committee on the Elimination of Discrimination against Women

518 The Second International Decade of World's Indigenous People, 2004, main objective, available at <http://www.un.org/esa/socdev/unpfii/en/second.html>

519 Ibid., p.98.

520 UN Department of Economic and Social Affairs, *Resource Kit on Indigenous Peoples' Issues*, 2008, p.17.

521 Ibid.

and other relevant human rights bodies; (e) Dialogue on climate change; and (f) Health education programmes for indigenous women and men.⁵²²

While mechanisms for participation can vary, participation should not be confined to mere consultation. For example, Indigenous peoples' representatives should be involved with other sectors of civil society and conduct meetings with government officials. Specific and culturally appropriate consultation mechanisms can also be established through the creation of consultative groups of indigenous leaders to advise governments at all stages of the programming process, or through consultations at the local level.⁵²³ The idea, as explained by the Inter-Agency Support Group, should be to develop mechanisms at the country level giving indigenous peoples a greater sense of ownership within intergovernmental organizations and to enable full participation of indigenous peoples in activities directly affecting them.⁵²⁴

The government of the Philippines has enacted the Indigenous Peoples Rights Act. According to the law, consent of indigenous peoples is required for the following activities:

- exploration, development and use of natural resources;
- research and bio prospecting;
- displacement and relocation;
- archaeological explorations;
- policies affecting indigenous peoples like Executive Order 263 (Community-based Forest Management);
- entry of military.

The definition of prior informed consent in the Indigenous People's Rights Act of the Philippines provides that:

- all members of the community affected consent to the decision;
- consent is determined in accordance with customary laws and practices;
- freedom from external manipulation, interference or coercion;
- full disclosure of the intent and scope of the activity;
- decision is made in language understandable to the community; and
- decision is made in process understandable to the community.

4.4. International Development Cooperation and Indigenous Peoples

While principal responsibility for the realization of the right to development and human rights rests with each state, rich States have some responsibilities towards the realization of human rights in poor countries within the context of international cooperation. These responsibilities arise, inter alia, from the provisions relating to international assistance and

522 UNPFIs, Analysis prepared by the secretariat of the Permanent Forum on Indigenous Issues: indigenous women, E/C.19/2009/8, 2009.

523 UNDG, *United Nations Development Group Guidelines on Indigenous Peoples' Issues*, 2008.

524 UN Department of Economic and Social Affairs, *Resource Kit on Indigenous Peoples' Issues*, 2008, p.17.

cooperation in international human rights law. Importantly, international assistance and cooperation should not be understood as meaning only financial and technical assistance: it also includes the responsibility of rich States to work actively towards an international order that is conducive to the elimination of poverty and the realization of human rights.

The parameters of international assistance and cooperation are not yet clearly defined. However, in principle, international assistance and cooperation requires individuals in a position to assist should first, refrain from acts that create difficulties for indigenous peoples achieving full realization of human rights and second, take measures to remove obstacles that impede indigenous peoples' realization of their human rights.

Both governments and international development agencies have responsibilities for including indigenous peoples in development processes. Numerous policies have been adopted over the years by World Bank, the Asian Development Bank, United Nations Development Programme, and a number of bilateral donors for the inclusion of rights and interests of indigenous peoples in development programmes. These policies and strategies reflect positive steps helping place indigenous peoples on the international development agenda.⁵²⁵

Nevertheless, there are challenges with regarding implementation of these strategies, including lack of mechanisms for securing participation of indigenous peoples, paucity of specific statistics or data available on the situation of indigenous peoples and lack of knowledge for staff in development institutions and government on indigenous issues. For indigenous organisations, it remains a challenge to push further participation in development processes, particularly as the process becomes more centralized at the national level through the Aid Effectiveness Agenda.⁵²⁶

4.5. Effective accountability

International human rights empower individuals and communities by granting entitlements and placing legal obligations on others. Critically, rights and obligations demand accountability: unless supported by a system of accountability, rights and obligations will be no more than window-dressing. Accordingly, a human rights approach emphasizes obligations and requires all duty-holders be held to account for their conduct.

States and other duty-bearers are answerable for the observance of human rights and must comply with legal norms and standards enshrined in human rights instruments. When States fail to do so, aggrieved rights-holders are entitled to institute proceedings for

525 ILO, *Indigenous and Tribal Peoples' Rights in Practice*, 2009, p.119.

526 Ibid.

appropriate redress before a competent court or other adjudicators in accordance with rules and procedures provided by law.⁵²⁷

Accountability mechanisms in the context of MDGs are weak. One possible vehicle for accountability is the country-level Millennium Development Goals report. Several such reports have been published over the years.⁵²⁸ These Reports are emerging as one of the most important instruments for tracking and monitoring progress at the national level. They are, however, primarily intended for “awareness advocacy”, rather than policy formulation or accountability. These reports can be used to hold governments to account with respect to MDG commitments in relation to indigenous peoples.

Human rights, including the rights of indigenous peoples, can strengthen weak accountability mechanisms presently associated with all MDGs. Provided the mechanisms are adequately briefed and resourced, existing human rights accountability mechanisms can consider the adequacy of what States are doing to realise MDGs in context of indigenous peoples. For example, examination by a human rights treaty body of a State’s periodic report could consider those goals falling within the treaty body’s mandate. On country missions, special rapporteurs could explore mechanisms falling within their mandates. At the country level, a national human rights institution could establish a MDGs and Indigenous Peoples monitoring and accountability unit.⁵²⁹

It is the responsibility of the international community, and other actors as well, to identify appropriate, effective, transparent and accessible accountability mechanisms with respect to indigenous peoples and MDGs. If it does not, the chances of achieving the MDGs will be seriously diminished.

5. Conclusion and Recommendations

Policies and strategies that integrate the rights and aspirations of indigenous peoples are more likely to be effective, equitable, robust, participatory and meaningful to indigenous populations around the world. These policies and strategies should be culturally appropriate, taking into account the right of indigenous peoples to exist as distinct peoples. States should adopt national processes to implement the MDGs with the full and effective participation of indigenous peoples.⁵³⁰

527 Victoria Tauli-Corpuz, “A Framework for Advocacy in Support of Indigenous Peoples’ Visions, Perspectives and Strategies for Self-Determining Development”, in UNDP, *Indigenous Peoples and the Human Rights-Based Approach to development: Engaging in Dialogue*, 2007, p.99.

528 MDG Reports and Indigenous Peoples: A Desk Review, 2006-2008, available at <http://www.un.org/esa/socdev/unpfii/en/publications.html>

529 Report of the Special Rapporteur on the right to the highest attainable standard of health, UN Doc. A/59/422, 2004, para 40.

530 Report on the fifth session UN Permanent Forum on Indigenous Issues, UN Doc. E/C.19/2006/11, 2006, para 8.

In particular, Governments and other actors should make every effort to ensure:

- (a) The disaggregation of data by ethnicity, gender, socio-economic status, cultural or tribal affiliation and language;
- (b) The active and informed participation of indigenous people in the formulation, implementation and monitoring of MDGs policies and programmes;
- (c) As far as possible, the availability of programmes and projects, and MDGs-related information, in languages spoken by indigenous peoples;
- (d) Strengthening of MDG programmes in indigenous communities, including adequate budget allocation and outreach services to indigenous communities;
- (e) Training of government officials and others to raise awareness of, and sensitivity towards, issues of ethnicity and indigenous culture;
- (f) The establishment of monitoring and accountability mechanisms in indigenous communities in relation to abuses and neglect in the health system.

For no other group of people does the attainment of MDGs matter more than for indigenous peoples. MDGs offer a powerful tool for converting the rights and aspirations of indigenous peoples into reality. Together we can ensure realization of the rights of indigenous peoples and achieve the MDGs.

Legal Identity and MDG Implementation

Tiernan Mennen

1. Introduction

Possession of legal identity is a fundamental threshold for gaining access to a range of goods and services with the potential to improve people's lives and help countries achieve the Millennium Development Goals (MDGs). Legal identity establishes citizenship and/or residency and can provide access to education, health care and social welfare, registration of title to land, receipt of pension or social security, obtaining utility connections, enforcing inheritance rights, and even registration and protection of small businesses. Legal identity also protects human rights such as freedom of movement, property rights, and the right to vote; helps limit crimes against minors such as trafficking and child labor; and improves government databases for better development planning and the adequate and equitable distribution of public resources to those who need it most.

Legal identity is a cornerstone for access to justice. Despite the unequivocal provision in the Universal Declaration of Human Rights, tens of millions of people lack a formally documented legal identity. Yet, the number of people without legal identity is shockingly high in many countries. It is estimated more than seven in ten children in the world's least-developed countries do not have birth certificates or other registration documents. Over half of all births in South Asia go unregistered, leading to complications for obtaining legal identity later in life. In Nepal, for example, 80% of citizens are unregistered and as a result are often denied lawful access to education, employment opportunities, and the political process.⁵³¹

Lack of legal identity prevent the most marginalized and vulnerable people from accessing critical healthcare and education services, furthering the cycle of poverty and frustrating efforts to meet the MDGs. Social welfare and public services target the same disadvantaged populations facing the greatest barriers for obtaining legal identity. Rather than receive documentation enabling disadvantaged people to obtain benefits, they remain stuck in legal purgatory and are unable to take advantage of anti-poverty programs specifically intended for them.

2. What is Legal Identity?

Legal identity verifies the legal existence of a person vis-à-vis the state. Such identity entails benefits and protection accorded to citizenship, residency, or other national status. Legal identity is a recognized human right, but is also a gateway right facilitating the enforcement of other rights. Ultimately, legal identity is a complex combination of factors enabling a person to access rights, benefits, and responsibilities.

⁵³¹ Deprived of an individual *identity*: citizenship and women in Nepal. Mona Laczó, 2003

Legal identity includes the legal registration and documentation of name, personal data, date of birth, and unique characteristics such as biometric data or an identifying number. Legal identity typically accords personal possession of an official, government-issued and recognized identity document containing basic information attesting to the holder's name, age, status, legal relationship(s), unique identification number and photo form of identification. Most countries have a range of identity documents serving a variety of purposes from birth, marriage, and death certificates to passports and professional licenses. Birth certificates are, however, seen as the preferred standard and are the most common form of establishing legal identity.

The lack of legal identity, in particular birth certificates, is a chronic problem worldwide, especially in parts of Asia. In 2008, UNICEF estimated approximately 36% of all births worldwide went unregistered.⁵³² South Asia had the largest number at 63% (about 23 million)⁵³³, representing 47% of all unregistered births worldwide. 19% of all births in East Asia and the Pacific and 55% in Sub-Saharan Africa were unregistered. According to UNICEF in India, only 41% of children under five were registered at birth. There is a substantial urban rural difference in registration with 59% of urban children under five being registered at the time of the survey versus only 35% in rural areas.

An unregistered birth results in no birth certificate and complicates the process of obtaining legal identity later on in life. The inability to prove identity results in a hampered capacity to exercise a person's full rights, including access to entitled public services. Lack of legal identity as an adult can be depicted in a few ways: a) absolute—when the person's birth was not registered and therefore they have no birth certificate or identity document; b) relative—the person's birth was registered but no registration document was received due to a registration or other error, and thus never obtained a national identity document, c) partial – the person has a national identity document but it is incorrect in one of many ways preventing the person from exercising his or her rights.⁵³⁴

Legal Framework

Almost all countries have international obligations to provide legal identity to their citizens. The Universal Declaration of Human Rights (UDHR) provides for the universal right to nationality (Art. 6) and the right to be considered a citizen of some state (Art. 15). The International Covenant on Civil and Political Rights (ICCPR) provides for "the right to be recognized as a person before the law" (Article 16). Article 24 provides for the rights for children (status as minors, nationality, registration and name). And Article 7 of the Convention on the Rights of the Child (CRC), states, "The child shall be registered immediately after birth and shall have the right from birth to a name [and] the right to acquire a nationality." Article 7 contains a second paragraph explicitly requiring state parties to ensure implementation of this right.

532 UNICEF State of the World's Children, 2008

533 This number reportedly increased to 69% according to the 2010 UNICEF SOWC

534 See. *Democratic Governance, Citizenship, and Legal Identity, Linking Theoretical Discussion and Operational Reality*, Mia Harbitz, Bettina Boekle-Giuffrida, Working Paper, Inter-American Development Bank, May 2009

All countries have corresponding national legislation and norms for the registration of persons, their vital events, and the granting of legal identity. Most nations also have institutions regulating and enforcing these procedures and requirements, to provide processes by which citizens can access documentation proving their legal existence.

Institutions and Procedures

Civil registries are typically the most important institution for documentation and birth registration. The civil registry fills various functional roles within the state including, establishing legal identity; providing basic demographic statistics; providing the basis for the electoral registry; and, in many countries, access to social programs.

Birth certificates are generally preferred as legal identity because they document age, place of birth, and familial relationships from the very beginning of life. They are typically administered through civil registries. Other identity documents, such as citizenship certificates, ID cards, driver's licenses, and family and lodging books, are often used in place of birth certificates, and in many cases are easier to obtain. In some countries, legal identity can only be proven by a complete set of documents. In Guatemala, for example, the individual must have a certificate of live birth, a birth certificate, and a national identity card. Without a birth certificate it is nearly impossible to obtain an identity card.⁵³⁵

With respect to registration of births, there are various scenarios: a) registration that is free of charge within timeframes established by law in each country—generally between 30 and 60 days following birth, but sometimes up to 12 years; b) late registration, which occurs later than the time periods established by law in each country and generally requires the payment of fees and administrative and judicial procedures; c) the absence of registration or when no legal registration of birth exists—such situations usually need to be resolved by costly administrative and/or judicial processes; and finally, d) duplicate registration, the results of scant or deficient controls and security measures that enable duplication of registration and issuance of duplicate documents.

Causes pertaining to lack of legal identity can be nuanced—some people were never registered in the first place; some never obtained identity documents; some misplaced their documents and never obtained replacements; some had their records lost (e.g., deterioration or disappearance of registration books); some were registered but the personal data at the registry is incorrect (e.g., spelling errors in the first or last names—a situation which occurs frequently among indigenous populations because of the inadequate knowledge of indigenous languages on behalf of civil registry staff); and

535 *The Significance of Legal Identity in Situations of Poverty and Social Exclusion: The Link between Gender, Ethnicity, and Legal Identity*, Mia Harbitz, Maria del Carmen Tamargo, Inter-American Development Bank, November 2009

some have invalid documents due to changes in countries' documentation systems.⁵³⁶ The failure to register births in a timely fashion is the precursor to most problems related to lack of legal identity in adulthood.

Indigenous right to identity

The International Labour Organization Convention No. 169 protects the rights of indigenous populations worldwide. Specifically, it allows for self-identification and guarantees the right of citizenship without discrimination. Indigenous groups and ethnic minorities still suffer disproportionately from discriminatory practices that deny their legal identity and thus further their marginalization vis-à-vis the state. A lack of legal identity exacerbates social barriers to participation in the formal economy and receipt of public benefits. Examples include:

- **Thailand**—over half of the Hill Tribe population has been denied access to Thai citizenship as a result of excessively burdensome requirements to prove their nationality, even though the Hill Tribe people, who number over one million, were born in Thailand and have lived there all of their lives.
- **Bangladesh**—over 200,000 stateless Biharis initially granted citizenship at the time of Bangladeshi independence were later denied citizenship by the Bangladeshi government and today live in camps in Bangladesh.
- **Kuwait**—the government has excluded the *Bidun*—descendants from nomadic tribes and migrants who have lived in Kuwait for decades.
- **Burma**—members of the Rohingya Muslim minority, who have been living in the northern state of Ankara since the 12th century, are excluded from citizenship by the 1982 citizenship law, which provides several categories of citizenship, none of which the Rohingya are deemed to satisfy.
- **Middle East**—Palestinians in Syria and other Arab states have been barred from acquiring citizenship.
- **Russia**—regional authorities in Krasnodar Krai have arbitrarily denied approximately 13-16,000 Meskhetians, a Turkish-speaking Muslim ethnic minority, all rights of Russian citizenship to which they are entitled as former Soviet citizens.
- **Kenya**—the Nubian community, composed of more than 100,000 descendants of persons originally from the territory of Sudan who were resettled by the British colonial government, live as *de facto* stateless persons without adequate legal protection as they are systematically denied their right to Kenyan citizenship and to own land.⁵³⁷

Much is made of the chronic and growing problem of statelessness – where individuals do not have recognized legal identity in any country and are continuously deported and

536 *Más allá de los promedios: afro descendientes en América Latina. Los afroecuatorianos*. Editors: Josefina Stubbs and Hiska N. Reyes. Washington DC: The International Bank for Reconstruction and Development/World Bank, 2006

537 See. *Human Rights and Legal Identity: Approaches to Combating Statelessness and Arbitrary Deprivation of Nationality*, Thematic Conference Paper, Open Society Justice Initiative, May 2006, (available at: <.....>)

relocated to other countries. This chapter will deal less with statelessness and international migration themes and more with domestic processes that impede access to legal identity for citizens.

3. Barriers to Legal Identity

A range of obstacles contributes to a lack of legal identity. Economic barriers, geographic isolation, burdensome procedures, socio-cultural barriers, discriminatory laws and practices, institutional deficiencies, and a lack of adequate information about the benefits of legal identity all serve to discourage or prevent people, especially the most vulnerable groups, from attempting to register themselves and their families.

A birth registration document is the first and founding document of a chain of rights that should be gradually granted in one's lifetime. Ideally, every child should be registered at birth and thereby have automatic access to all citizenship rights. In reality, this does not always happen. Without a birth registration document, access to all other documents, such as a passport or driver's license, will be either denied, complicated, or associated with extra administrative or legal costs.

Economic barriers

While registration of birth is an obligation of the state and technically free in many countries, the reality is that most poor, rural and indigenous populations lack access to government registry offices and would incur considerable travel expenses to register birth of their children. Most births still do not occur in hospitals and even when they do, there is no system for automatic birth registration. In addition, many countries charge fees for registration.

Countries typically have a 30 to 60 day requirement for registering a birth, after which a more complicated application is required. Late registration of both children and adults requires extemporaneous creation or replacement of birth certificates and implies considerable administrative procedures. Often, a series of affidavits must be generated, necessitating the hiring of a notary public and/or attorneys. This cost is too high for many families to bear.

Corruption or rent-seeking, often by local officials or elites, can create additional economic barriers for access to legal identity. In Bangladesh, for example, procedural barriers help construct additional economic barriers. Citizens requesting legal identity or late registration of a birth are required to apply for a recommendation letter from a local official such as a mayor. Applicants complained that they were often unable to obtain the required recommendation without paying a bribe. Those who cannot provide cash nor goats are denied legal identity.⁵³⁸

538 See, *Legal Identity for Inclusive Development*, eds. Caroline Vandenabeele and Christine V. Lao, Asian Development Bank, 2007

Geographic barriers

Lack of legal identity is particularly high in rural areas throughout the world. In India studies have shown up to a 24% difference between rural and urban registration. In parts of Latin America, the number of unregistered rural births is triple the amount of urban births.⁵³⁹ Government legal identity campaigns often fail to access rural areas and remote populations. A lack of access to government offices, civil registries, lawyers, and public notaries in rural areas compounds gender, ethnic and other barriers, particularly for attempts to retroactively register a birth or establish legal identity.

The establishment of legal services offices in rural areas addressing legal identity among other issues has demonstrated a positive impact in strengthening identity in remote and disadvantaged populations.⁵⁴⁰

Procedural barriers

Various mechanisms, procedures, and administrative arrangements governing the granting of birth certificates, revision of faulty legal identity, and retroactive establishment of identity can severely hamper legal identity efforts. These procedures raise costs, take up time, serve as disincentives, or represent insurmountable barriers that disproportionately affect economically and socially disadvantaged groups. They also create an environment for rent seeking by public officials. Paying bribes to obtain or change identity documents is a normal practice in countries throughout the Asia region.

Most births are not registered immediately after their occurrence (see example in Figure 1). Yet many countries have procedural burdens for late registration of both children and adults requiring production of affidavits and sometimes references from government officials. This results in substantial delays, extra costs, and exposure to rent-seeking.

⁵³⁹ Supra note 5

⁵⁴⁰ See. *Mystery of Legal Empowerment: Livelihoods and Community Justice in Bolivia*, Tiernan Mennen, Legal Empowerment Working Paper, no. 6, IDLO, 2009

Figure 1.

Registration of Births in Ramgram Municipality, Nawalparasi, Nepal⁵⁴¹

	Before 35 days	After 35 days	Total
2000–2001	62	396	458
2001–2002	34	409	443
2002–2003	37	370	407
2003–2004	42	661	703
2004–2005	48	575	623
2005–2006	15	438	453

For example, some countries have been able to reduce procedural requirements by allowing birth registration at any time up until adulthood, or by reducing the number and/or nature of affidavits. Allowing less formal testimony of someone’s identity has associated risks of abuse, but also offers a wider benefit of increasing access for poor and indigenous peoples. There is sometimes a tradeoff between inclusiveness and precision.

Discriminatory laws and practices

Discriminatory laws, practices, and attitudes toward registrants, particularly women and minorities, create further difficulties and discourage potential registrants. Citizenship, birth registration as well as marriage and inheritance laws can contain discriminatory provisions undermining the goals of universal registration. However, the practices of officials at registries and other institutions are the leading cause of abuse. Additional procedural requirements facilitate discrimination by officials. For example, in many countries a migration certificate is required to obtain a legal identity document in a place other than the district where the father’s citizenship is registered.

Research has shown ethnicity and gender to be aggravating factors of the structural causes towards lack of legal identity.⁵⁴² In Guatemala, for example, only 10% of the entire population is unregistered compared to 40% of the indigenous population.⁵⁴³ Migrants and minority groups are often denied legal identity or registration of the birth of their children. In Syria, ethnic Kurds are systematically denied identity documents and citizenship. Local control of citizenship registration can encourage discriminatory practices by local majority groups over minorities or outsiders.

Women are systematically discriminated against in registration, particularly if they are also a minority, indigenous or rural poor. In some countries, only male or paternal relatives

541 Supra note 7 at 48

542 Supra note 5

543 Id.

can apply for the registration of a relative's birth, even if the father is unknown, residing elsewhere, or refuses to provide assistance. Officials have also been found to refuse transfer of ownership of inherited property to female applicants if their family name differed from that of their deceased husbands.⁵⁴⁴

Social and cultural barriers

Cultural norms and lack of awareness can complicate or provide additional disincentives to registration and obtaining legal identity. Language barriers for ethnic minorities impede communication of the importance of legal identity. Some religious and racial minorities as well as immigrants fear obtaining legal identity out of concern that government recognition could enable discriminatory treatment.

Parents often do not associate birth registration with access to benefits such as education and healthcare. There is often a stigma for single mothers associated with registering children born out of wedlock. In many instances, girls are under-registered because they are perceived as not desirable or requiring extensive education. Many people will remain unmotivated to register unless there are obvious payoffs for doing so.

Weak institutions

Civil registries are essential institutions for maintaining accurate birth registration and identity records. However, registries often lag behind other institutions with respect to modernization and budgetary support, despite the ramifications for public service planning, elections and other aspects of government that depend on demographic information. Establishing and maintaining a complete, effective, and accessible civil registration system requires sufficient resources, political priority, enforcement capacity, and administrative infrastructure. Registries are typically understaffed and have low national coverage, particularly in rural areas. Low levels of information processing technology and expertise and the persistence of manual practices have also plagued reforms.

Centralization of civil registries creates a number of benefits for consistency, accuracy and safety of information across countries, particularly those with high rates of migration and urbanization or displaced populations. However, centralization can create its own technological barriers such as a lack of reliable, consolidated databases, electronic infrastructure failures, and inadequate electronic connectivity between district and municipal offices. Despite centralization and computerization efforts, most people have to return to their place of birth to properly register or change identity documents.

Institutional deficits also relate to how countries register births. Hospitals and maternal health centers are often the frontline for birth registration, yet often they do not have registration capabilities, requiring families to instead register separately with the civil

544 Supra note 7

registry or appropriate authority. Even when hospitals are able to link birth records with the central registry, over half of all births in developing countries occur outside the public health system.

Political barriers

Capacity-building efforts and direct registration efforts are far too often frustrated by political barriers excluding targeted segments of the population from full participation. This problem is particularly acute for groups denied citizenship on grounds of ethnicity or status as refugees or migrants. Examples of groups having no formal citizenship rights, or limited citizenship rights, include the Kurds in Syria and Turkey, the Palestinians throughout the Middle East, Nubians in Kenya, Bihari in Bangladesh and Rohingyas in Myanmar. Political barriers to legal identity can also exist simply due to entrenched interests that would suffer should registration affect more constituents from areas that support the opposition (e.g., indigenous populations in the Andes and Central America). Formal registration is a threat to the incumbent elite because it would incorporate greater numbers of poor and indigenous.

Understanding the country context, including the incentive structure of institutional actors, is essential. Establishing and maintaining a complete, effective, and accessible civil registration system requires sufficient funding, human resources, political priority, enforcement capacity, and administrative infrastructure.

4. Legal Identity Impacts

Having a document that verifies one's identity is fundamental for the ability of any citizen to protect their rights and access benefits and services. Identity provides legal protection and redress for violations by allowing access to state institutions such as courts and law enforcement agencies. Identity also provides access to social welfare, health care, professional opportunities and a range of other public services and entitlements. Having a legal identity is increasingly important as countries strive to improve services for the poor and meet MDG obligations.

Without proof of one's legal identity, it is difficult, if not impossible, to exercise and enforce one's full set of rights and obtain public benefits and opportunities. Consequently, legal identity can be construed narrowly to refer to the full set of identity documents that prove one's status as a legal person and allow access to institutions and benefits. There are often multiple required documents depending on the service or benefit. Most documents derive from a valid birth certificate, but not all are easy to obtain even with registration.

Protection of Rights

Legal identity is critical to protecting a litany of human rights and facilitating enforcement of laws and regulations intended to protect the poor and disadvantaged. Weak civil registration has been linked to patterns of exploitation and abuse related to child labor, underage marriage, and trafficking. Registration of land and property is also dependent on having legal identity. There is an extensive corpus of laws to protect children, yet few cases of violations actually find their way into the courts. Children's rights are often dependent on being able to prove age based on a valid birth certificate. Laws seeking to protect children from exploitation and abuse include, juvenile justice sentencing and due process requirements, child labor laws, anti-child trafficking efforts, and laws banning child marriages. All depend on verification of age. Such laws are often violated with impunity. Moreover, access to courts, prosecution, and public defender services to enforce these rights is contingent upon being able to demonstrate legal identity and/or citizenship. Legal recognition aside, victims may still not have the financial means and know-how to access the legal system, or may view lack of prosecution as more socially acceptable.

Property rights and the ability to register, sell and inherit land is a major impetus for acquiring legal identity. In many countries, lack of a birth certificate can significantly impair access to land markets. Lack of legal identity documents can lead to lengthy and expensive litigation for inheritance of land. In Bangladesh, for example, there are a large number of unnecessary legal proceedings taking place simply because there is no record of birth which presents a significant barrier to obtaining a succession certificate.⁵⁴⁵

Access to Benefits

A major advantage generally associated with birth registration is that it enables access to benefits and opportunities. The premise is that laws or policies make access contingent on providing formal proof of one's identity through an identity document, primarily a birth certificate.

545 Id.

Figure 2 outlines the range of benefits and activities, presuming they are available, requiring a birth certificate or other form of recognized legal identity document.

Figure 2. Legal Identity Benefits and Rights		
Vital Events	Civic Events and Rights	Social Rights and Benefits
Birth registration	Voting	National welfare scheme benefits (ex., National Rural Employment Scheme – India)
Death	Military service	Family cash transfer programs
Adoption	Tax registration (ID) and payment	Admission into public education institutions
Marriage registration	National ID	Services at public hospitals and health centers
	Passport/travel documents	Employment in the formal sector
	Right to legal protection/court access	Joining a union
	Protection against exploitation, child labor, and trafficking	Obtaining an export or import license
	Juvenile justice protection	Obtaining a contractor’s license
	Enforcing inheritance rights	Obtaining trade and other professional licenses
		Obtaining drivers’ licenses
		Registering motor vehicles
		Registering a small business
		Registering land ownership
		Opening a bank account
		Connecting to a utility line

Public benefit programs are designed to target poverty. Lack of access to programs due to lack of legal identity documents undermines their mission. For example:

- A child who lives in a poor, rural and/or indigenous family that cannot prove his or her identity with a birth certificate will more likely be excluded from receiving a scholarship and possibly prevented from attending school, especially if suspected of being an immigrant or too young/old.
- An elderly person that is poor and/or indigenous and does not have an identity document will not be able to access economic assistance from publicly-funded social security schemes.
- A poor indigenous mother with minor children will be excluded from access to public welfare and family economic assistance (cash transfer) programs if she cannot prove her legal identity by means of an identity document, although she is part of the target population that the program is aimed to assist.

- A recently unemployed worker will not be able to receive unemployment benefits or access to government employment schemes – such as the National Rural Employment Guarantee Act.

While legal identity is a fundamental precursor to obtaining benefits, it is not a magic bullet. Barriers to access are often varied, complex and context-specific. Possession of a legal identity document does not guarantee access to services. Depending on the country as well as the benefit, service, or opportunity in question, budgetary constraints and other barriers (geographical, discriminatory practices) often make government services unavailable. Those services that are available can, in many instances, be obtained without presenting a legal document. Health treatment and school registration, for example, are often provided regardless of documentation.

The nexus between legal identity and access to benefits and opportunities depends on certain underlying assumptions: 1) services, benefits, and opportunities actually exist; 2) laws, policies, or practices make access strictly contingent on the possession of a birth certificate or identity document; 3) available identity alternatives are not acceptable; and 4) other more fundamental economic, political, and social barriers do not impede access.⁵⁴⁶

Public Planning

Accurate demographic information provided by civil registries is an essential element of public planning for development, funding and provision of public services. Civil registration systems enable government agencies to properly plan and define development priorities and provide for the proper allocation of resources and benefits, especially for poor and disadvantaged communities. However, low registration rates, particularly in rural areas and among the uneducated and impoverished, make it impossible to plan based on vital statistics.

Many citizens lack legal identity and documents because of insufficient financial resources for registration services and, consequently, inadequate service coverage, especially in remote areas. From a budgetary perspective, this also means unregistered citizens do not pay income or payroll taxes and thus governments have less means to repair critical holes in the tax system.⁸ Moreover, if considerable numbers of citizens are unable to exercise their rights to vote and/or be elected to office, it will be difficult for a modern nation state to reach a higher degree of democratization.

Economic Growth and Millennium Development Goals

Legal identity has profound implications for achieving the Millennium Development Goals. As many of the MDGs relate to provision of public services for the poor and

⁵⁴⁶ Id at 8

disadvantaged, the inability of the poor to access these services due to systemic barriers is a critical consideration. Beyond access to public benefits, birth certificates and other identity documents are often required for sophisticated transactions with ramifications for economic opportunity. On a macro level, activities such as registration and land transfer, access to credit, starting and registering a business, getting a professional license, and opening a bank account directly affect economic growth and development.

According to an econometric study in Bolivia, Brazil, Colombia, Peru, and Nicaragua the pervasive problem of under-registration of births is central to poverty reduction. Children and adults without legal identity are more prone to lack of access to health, education, housing, and nutrition benefits guaranteed by public poverty reduction policies.⁵⁴⁷ The study shows children from low socioeconomic backgrounds face higher risks of being unregistered from birth to the age of five and that poverty and under-registration are strongly connected to each other.

The nexus between the MDGs and legal identity is pronounced in each of the seven goals, but is particularly strong for goals that relate to public service provision:

- **Goal 1: *Eradicate extreme poverty and hunger*** – poverty and hunger are byproducts of a range of structural issues, denial of human rights, and lack of access to public benefits and poverty reduction schemes. National welfare and cash transfer programs, especially for single mothers, can counter extreme poverty and hunger, but are often dependent on proof of legal identity or possession of a birth certificate. People most in need are also most likely to not have had a registered birth or able to afford late registration or subsequent administrative processes for obtaining a legal document. Inadequate birth registration and civil registry systems also hamper public planning efforts for relieving hunger and extreme poverty both by national governments and international relief organizations.
- **Goal 2: *Achieve universal primary education*** – primary education is often unavailable to people living on the margins who cannot prove the legal identity of their children. Lack of identity is also an aggravating factor for discriminatory practices that deny education to ethnic minorities, girls, or migrants.
- **Goal 3: *Promote gender equality and empower women*** – lack of legal identity disproportionately affects women and girls, denying them access to benefits and protection by the law from discriminatory practices. Many national birth certificate programs, especially for late registration, require information or presence of the father – a considerable obstacle for many single mothers.
- **Goal 4: *Reduce child mortality rates*; Goal 5: *Improve maternal health*; Goal 6: *Combat HIV/AIDS, malaria, and other diseases*** – public health-focused MDGs face various rights-related barriers curtailing their progress. Lack of accurate birth registration and access to legal identity also undermines demographic-based planning efforts to meet demands for health services. It also prevents individual barriers to health services requiring some proof of identity or citizenship. Obtaining a medical card allowing

547 Study Duryea, Oligati, and Stone (2006),

access to services is difficult without a birth certificate and can require days of travel to a government office where women, especially single mothers, are often harassed. Vulnerable populations such as displaced persons and indigenous groups have the greatest need but are most likely to be denied services due to lack of identity.

- **Goal 7: *Ensure Environmental Sustainability*** – community ownership, sustainable use and management of local natural resources is often denied by States, sometimes due to lack of access of persons and communities to legal identity, thus limiting their ability to register lands and concomitant resource rights.

5. Legal Identity Programming

Programming specifically targeted at increasing access to legal identity can have a multiplier effect on other development efforts, including the MDGs. However, it is also worth cautioning that legal identity is not the only or even a primary solution to development problems. There are many other barriers to receiving benefits and protecting rights, regardless of whether legal identity exists. For example, legal identity can help ensure access to benefits and livelihood opportunities, but such services, benefits, and opportunities must actually exist. Unfortunately, in many countries across the Asia region, these benefits are far removed from large segments of the population that rely on agriculture and the informal economy for their livelihoods.

Programming should appropriately consider underlying causes of various barriers to legal identity and design interventions. The barriers detailed here can generally be categorized under three primary causes:

- First, many countries lack an effective bureaucratic system for providing accessible, reliable, and low-cost registration services for all people who would like to formally register themselves with the state. This encapsulates a range of technical and management capacity, geographic, procedural and financial barriers.
- Second, the denial of legal identity is often the result of a deliberate interest in excluding certain groups from full participation in the economy and public sphere. Sometimes this exclusivity arises because of acute discriminatory practices. In other cases, such as those involving long-term migrant or refugee populations, the problem is more complex, and may implicate the policies of more than one state.
- Third, some poor individuals may lack formal legal registration because they choose not to take necessary steps to acquire it. Sometimes avoidance is rational and based on disincentives toward registration. In other cases, avoidance is due to lack of awareness of the benefits registration accords.

Programming efforts often focus on and advocate for universal birth registration as the primary means for ensuring legal identity. The reality of universal registration is, however, more complicated. Significant geographic, socio-cultural and discriminatory barriers exist in most countries that make complete formal registration impossible. Concurrently, many laws, procedures and institutions need updating, streamlining and modernization with potentially larger, more cost-effective benefits to provide legal identity for both adults and children.

This chapter groups programming efforts to strengthening legal identity into two categories—community empowerment and institutional support, or demand and supply. In this way, both community-based social programs and state modernization projects can address legal identity as part of an integrated approach to development.

A. Institutional and legal framework reforms

Programs that improve institutional capacity and address legal and procedural barriers can facilitate access to legal identity documents. Civil registries are a primary institutional focus. Lack of a consistent, comprehensive and centralized registration database creates gaps and duplication, especially for mobile populations in regionally diverse countries. In many countries citizens have to travel back to their birthplace to obtain identity records or to make revisions to erroneous identity documents. At the same time, overly centralized civil registries create access problems for rural populations. Travelling to regional or national capitals to register a birth is a major disincentive.

Improved capacity and autonomy of civil registries

Modernization programs can buoy under-resourced government agencies to introduce best practices and technology. In many countries creation of a single agency is needed to coordinate registration and provision of legal identity documents. Institutional support to registries, or the agency tasked with registration, should include expanding operations to underserved areas, improving connectivity of these offices, introducing better databases, computerization, and improving internal staff capacity and procedures to ensure accurate and reliable information.

Establish autonomous civil registration institutions. Without independence from the political arm of government, a civil registry will not develop the administrative capacity required to function adequately and will be at risk of a high turnover of personnel as successive, new governments assume power. A further risk in non-autonomous registries is manipulation and malfeasance for rent-seeking purposes or political maneuvering.⁵⁴⁸

Where an autonomous agency is not possible coordination between government agencies is essential. Many countries have multiple agencies with identification responsibilities. Each agency often administers databases for their specific function, without cross-checking statistical information. In these instances, programs should identify the benefit of creating a centralized agency that coordinates and ensures standardization and accuracy across each database.

Decentralization

Support to building institutional capacity should not ignore the role that local and municipal governments, religious institutions, and civil society play in providing information for registration. For example, church parishes, synagogues and mosques

548 Supra note 4 at 36

have played a key role keeping registries of births, marriages and other important life events in their communities. These resources have been used and trusted at the local level to create a legal or public identity. In Cambodia, commune councils submit monthly registration statistics to district level authorities, which in turn pass them to provincial level authorities. These authorities provide quarterly statistics to a central ministry by entering the registration data in a basic computerized spreadsheet with columns for population, numbers registered, and percentages registered. Such a system enables data to flow seamlessly from district and provincial levels to the central level.⁵⁴⁹

Programs should strive to establish standard mechanisms and procedures for collecting, documenting, transmitting, storing, consolidating, and analyzing data collected by local registrars and community partners. On the most basic level, this requires local registrars to effective procedures and mechanisms for verifying the accuracy of collected information. For example, all local registrars must consistently submit periodic reports to a central authority responsible for consolidating and analyzing data. Increased use of computers and digital databases at local registrars can assist this process, but often face additional obstacles.

Legal and Regulatory Reform

Legal and regulatory reform can relieve bottlenecks and inefficiencies preventing the efficient operation of civil registries thus creating barriers for poor and marginalized people when accessing legal identity documents. Legislation in most countries requires registration of a birth within 30 to 60 days. At any point beyond this legal grace period, registration becomes more complicated, costly, and lengthy. In some cases, this becomes too onerous, especially for the poor. Other changes to identification documents, such as correcting an erroneous name or wrong birth date often requires multiple affidavits, a judicial decision, and multiple trips to central government offices along with long waiting periods. Legal and procedural reforms should seek to increase the grace period for free birth registration – some countries have extended to 10 to 20 years—bearing in mind access issues for the poor and isolated. Other reforms include decreasing formal legal processes required for late registration or considering alternative forms of supporting documentation for fixing erroneous identification such as documents available through local councils or community leaders.

Programs should push to eliminate fees for birth registration and first applications for legal identification documents. The usual arguments supporting user fees for government services do not apply for legal registration. Legal identity is not a scarce resource constituting government regulations and measures for preventing abuse.

Child access to health and education programs is an important point of entry where the presence or absence of a birth registration document becomes an issue. It is precisely in these moments where health care and educational institutions should be more flexible

549 Unfortunately, in Cambodia this system is not integrated well into the civil registry and public planning efforts. Supra note 7 at 35

and legally allowed to accept children, even if the grace period for registration has passed. Regulatory reforms are needed in these instances to allow institutions and service providers provision of benefits without onerous identification requirements. Regulations should be altered to consider whether identification is needed at all, such as for health services, and if so, to accept a variety of documents, besides a birth certificate, as legal identification.

Examples of over-formalized and cumbersome national identity legislation are abundant. Restrictive legislation creates an environment furthering exclusion and informal economic activity. The 2004 Registration Act of Bangladesh, for example, mandates the production of birth certificates for a wide array of purposes—going to school, employment in the formal sector, registering to vote, formally owning land and registering title to land, opening a bank account, receiving public utilities, paying taxes, obtaining a drivers license or registering a car, obtaining a trade license, passports for international travel, etc.⁵⁵⁰ Requiring a birth certificate creates barriers to formal economic opportunities, driving growth of the informal sector, and limits democratic participation for the majority of the population born outside of hospitals with no registration of their birth.

B. Community-based programs

Large community awareness and direct documentation campaigns are essential for tackling the sheer size of legal identity gaps in many countries. They are often needed as an implementing mechanism for new legal and policy reforms to ensure reforms do not remain paper tigers. Developed and implemented correctly, reforms can also empower communities and citizens to build further momentum behind legal identity policy and legislation reform efforts.

Awareness-raising

Awareness-raising campaigns can serve to cultivate the agency of citizens to strengthen their own legal identity through better understanding of the benefits it provides to them and their children. Campaigns also increase knowledge of how to access identity documents, where to register births, and the availability of legal or other assistance for more complicated cases. Campaigns should be sensitive to cultural barriers, low literacy rates and the prominence of indigenous languages in many isolated communities and therefore incorporate methodologies such as radio programs and community drama groups to spread awareness.

Direct documentation

Civil registration and documentation campaigns can provide direct services to targeted, underserved populations that might otherwise face insurmountable barriers to legal

⁵⁵⁰ Supra note at 16

identity. Such populations include ethnic minorities, migrants, slum dwellers, rural communities, single mothers, and other isolated communities. Documentation campaigns should encourage alternative approaches such as the creation of ad hoc, itinerant and decentralized systems to register individuals.

Many countries conduct campaigns boosting registration in underserved areas, only to see results not sustained over time. A successful example is Chile, which has annual expeditions to the remotest areas of the country to register civil events and issue identity cards.⁵⁵¹ Strategic documentation campaigns containing long-term perspectives will increase the level of general awareness in society and demonstrate the benefits of registration, thus increasing demand and community-driven solutions. Campaigns should be timed, coordinated, financed, and organized in a way that allows a long-term impact, including cooperation with civil society organizations closer to the needs of local people, their languages, and cultural traditions.

In order to reach remote areas, it is equally important to develop strategies that diversify the support structure of civil registration with the help of local NGOs, churches, and community organizations. This has been the case in Nicaragua, an example highlighted later. Local organizations, such as the municipality, the church, or any other community organization, play important roles by encouraging and facilitating the process of civil registration for events such as birth, marriage, divorce, and death. In some countries, midwives and other individuals trusted by the community have been trained to register births and other civil events as an approach to increase the rate of registration.

Advocacy

Awareness-raising and access to registration services can sometimes have limited effect due to powerful underlying causes. Political and local power dynamics often create suspicion by the poor toward the state and its agents or create disincentives for registration that outweigh any benefits. Registration efforts could actually be counter-productive if they coerce or persuade poor people into registration that is ultimately against their own interests. Programs should be careful to identify these causes and analyze the underlying dynamics to design appropriate interventions. Programs encountering barriers will likely have to address wider structural inequalities and integrate legal identity efforts into broader legal reforms. Broad-based legal service programs that include support to policy reform, advocacy and litigation have shown promise towards addressing these issues.

Community legal services

Access to community legal services can often provide a key, missing component of a systematic approach to fighting barriers to legal identity. Legal support services are commonly needed to respond to the often onerous administrative and legal requirements for late registration or revision of faulty legal identification documents. Programs, such as

551 Supra note 5

community justice, legal aid and information centers can play an essential role helping marginalized communities access information on securing legal identity and provide legal representation necessary to ensure enforcement.⁵⁵²

Public-interest litigation

Lack of legal identity is sometimes a product of discrimination based on race, ethnicity, gender or other issues. In these instances, legal action is required to enforce rights. Systematic legal identity discrimination against entire segments of the population is common throughout the world, including the Roma in Europe, Dominicans of Haitian descent, and Nubians in Kenya. Immigrants are also systematically denied their right to an identity. There are active class action suits in both domestic and international forums according to violations of international treaties and *jus cogens*. International human rights litigation is most effective as part of a broader political strategy. International tribunal decisions are rarely enforced, but the visibility and political pressure they generate can stimulate compromise and mobilize domestic actors. Civil society plays an important state-monitoring role and creates the groundswell ensuring all people are recognized as 'people' in the eyes of the law.

C. Country Examples

UNDP has been implementing the Equal Access to Justice Project in **Sri Lanka** since 2006. The project has supported legal and mobile clinics through war-affected areas in the north and east. As part of its legal assistance work, the project supported mobile documentation clinics in priority areas by providing documentation services to large segments of the population, including large numbers of displaced people. The Project expands legal awareness on basic civil and human rights, as well as on the importance of civic documentation, through radio campaigns, schools, hospitals and other social services. There were over 29,000 legal identity beneficiaries in 2009 alone. The project provided a range of legal identity documents, including birth certificates, ID cards, marriage certificates, and titles to land. The Project also supports long-term sustainability through work with the Registrar General and the Registration of Persons Department to build capacity toward a national mechanism for the provision of civic documents.

A number of donor-funded initiatives have attempted to modernize registration systems in **Bangladesh**. Responsibility for birth registration is decentralized and delegated to various local level authorities, resulting in inconsistent standards and widely divergent practices. Handwritten ledgers of births are stored with local municipal corporations,

552 For more detail on legal service programs assisting access to legal identity see. *Mystery of Legal Empowerment: Livelihoods and Community Justice in Bolivia*, Tiernan Mennen, Legal Empowerment Working Paper, no. 6, IDLO, 2009 (details a USAID-funded access to justice program that made substantial impact on increasing legal identity in targeted rural areas through a broad based legal service program that conducted proactive legal identity campaigns)

dating back to 1913. A number of donor-supported initiatives provided computers, servers and other equipment as well as staff trainings in an attempt to digitize, centralize and standardize the central registry. However, human resource shortages and continued low capacity have resulted in most officials continuing to manually register people into ledgers. Central-level ministries rarely receive regular, reliable reports of registration from numerous local authorities.

The World Bank, UNICEF and other international actors have been providing support to the **Egyptian** government to help thousands of women obtain legal identity cards, relying on local NGOs and community-based organizations. These local organizations have proved particularly valuable in registering wary, marginalized groups, such as women and ethnic minorities.

UNICEF has worked in **Angola** for many years to strengthen national and local administrative systems and community capacity to increase access to legal identity. Local community workers are trained to write formal documents and to negotiate with government officials. Angola has introduced new systems such as specialized units within the civil registration system to work with excluded and vulnerable populations, created mobile registration units to access isolated communities, placed civil registration facilities in hospitals, and introduced a unique personal identification number used on all legal identity documents from birth certificates to driver's licenses.

6. What UNDP can do? Conclusion and recommendations

Access to legal identity is a crosscutting issue that should be addressed by all UNDP programs. Legal identity affects development objectives pertaining to virtually all of the Millennium Development Goals. The causes and ramifications are often not readily apparent upon initial program design, thus country offices should anticipate legal identity barriers and consider potential interventions. For example, empowering health care professionals to provide pre-natal care for registering newborns can substantially improve registration efforts. Recommendations for UNDP country offices include:

1. Analyze and be cognizant of registration requirements when designing development interventions, but at the same time ensure these interventions do not lead to unintended consequences.—Development partners must determine if national legal identity requirements could prevent mainstream development projects (e.g. in diverse areas such as health and education, development of small and medium enterprises, and delivery of utility services) from reaching target beneficiaries who lack necessary documentation.
2. When designing mainstream development projects in areas such as education, health, land rights, small and medium enterprise development services, and delivery of utility services, development partners must critically analyze the potentially negative impact of the existing identity regime, i.e., how could existing legal identity regulations limit the range of project beneficiaries?

3. Programs attempting direct registration campaigns in coordination with government partners should encourage outsourcing registration processes to local organizations, community councils, chiefs and elders, churches, mosques, and other places people engage in social and economic activities. In essence, make legal identity a part of everyday life. Local authorities play an important role providing local knowledge to the registration and legal identity process. Incorporating community councils, local chiefs, and community leaders can help civil registries and other centralized institutions liaise better with poor communities. Local leaders can provide information to the community as well as deal with state authorities.
4. Legal and regulatory reform is an important aspect for lengthening the period of birth registration as well as taking into consideration the objective and symbolic-cultural conditions of diverse population groups.
5. Incorporate legal service provision and strategic advocacy on legal identity issues, in particular to help drive reform of regulations to reduce barriers for the poor and marginalized.
6. Institutional improvements to improve the quality of civil registration depend not only on the individual agency and how it performs independently, but also on the importance of communication and coordination between agencies.
7. Complementary reforms are needed to make legal identity meaningful. Legal identity documents can accomplish little by themselves but they can be an important component of a larger reform agenda for promoting inclusive development.
8. Understanding the country context, including the incentive structure of institutional actors, is essential.
9. Unless identity documents serve a higher purpose and have apparent relevance to people's daily lives, people are unlikely to take the time, money, and effort to register.

Legal Empowerment and Organization of Vulnerable Groups: A Personal Essay Based in Insights from Three Decades of Advocacy

Madhu Purnima Kishwar

The following chapter is based on a presentation given by Madhu Purnima Kishwar at a regional workshop on Ways and Means to Realize Social and Economic Rights at the Asia Pacific Regional Centre of UNDP in Bangkok on 6 September 2011. It is a personal account of three decades of advocacy on behalf of India's rural and urban poor. It offers a type of "institutional and context analysis" approach to the discourse on legal empowerment, legislative and institutional reform and access to justice. In its sober and pragmatic tone it represents a reality check to what is sometimes perceived as the idealistic and euphemistic manner such issues are at times discussed among development professionals.

Kishwar describes various insights she and her organization, Manushi, have gained over three decades working on reforming inheritance legislation and practice in rural Bihar, the successful use of mythology-based community mobilization to enhance women's economic rights, and years of campaigning for a more sensible pro-poor approach to regulating rickshaw pulling and street hawking in Delhi. Kishwar concludes the potential of legislation as an instrument for strengthening the rights of vulnerable groups can be realized only if such efforts:

1. Recognize inherent limitations, especially when dealing with groups positioned so precariously in the social, economic and political hierarchy that any assertion of legal rights endangers lives at the hands of powerful groups (whose mercy they currently survive);
2. Create effective, non-partisan and accountable machinery for implementation;
3. Ensure law-and-order machinery—notably the police and judiciary—is willing and capable of offering protection and redress to those whose legal rights are being violated;
4. Have the ability to create a broad-based social consensus on the desirability of empowering vulnerable groups through specific legal measures;
5. Rely more on *enabling legislation* instead of enacting draconian, punitive laws that inevitably lend themselves to easy abuse and sabotage if the law and order machinery is not designed and geared towards protecting the rights of vulnerable groups;

The following personal essay illustrates these ideas by sharing a number of examples of Manushi's advocacy campaigns for reforming laws relating to women's property rights involving cycle rickshaw pullers and street vendors in India. However, the insights provided on interrelationships between poverty, the regulatory framework, customary law and practices, in particular among tribal communities, the way sexual violence and conflict can exacerbate such vulnerabilities, the debilitating effects corruption and entrenched

economic interests can have on regulatory and institutional reforms, and the practical challenges connected with what development jargon summarily described as “access to justice” are doubtlessly relevant for the entire Asia Pacific region and perhaps beyond.

1. The Battle for Women’s Land Rights in Rural India

Today, it is widely acknowledged economic dependence of women on men of their families is a prime cause of their vulnerable status in society. My involvement with this issue began with women at the bottom of our economic and social hierarchy. In December 1980, I was invited by a group of activists working in what was then south Bihar (and later became part of the new state of Jharkhand) to investigate allegations of sexual violence against women from tribal communities.⁵⁵³

During the course of this enquiry, one of the reasons for the initial reluctance of tribal women to speak openly about having been victims of sexual violence by someone outside the tribe was that they automatically lost their economic, social and ritual rights. They were considered ritually impure—even water was not accepted from their hands or offered to them. If married, their husbands would have the right to divorce them without providing for them. If unmarried, they lost their right to work on and maintain by their parental land. They were usually forced to leave their homes as well as their village. Often, the only means of survival most of them had left were begging, prostitution and migration to the cities where they ended up as bonded labour in severely exploitative employment such as in the brick kilns.

These findings, however, pointed to a broader context of systematic discrimination excluding women from equal rights to inherit land and hold title over property. These discriminations exist, despite the fact that, among all these communities, women are the primary cultivators. More than 90 per cent of economic activities, including agricultural operations, forest gathering, animal rearing, marketing of farm and forest produce, are performed by women. Except for ploughing, which is ritually prohibited for women, all other agricultural operations are essentially carried out by women.

This discrimination is being given dubious legitimacy through a distorted interpretation of customary tribal law. Women are permitted only limited usufructuary rights in the family land, whether they are living with their parents as unmarried daughters, or after their marriage, in their marital home.

In these tribal areas, as also in other parts of India, an unmarried or widowed woman exercising her usufructuary rights over land becomes very vulnerable to the rapacity and land-hunger of unscrupulous male relatives who think they can grab the land if they

⁵⁵³ The initial purpose of the visit was to investigate allegations of sexual atrocities and human rights abuses inflicted by the state police and paramilitary forces on tribal communities of the area battling for restoration of their traditional forest rights.

can only get her out of the way. Thus, she is often either forced to surrender her lifetime usufructuary right or she becomes a target of violent attacks of various kinds.

- a. The land can only be inherited by sons or grandsons or other male descendants. Even in cases where there is no direct male heir, the woman still does not get any share in the land. The land goes to the nearest male agnates (relatives on the father's side) and if there are no eligible agnates, then the land becomes the common property of the village community represented by the Munda (headman).
- b. If a man dies, leaving a widow or a daughter, she is entitled to maintenance from the next male relative who takes the land and receives the gomong (bride price) on the daughter's marriage. This makes women totally dependent on their male relatives for their daily sustenance despite the fact that they may continue being primary workers on the land.
- c. In theory, a widow has usufructuary rights in the family's land for her lifetime. But in practice, when there are adult male heirs, the land is often taken over by them and there is no guarantee that her usufructuary rights will be respected. An unmarried daughter has usufructuary rights in the family's land only up to the time of her marriage. In both cases, women have no right to dispose of the land as and when they find it necessary. However, the male relatives who inherit the land, should they decide to mortgage or otherwise dispose of it, do not even need to consult the women of the family who have usufructuary rights.
- d. In cases where a woman gets raped by a non-tribal man, even her usufructuary right in the land is denied to her.

In District courts of this region, many of the lawyers brought to my attention a number of cases wherein single women — unmarried or widowed — had been murdered by their own relatives. In some of these cases, the ostensible reason given for killing them was that they were witches. But the real motivation was to eliminate the woman and take away her land.

Local lawyers narrated numerous instances whereby women unmarried or widowed were implicated in false court cases as a strategy to deprive them of their land rights. Whichever way the case is decided, the women are likely to end up landless and destitute because if they are sentenced to a prison term on the charge of murder, the land will be taken over by the agnates; however, if they are acquitted, most of the land is likely to be under mortgage on account of the expenses of the court case. These women can only raise money by mortgaging their land, since they were very poor.

The loss of usufructuary rights of tribal women due to rape by dikus (outsiders; non-tribals) has been increasing as the tribal society is increasingly invaded by outsiders and the immiserization of the tribal peasantry forces the tribals to seek outside employment in order to survive. Women constitute the bulk of this desperate migrant labour force. Wherever they are forced to seek work, be it in mines, in brick kilns, or on irrigation projects, as agricultural labourers or as domestic servants, they are subjected to sexual abuse and exploitation. But even when they are residing in their villages, they are not safe from sexual abuse by male outsiders such as the forest guards and the police.

A Bitter Lesson Learnt From Early Setbacks

During the course of my travel, I met a 55 year old Ho⁵⁵⁴ woman named **Maki Bui**, in Lonjo village of Sonua block, in Singhbhum district. Her husband, a retired police constable, had died about three months before I met her. While her husband was posted to different places, Maki Bui stayed in the village to take care of the land. But after he died, her husband's brothers and nephews became hostile. She told me that she feared for her life, that she might be killed any day by her husband's younger brothers and their sons. She had only one married daughter, and no sons. Her husband's brothers and nephews were determined to take away her land. They threatened that if she ploughed her land, they would forcibly take away the harvest.

Since she lived alone with no kin support in the village, (only her husband's relatives live in her marital village and one of them was the headman), she felt extremely vulnerable to their violent attacks and threats to kill her unless she surrendered her land to them. She wanted her land to go to her married daughter after her death. However, according to "customary law" being followed in the area, her daughter could not be allowed to inherit the land. She put the matter before the Panchayat (Local Council) but she found no support there. Women were not allowed to be Panchayat members. She felt so unsafe in this village that she wanted to sell or mortgage her land and go and live elsewhere. But tribal women are not allowed to sell or mortgage their land because they are considered maintenance holders, not title holders. When I met her, her husband's agnates had already started accusing her of being a witch as part of a conspiracy to eliminate her.

According to customary practice in her area, Maki Bui was entitled to occupy her husband's share of the family land during her lifetime. After his death, the land would revert to one of her husband's agnates rather than her already married daughter, Sonamuni, who would have been allowed limited usufructuary rights in her natal family land only if she had remained unmarried.

When Maki Bui sought my help, I suggested we challenge the constitutional validity of the discriminatory tribal law. It appeared to me that it would be simple to get the Supreme Court to rule that those aspects of tribal customary law which discriminate against a woman's inheritance rights were unconstitutional. Manushi filed a petition in the Supreme Court on behalf of Maki Bui and her daughter, Sonamuni, whereby we challenged the denial of equal inheritance rights to women of their Ho tribe. Though this petition focused on the plight of Ho women, the conditions that contribute to women's vulnerability are as true for tribal women in most other parts of India, as well as peasant women in many other caste Hindu communities.

Following Maki Bui's petition, which was published in Manushi No. 13, many other individuals and activists wrote to us saying the situation was similar among several other communities and therefore, they wished to join us in challenging these laws that

554 The Ho people are a tribe of people concentrated in what is now the Indian state of Jharkhand (previously southern Bihar), where they number around 700,000 people.

discriminate against women in matters of inheritance. This included Mary Roy, from the Syrian Christian community, who filed a petition along the lines of the Manushi petition challenging similar discrimination against Syrian Christian women. From Maharashtra's Dhulia district, Sharad Patil, a prominent political activist working among tribals, also filed an intervention petition because many tribal communities in that area practiced similar denial of land rights to women. From within Bihar some activists working with the Jharkhand movement brought more intervention petitions involving other tribal communities. In Mumbai, activists of Nivara Hakk Samiti, who were fighting for the housing rights of pavement dwellers, wrote to say that they had decided to demand house pattas in the name of the women in these families. Even in neighbouring Nepal, activists who were in touch with Manushi such as Hisila Yami—who worked as a volunteer with Manushi in 1980, and later became a prominent Maoist leader and government minister—responded to this issue with great enthusiasm and made it part of their own campaigns in villages of Nepal. Maki Bui's case thus seemed to have a large ripple effect. Within a short time, we had succeeded in getting the issue of women's land rights debated and discussed among a whole range of social and political organizations.

However, in the Jharkhand region, almost all political leaders opposed our intervention. Many prominent church leaders of the area came out against it on the specious ground that giving women inalienable land rights would destroy the "tribal culture and way of life". They dubbed it as a conspiracy to facilitate the takeover of tribal lands by scheming outsiders. They argued that it was impractical to give land rights to women because they go away to their marital homes and claim land rights there.⁵⁵⁵

Even though several leading activists of tribal rights movements in the region actively assisted Manushi in mobilizing opinion in favour of our petition, women of this region who stood to gain most from our intervention could not get organized and put up a united front in the same way that men did to safeguard their collective interests. In fact, Maki Bui's own female relatives turned against her, since her land was expected to revert to their families after her death. Since in most instances women's identification with men of their own families is much stronger than their sense of solidarity with other women, we could not unite them on gender lines. Those few who dared stand up were silenced through threats of violence.

At the other end, the Supreme Court proved very ineffective in dealing with the case. Getting the case admitted into the Supreme Court was no problem. However, getting the case heard was a far more difficult matter. The years that followed were full of unending petty harassment, slipshod court procedures and interminable delays. After the case was admitted on August 20, 1981, the Supreme Court ordered the Bihar government to ensure that during the period that the case remained before the court and until final orders were passed, they were to see to it that Maki Bui continued to enjoy her customary rights as a widow without fear or hindrance.

555 For a detailed study of the impact of denial of land rights to tribal women and response to the specious argument to justify the disinheritance of women see "Toiling without Rights", (*Economic & Political Weekly*, Vol XXII, No.3 17 January, 1987)

But that was not to be. After the Court asked the Block Development Officer (BDO) to conduct an enquiry into her allegations, her in-laws' family began to harass and intimidate her even more for having dared to take them to Court. The B.D.O. was bribed to give a report in favour of her tormentors. We did all we could to get her case expedited. However, the Bihar government kept requesting postponement after postponement on one pretext or the other. In the meantime, Maki Bui was getting desperate as her in-laws made concerted efforts to drive her out of the village. Finally, she had to leave her village, Lonjo, and go far away to live in her daughter's village. Maki Bui had started off by asking our help to enable her to pass on her piece of land to her daughter. Instead of assisting her to get more than the discriminatory customary law allowed, her approaching the Supreme Court had actually endangered her life even further and she could not even continue living in her village. The local police as well as other government officials actively supported those who were endangering Maki Bui's life both in the village as well as by submitting false affidavits in the Supreme Court.

We filed a petition alleging contempt of court against the Bihar government for violation of the court's interim orders that Maki Bui be offered protection. Even though, by now, our expectations of the Supreme Court had been scaled down considerably, we were still not prepared for what happened. Justice Ranganath Mishra, who heard the case at that stage, said openly in a packed court: "We can pass a contempt order if you insist. But what good will it do for the petitioner? The Bihar government or its police are not going to heed it any more than they did our original order. Better that you advise that old woman to continue staying with her daughter so at least she is safer than in her own village. Or else bring her to Delhi and keep her with you so she is safe." The Bihar government showed no inclination to propose a solution and the Supreme Court insisted on waiting for the Bihar government's proposal for finding a satisfactory formula on this issue.

We had approached the Supreme Court in the hope that its judgment would help millions of women, not just Ho women, but other peasant women as well. Now the Supreme Court was itself admitting that it could not even provide this one woman with elementary protection, let alone strengthen her economic rights.

Maki Bui and her daughter both died under mysterious circumstances years before the Supreme Court pronounced its judgment. Their deaths left me deeply traumatized and remorseful. Maki Bui's fate came to be a permanent symbol and reminder of the dangers of legal interventions without preparing adequate support within the community. It also taught me the importance of avoiding situations in which our interventions appeared like an attack from "outsiders". This caution becomes doubly necessary when you are dealing with groups and communities who are much poorer and in a weaker position than those of us who take up their causes. Men of such communities are already victims of exploitation, discrimination and contemptuous treatment meted out to them by powerful outsiders. The low self-esteem and frustration of men of such downtrodden communities finds an easy outlet in oppressing women in their own community. That is the only way they can feel "manly" since, in the outside world, their manhood is constantly crushed by powerful aliens. In such a situation, when an outside agency or individual descends in their midst to

attack their treatment of their own women, their response is inevitably one of aggression and hostility. Using “shame” or statist interventions as a weapon of transforming gender relations tends to generate anger and resentment rather than make them more sensitive to women’s needs.

In the intervening years, my experience of dealing with victims of domestic violence had demonstrated that when you appeal to men’s sense of honour and justice, and work with them to find a solution to their problems rather than present work through statist measures, it produces far better results.

Freeing of Enslaved Goddesses

Fortunately, we had a chance to test this approach on a large scale through Manushi’s association with **Shetkari Sangathana** (“Farmers Organization”)—one of the largest and politically innovative mass-based movements of farmers at that time. The organization was founded in Maharashtra in 1980 by Sharad Joshi—a former UN official turned farmer. In 1986, Joshi invited Manushi to come and participate in their newly formed women’s front – Shetkari Mahila Aghadi and develop a programme of action aimed specifically at empowering women of farm households who had, till then, been mobilized mainly on economic issues affecting the farm sector.

Since the Sangathana is committed to non-violent methods of agitation, their meetings and rallies are exceptionally disciplined without any policing methods. Therefore, women have always felt very safe and comfortable in this movement and participated in massive numbers. Many of them came into the movement with a do-or-die spirit. For many years they participated only on general issues affecting the farm sector as a whole without raising gender specific issues till Joshi decided to set up a separate wing for women.

For the farm sector as a whole, the movement’s emphasis was on farmers receiving due price for their labour, with economic freedom being the core issue rather than a demand for subsidies or protection from the government. Similarly, I advocated that the women’s strategy should be to ensure they too do not have to live a life of hapless dependence with all economic resources concentrated in the hands of the men of the family. I was able to convince Joshi that for strengthening women’s rights in the family, they need not wait till the government agrees to change this or that law. It was far more important that the Sangathana be able to persuade its followers to willingly give women of their family their due share in the family land.

The product of this collaboration between Manushi and Shetkari Mahila Aghadi and Manushi was a unique campaign called Lakshmi Mukti Karyakram (“Lakshmi liberation programme”).

Sharad Joshi announced that any village which performed the following three acts for women’s empowerment would be honoured as a Jyotiba Gram:

1. Voluntarily transfer a piece of land from husband to wife by a hundred or more families in the village. Such a village would be honoured as a Lakshmi Mukti gaon (a village which had liberated its hitherto enslaved Lakshmis) through a public function at which Sharad Joshi would personally distribute certificates of honour to each such family.
2. Close the village liquor shop by mobilising the whole village in order to curb drunkenness and wife beating.
3. Ensure by consensus the victory of an all women panel in panchayat elections,

A small remote village named Vitner in Jalgaon district made history by performing all the above tasks within a month and received the Jyotiba Phule award from the then Prime Minister of India. My very positive report on the amazing change in village culture as a result of these achievements enthused Joshi to launch a movement for the implementation of Lakshmi Mukti in all the districts where they had a stronghold. The only incentive offered was that Sharad Joshi himself would go and bestow certificates of honour to each such village.

The nomenclature and symbolism of this unique campaign is in itself fascinating. In the Hindu mythology, the goddess of wealth is named Lakshmi. However, a wife is also traditionally referred to as “griha Lakshmi” – i.e., goddess of the household. Likewise the birth of a daughter or daughter-in-law is also meant to be celebrated as the coming of Lakshmi in the family, even though many communities have come to see females as a burden rather than a blessing. Thus, the core message of the Lakshmi Mukti Karyakram was that by enslaving their household Lakshmis, the farmers had incurred the curse of poverty. In order to free themselves from economic bondage, they had to liberate their own Lakshmis and earn their blessings. My own campaign speeches were more focused on the advantages Lakshmi Mukti would bring to farm families but Joshi’s speeches dexterously used economics, mythology, and a sense of sacred and dharmic responsibility to get his point across. He would introduce the Lakshmi Mukti campaign by saying that so far the Sangathana had worked tirelessly to get various exploiters off the farmers’ backs and ensure that farmers received fair and remunerative prices for their produce. Now, it was time for the Sangathana to ensure that men associated with the movement also were just to the women of the household.

Their slogan “Bheekh naka hawe ghamache daam” (we don’t want concessions, we want the due price for our labour) could easily be used for lending legitimacy to women’s right to land because women in most farm families are the primary workers on the land.

Joshi linked the whole endeavor to an earlier Karzmukti Andolan (movement for freedom from debts) whereby he had built a case through careful economic calculations that the farm community needed to be liberated from the stress of indebtedness to government banks by writing off of their loans since the government robbed the farm sector of Rs.72,000 crores (72 billion) every year by artificially depressing prices of farm produce through numerous authoritarian, statist controls. He would then give them a similar lesson in household economics to explain the debt they owed their wives for the work they had performed but not been fairly compensated for.

In village after village I would see men reduced to tears listening to Joshi's appeal. Within two years, men in hundreds of villages carried out the Lakshmi Mukti programme of land transfer to wives, celebrating the occasion as though it were a sacred festival. The entire village would be spruced up and decorated with men dancing to the beat of drums. We would be received with much fanfare with women performing art and singing songs as they received Joshi to preside over the certificate giving ceremony. Men seemed even more elated than women. Much of the initiative for preparing villages for Lakshmi Mukti was taken by young male cadres of the Sangathana. Some of the men I interviewed described the whole campaign as a mahayagna (a sacred dharmic ritual).

The occasion would attract many people from neighbouring villages. After each public meeting, men from surrounding villages would come up and volunteer to establish similar transfers of land in their own village provided Joshi joined them likewise for the celebration. Thus far from creating a backlash among men, the approach of appealing primarily to the sense of fair play and justice among men created a supportive atmosphere for women to exercise their rights. Domestic violence went down dramatically in all such households where the beginnings of a new equation between men and women were being established.

The Gandhian paradigm within which Joshi operated put great emphasis on self-respect and justice. Once men become self-respecting by giving up groveling before their own tyrants (in this case various government agencies) they are more easily able to extend the same respect to women. Men who themselves live under authoritarian regimes and controls become less self-assured and, therefore, more tyrannical towards women.

Most important of all, the key men of the Sangathana led by personal example. They not only transferred land to their wives' names, but also encouraged them to take a part in Sangathana work. Their domestic conjugal lives showed visible improvements rather than becoming more stressful. Therefore, people could see for themselves that strengthening the rights of women need not lead to breakdown of the family or greater conflicts between husband and wife. Rather it could lead to happier relations. Men did not feel attacked; rather they felt elevated when being called upon to do justice and being honored for it.

This campaign led to far reaching changes in the area, including creating greater space for women in political and public life of Maharashtra and curbing domestic violence. While the entire might of the Supreme Court and agencies of the Indian State failed to protect one Maki Bui, the enthusiastic response to the message of a respected leader could move many thousands of families into changing repressive norms towards women.

Even though, the campaign could not be sustained in a consistent manner beyond the first three-four years, this movement created enough political pressure on the Maharashtra government to issue a notification called Lakshmi Mukti Paripatruk in 1994 requiring joint pattas (ownership documents) issue both for landed property as well as for land allotted for housing to urban poor. In this case, a legal notification followed large scale mass mobilization, creating a socially receptive environment for strengthening women's rights.

Reforming Policies and Laws Concerning Cycle Rickshaws and Street Vendors in Delhi

I became involved in a long drawn battle for policy and law reform for cycle rickshaws and street vendors policies propelled by a simple curiosity: “Why are cycle rickshaw and street vendor carts in India so dilapidated? Why don’t their owners invest in improving their technology so that pulling them does not involve such Herculean effort?” The facts that emerged from informal interactions with rickshaw owners and street vendors told a story of daily economic war being waged against two groups of self employed urban poor by agencies of the state on account of perverse laws that trap both these legitimate occupations in a web of illegality.

The License Quota Raid Raj Enshrined in the Cycle Rickshaw By-Laws: Policy Reforms Sabotaged

Cycle rickshaws are the most eco-friendly of all vehicles. Since they do not consume petrol or diesel, they cause neither air nor sound pollution.

Cycle rickshaws are a popular mode of short distance transport in most towns and cities of India. They provide one of the few “instant means of livelihood” for poor rural migrants. Most pullers are seasonal migrants who leave their families in the villages so that they can keep their living expenses low and save as much as they can for sending home. Within a few hours of arriving in the city, by renting a rickshaw for the day, a migrant is able to not only earn enough to buy food for the day, but also to save something for sending home.

As per the figures provided by the Municipal Corporation of Delhi (MCD) to the Delhi High Court there are nearly 600,000 rickshaws in Delhi alone requiring at least as many pullers who earn their living from it. In addition, thousands of people get employment in the small-scale industry that produces rickshaw parts. The rickshaw trade of Delhi also makes use of the services of thousands of repair mechanics and assemblers. At an average of four dependents per person, the survival of 35 lakh (3,5 million) people may thus be linked to Delhi’s rickshaw trade.

Less than 13 per cent of the citizens in Delhi own private motorized vehicles while 85 per cent have to rely on public transport, of which cycle rickshaws are a very crucial part, because they are versatile and multi-purpose in their uses for short distance commutes.

However, instead of encouraging the use of this eco-friendly and employment friendly vehicle, municipal agencies and police have imposed numerous restrictions on this trade through laws and regulations, including arbitrary entry bans on plying cycle rickshaws on city roads on the plea that they are “backward” relic and obstruct the smooth flow of motorized traffic.

It is noteworthy that there are no quotas on the number of cars, trucks and other motorized vehicles plying in urban centers even though they cause deadly pollution. But cycle rickshaw ownership and operation is subject to draconian controls and stringent quotas.

For example, in Delhi, the quota for rickshaw licenses was fixed at 600 during the 1960s; it was raised to 20,000 in 1976; and to 50,000 in 1993, when the actual number plying was reported to be 450,000. In 1997, it was raised to 99,000 and remains the same at a time when according to MCD's own admission in the High Court more than 600,000 rickshaws are reportedly plying in the City, including trolley rickshaws for carrying goods and garbage. The actual number of licenses issued to rickshaws in the year 2006-07 was 89,429. This quota was further reduced to 52,000 in 2007

However, all of rickshaws including the supposedly licensed ones carry the stigma of "illegality" because of the following restrictions that govern this trade.

- a. As per the Cycle Rickshaw Bye-Laws (1960), a person can ply a rickshaw only if he has two licenses – one for pulling and one for owning the vehicle. The vehicle can only be plied by the owner of the rickshaw. If someone other than the licensed owner is found plying the vehicle, it is liable to confiscation. A person who owns a truck, bus or taxi may hire whoever he/she wants to ply that vehicle but in the case of cycle rickshaws, the MCD's regulations mandate that a person who lets another, including his own brother or son, ply his rickshaw invites confiscation and destruction of his vehicle.
- b. Anyone can own a fleet of cars, trucks, or even airplanes. However, possessing more than one cycle rickshaw has been treated as a legal offence, punishable with the confiscation and destruction of the vehicle.

Although this law was ostensibly meant to protect rickshaw pullers from being fleeced by supposedly exploitative rickshaw fleet owners, it is essentially a tool of exploitation by the police and municipal officials to extort bribes from unlicensed rickshaw owners and pullers, using the threat of impounding such rickshaws, destroying and selling them as junk. This is a major reason why most rickshaws are in a pathetic state in terms of their technology, functioning and visual appearance. Since the vehicle can be impounded any day with or without reason, owners spend no more than is absolutely necessary to keep the vehicle moving on the road.

The situation on the ground is totally contrary to the legal requirement. The vast majority of cycle rickshaws (almost 99%) are owned by entrepreneurs who own 5 to 500 rickshaws and give them out to others on rent. The "Owner must be Puller" policy is impractical given the nature of the trade and the compulsions of those who come to pull cycle rickshaws. But the very existence of rickshaw fleet owners is illegal. Therefore, the 89,429 licensed rickshaws also end up being illegal.

Since legally, no rickshaw operator is allowed more than one license, all others have to be made as benami licenses in the name of real or hypothetical rickshaw pullers. Thus, even after paying bribes, no one, including those who have paid bribes to secure benami licenses, can ply all their rickshaws legally and each one remains vulnerable to his vehicles

being confiscated. Also, since most of the city roads have been officially declared as out of bounds for rickshaws, they are all vulnerable to seizure, extortion and harassment by the municipal agencies and the traffic police.

There are a number of reasons why rickshaw pullers have no interest in owning their rickshaws:

- a. Unlike registration for motorized vehicles, licenses for cycle rickshaws have been frozen indefinitely by the MCD. Applications for owner/puller are accepted once in every 2-3 years. Application forms are given selectively to those who have made prior 'arrangements' with MCD officials. This denies opportunity to those pullers who may want to own a rickshaw to legitimize their status.
- b. Most pullers are seasonal migrants and stay in the city for some months, save money and go home for some days or weeks. Often they have to leave at short notice due to some emergency at home or their own sickness. Many prefer to go and work in the fields during harvest and sowing seasons, or for festive or family occasions. During the periods where they are absent from the city, they have no way to keep their vehicles safe.
- c. If they rent out or even let a family member drive their vehicle when they go to their village, it is likely to be confiscated. Therefore, even if they have the money they prefer not to buy a rickshaw.
- d. Even when they are in the city, most pullers sleep on the pavements or share small illegal jhuggis with fellow migrants. They have no place to park their vehicle safely at night. The vehicle is likely to be stolen if they leave it out in the open at night.
- e. Since a rickshaw license is not available on demand as a right, MCD officials take hefty bribes for issuing and renewing these licenses, which are valid for three years and require to be renewed every year. Pullers can neither afford the time and bribes required in getting a license, nor take the risks involved in owning a rickshaw that may be confiscated any day.
- f. Even licensed rickshaws are not spared confiscation and destruction on patently illegal grounds. The MCD routinely rounds up and confiscates a large number of rickshaws under the guise of checking licenses. But an owner can get it released only if he can provide "proof" that he is the real owner and also that he was pulling the rickshaw himself. If he lacks the proof, the vehicle is liable to be destroyed. In case of rickshaw seizure, a puller runs no risk. He just comes and reports to the owner or simply abandons the vehicle and disappears. If it were his own vehicle, he would have to spend days, and a considerable sum of money, getting the vehicle released. An illiterate and poor puller is far more vulnerable to abuse and fleecing than a fleet owner, who over the years acquires some bargaining power with those he pays bribes to. None of the pullers have the staying power to spend days and large sums of money on bribes to get the vehicle released without earning anything for that time/period. By hiring a rickshaw on a daily basis, they lose nothing if the vehicle is confiscated and they can go and rent another rickshaw.

Once the vehicle is confiscated, the owner has to pay a minimum fine of Rs. 325 to get the vehicle released, plus Rs. 100 per day as store charges for each day that the vehicle stays in municipal custody. Once it enters municipal records, the average expense for getting

a rickshaw vehicle released from the MCD yard comes to around Rs 600-1,000, including fines, store charges and payoffs. Often the fines demanded can be as high as Rs. 2,200 for passenger rickshaw and Rs. 5,000 for a goods carrying trolley rickshaw. Such expenses can only be incurred by those owning substantial fleets that give them staying power and a good profit margin to pay the bribes. Therefore, rickshaw owners run after municipal officials and try to strike a bargain so that they can get the vehicle released before it is entered in the record book. They do this by paying Rs. 200 to 300 in bribes, since in almost all cases, the owner is not the puller and most rickshaws are unlicensed.

After seven days, even if you pay fines, the vehicle cannot be released and has to be crushed and sold as junk. Therefore, pullers find it preferable to rent the vehicle from fleet owners.

Large parts of the city and all arterial roads have been declared as “No Entry Zones” for rickshaws. The zoning rules formulated by the Traffic Police are arbitrary and impractical, since the forbidden zones cannot be avoided while ferrying passengers and goods. “No Entry Zone” regulations do not mean that the police disallow rickshaws from plying on those roads. All it means is that rickshaw pullers are terrorized into paying extra bribes for plying there. In most instances there is no road sign to warn a puller that he is getting into a “No Entry Zone”.

The fleet owners survive by working out elaborate arrangements for monthly bribes through elaborate camouflage. For example, almost all rickshaws have embossed a word or real name of the fleet owner. This indicates to the police and MCD staff the identity of the man responsible for paying the bribe for that particular vehicle. Anyone who tries to ply a rickshaw without entering into such an arrangement will never get his vehicle back once it is impounded. As per the MCD’s own admission, nearly 60,000 rickshaws were destroyed and sold as junk in 2005-2006. Many more times this number is released after the payment of bribes and penalties. (Hemraj Vs C.P. Delhi, CWP 3419/99). This indicates the number of rickshaws that were being junked every year.

As per Manushi’s estimates, the cycle rickshaw trade loses a minimum of Rs. 360 crores (3,6 million) every month in bribes, fines, confiscation and destruction of vehicles.

In response to a sustained advocacy campaign and public hearings of rickshaw pullers organized by Manushi, Prime Minister Vajpayee announced a rational policy framework for the cycle rickshaw trade provided in the New Policy for Cycle Rickshaw Pullers and Street Vendors in August 2001.

This policy accepted the need to dismantle the arbitrary ‘License-Raj’ and instead let market demand determine the number of cycle rickshaws in the city of Delhi. It also provided for on-demand registration as well as a ban on confiscation and destruction.

However, instead of implementing this policy with a degree of sincerity, the entire machinery of governance, including the police and politicians went to great lengths to sabotage the new policy. The Municipal Corporation and police became more aggressive

about confiscation drives. The police banned rickshaw entry on all arterial roads as well as major markets of the city thus making the presence of rickshaws illegal almost everywhere in the city. Rickshaws were banned even in Old Delhi where they are prime means of transport. This inevitably led to an increase in the bribe rates. A bizarre new scheme with many more restrictive clauses for issuing of licenses was announced by the municipal corporation in addition to reducing the license quota to 52,000 for the entire city. Simultaneously, they also stopped renewing old licenses and issuing new ones. Again, advocacy and regulatory change had resulted in unintended consequences that had made the lot of the targeted beneficiaries even worse in the short term.

In 2006, Manushi filed a case at the Delhi High Court challenging unconstitutional provisions of cycle rickshaw policy and demanding a new legal regime that treated non-motorized vehicles (NMVs) as an integral necessary and desirable part of city transport. In a historic judgment, on February 10, 2010, a Constitutional Bench of the Delhi High Court declared the existing rickshaw policy unconstitutional for its patently discriminatory provisions. Most importantly of all, the court ruled that the city government must provide equitable road space for NMVs. For this purpose it ordered that the Delhi Government should appoint an empowered Task Force for evolving a new road transport policy for the city so that NMVs are treated as an integral part of traffic in the city. As a member of the Task Force, I took on the job of drafting a proposal for new legislation of NMVs.

This legislation marks a major departure from the general run of laws in India which are drafted more with the intent to inflict punitive measures against citizens for not complying with unrealistic and unreasonable regulations rather than enabling citizens to exercise their citizenship right to livelihood with dignity. As opposed to cycle rickshaw by-laws whose stated intent was to control the number of rickshaws plying in the city, the new draft law defines its purpose as follows: “to make provisions to protect the Constitutional rights to equality and livelihood of persons engaged in the non-motorized vehicles sector, promote the use of eco-friendly employment friendly and cost-efficient non-motorized vehicles as an integral and necessary part of vehicular traffic, provide equitable road space and separate NMV tracks for such vehicles on city roads as mandated in the Delhi Master Plan-2021.”

The Draft Law also eliminates the colonial minded licensing system by creating a separate Authority (Non Motorized Vehicle Use Promotion Authority) for registration of NMVs. It takes away the arbitrary power of refusal previously vested in the licensing department of the municipality.

It mandates that registration will be granted instantly on payment of prescribed amount as a fee so fixed by the Authority from time to time. It abolishes the existing system of quotas and caps to limit the numbers of cycle rickshaws in the city. In case the registering authority fails to issue a registration certificate within the specified timeframe without assigning a valid reason, the application itself will be considered as Deemed Registration.

Registration of cycle rickshaws as well as pullers is to be made available on demand on any working day of the year. While issuing the pullers' Photo I Card, it will be the duty of

the registration issuing authority to ensure that the applicant views a well designed video recorded training module regarding the traffic regulations of Delhi, So that new entrants to this occupation coming from rural areas are not harassed by the police for their lack of knowledge of traffic regulations.

Even with such a clear mandate from the Court, city authorities are reluctant to implement the new policy. It was a stroke of luck that the Supreme Court refused to issue a stay order and in fact asked the High Court to monitor the implementation of the new policy on a monthly basis. However, the case will be heard in full by the Supreme Court and if we get a bench unsympathetic to the cycle rickshaw pullers, we could well end up losing the ground gained so far. But if we win the case and the High Court monitors the new policy diligently, the road architecture of not just Delhi will have to undergo a sea change to create an NMV-friendly, pedestrian-friendly city. As of now, both the police and MCD are doing all they can to slow down the construction of NMV tracks and sabotage the functioning of those already constructed as pilot projects.

- Delhi Police continues with arbitrary bans for NMVs and creating No Entry Zones.
- In addition, the police has appealed to the Supreme Court that it also be given the power to confiscate and junk rickshaws if they are plying without license. The police also want the power to arrest pullers who operate without a license. As of now only municipal authorities can confiscate rickshaw for plying without license. The police can catch them only for traffic violations but has to hand the vehicles over to municipal authorities.
- Since the police failed to influence the decision of the Task Force, because the majority voted in favor of liberalizing the licensing regime, they persuaded the MCD through the Lt Governor into appealing against the Feb 10, 2010 High Court Order in the Supreme Court.

The Case of Delhi Street Vendors

Street vendors in countries like India provide a vital link between the producer and consumer, connecting the two in innovative, cost effective ways according to varied requirements of people during different seasons, festivals as well as during various times of the day or night. As per the National Policy for Street Vendors, nearly 2.5% of the urban population is involved in street vending and hawking. This means that this occupation provides livelihood to nearly 10 million people in India. With an average of four dependents per vendor, the survival of 50 million people relies on street trading. A sensible policy would be to encourage this form of self-employment in a country with high levels of unemployment and 93% working in the unorganized sectors of the economy. Instead, government rules and regulations are designed to keep hawkers vulnerable to extortion and human rights abuses.

Despite Supreme Court judgments declaring that street vending is covered under the fundamental right to livelihood clause of the Constitution, municipal agencies all over India have managed to keep the vast majority of vendors illegal and insecure by ensuring

a gross mismatch between the number of vendors on the streets and those who are bestowed licenses. For example, as per the affidavit to the Supreme Court, the Municipal Corporation of Delhi claims there are at least 300,000 vendors in Delhi alone. Unofficial estimates put the figure at 500,000. But licenses have been issued to less than 3,000. This in effect means less than one percent of vendors have a legal status while 99 percent are treated as law offenders and face their daily work under perpetual insecurity. Municipal Corporations all over India carry out daily raids to remove vendors and confiscate their goods in addition to frequent large scale “clearance operations” under the guise of decongesting roads or “beautification” of the city. The real purpose of these eviction drives is to keep vendors terrorized so that they dare not resist paying bribes. In Ahmedabad, the Municipal Corporation issued a circular in 1993 saying that henceforth no new licenses would be issued and all old licenses stood cancelled. In Mumbai, after several High Court and Supreme Court orders, in 2005 licenses were issued to about 15,000 out of an estimated 250,000 vendors but in past five years nearly 200,000 vendors have been pushed out from this mode of livelihood. In Patna, 2,000 vendors out of 80,000 have received licenses after a long struggle both in and out of courts. There have been cases of vendors burning themselves to death in front of municipal offices in smaller cities like Gwalior, Patiala, and Lucknow in order to protest against repeated eviction drives and daily harassment.

There is not even a semblance of “due process” in all of this. The municipal employees swoop down and pick up what they can from whoever fails to run away fast enough to save his/her goods. Often the fines imposed or the bribes demanded for returning confiscated goods are so outrageous that in most cases the vendors cannot afford to pay the sums demanded so that their goods are either stolen by municipal employees or rot in municipal warehouses. This is illustrated by the following examples:

On the basis of citywide interviews carried out in the year 2001, Manushi calculated that in Delhi alone the terror unleashed by the threat of clearance operations targeted at vendors leads to loss of income due to bribes and confiscation of goods worth Rs 500 crores (50 million) per year, plus enforced idleness for long periods and heavy indebtedness.

Absurd restriction and quotas on street vending are a by-product of municipal laws imposed on India by the British in the 19th century making it illegal to vend without a license, which is issued at the sole discretion of the municipal officers. While there are set procedures for those who wish to apply for a license to set up a corporate enterprise, for decades there has been no set procedure for applying for a tehbazari license. Municipalities all over India stopped issuing licenses to street vendors since the 1960’s and those received got licenses represent only a minuscule proportion of vendors operating in any urban area.

Individual vendors as well some of their unions have had to fight long drawn-out battles in the High Courts of various states as well as in the Supreme Court of India demanding the right to pursue their occupation legally. The judgment of 30th August 1989 delivered in the Sauthan Singh and Others Vs NDMC case (1989) became a historic landmark because it ruled that “...the fundamental right of livelihood under Article 19 (1) (g) of the Constitution cannot be denied to street/pavement hawkers...” and that “street trading should be seen as a “legitimate trade, business or occupation”. The Supreme Court also

ruled that proper hawking zones should be created in cities and towns so that hawkers could operate without inconveniencing other citizens.

In addition to mostly ineffectual interventions by the Supreme Court and various cases in the High Courts of India, there have been two national level policy reform measures by the Central Government. In August 2001, the Prime Minister's Office announced a new policy for street vendors and cycle rickshaw pullers in response to Manushi's campaign on behalf of these two sectors (see above). This historic document accepted the basic premise that the economic reforms agenda needs to be extended to those working in the self organized informal sectors of the economy. Therefore, it recommended easy entry into these two occupations by dismantling the restrictive licensing policies as well as banning confiscation and destruction of their means of livelihood.

In the same year, a Task Force for Street Vendors was appointed by the Ministry of Urban Development and Poverty Alleviation for drafting a National Policy for Street Vendors, which was duly adopted by the Central Cabinet in January 2004.

The most significant innovations of this policy were that it

- Laid down guidelines for 'regulation' instead of 'prohibition' of street vending and rickshaw pulling. Licensing was to be replaced by a simple registration process without any arbitrary quota.
- Mandated that street vendors cannot be evicted in the name of beautification or cleaning drives. If vendors have to be moved or evicted due to unavoidable circumstances,, they should be simultaneously rehabilitated to restore their livelihood to the previous level.

Despite repeated interventions by the courts, asking various governments to implement the National Policy for Street Vendors, municipal authorities all over India have failed to implement orders requiring them to rationalize the licensing system for vendors. If anything Clearance Operations have become more frequent and more violent, even in smaller cities. For example, during the "beautification drive" to prepare Delhi for the 2010 Commonwealth Games, more than 1.5 lakh (150,000) hawkers were driven out of Delhi. Despite repeated interventions by the courts and reminders by the Urban Development Ministry, only a handful of towns and city governments have made provision for Hawking Zones. These two are on a very modest scale. No city has legalized all existing vendors. In a few cities, a token amount of space has been earmarked for hawking zones. The disregard for livelihood concerns of the urban poor is evident in the fact that the ambitious Jawaharlal Nehru Urban Renewal Mission does not even mention the need to provide space for micro-enterprises in City Development Plans. The battle is becoming more and more unequal as the elite sections and town planners develop ambitions for western-style gentrification of our towns and cities. In such an environment vendors are portrayed as causes of chaos and disorder and become easy targets. The battle is becoming so grim that there have been several cases of self-immolation by street vendors to protest clearance operations without alternative sites being provided to them in their respective cities.⁵⁵⁶

556 See article: "Destroying Swadeshi Retail Sector" *Manushi* issue 153 of 2006

History of the Model Market at Sewa Nagar

A key argument offered by municipal agencies and the police for not legalizing the status of street vendors is that street hawkers cause obstructions for other road users and also spread chaos and squalor. To combat this official prejudice against vendors, Manushi offered to take responsibility to show by example how:

- a. Vendors can be accommodated in the city in an aesthetic and orderly manner.
- b. Security of livelihood and avenues for upward mobility can be provided for the self-employed poor by giving them access to space for developing their entrepreneurial skills;
- c. The existing system of pay-offs and protection rackets run by politically connected mafias who indulge in routine human rights abuses to extract bribes can be replaced with fee based access to market space, enhancing municipal revenues and curbing the growth of criminal mafias who parasite on the poor in urban areas.

We raised funds through personal donations from Manushi supporters, hired a team of architects and submitted a detailed plan of action to MCD. Each project member voluntarily signed an oath (Shapath Patra) on Rs. 10 stamp paper agreeing to abide by the following disciplines:

- a. Pay a monthly rent of Rs.390/ to the MCD through Manushi;
- b. Contribute towards the salary of the Cleaning Brigade specially hired to maintain cleanliness in the project area;
- c. Stay within the agreed-upon Sanyam Rekha, (Line of Discipline) Hawkers who do not observe this discipline agreed to be fined Rs. 100 per violation of Sanyam Rekha.
- d. Promise not to build any extra structures above or outside the stall area;
- e. Promise not to sell or rent out the allotted stall.⁵⁵⁷

The vendors accepted that those who violate these disciplines are liable to have their membership cancelled. Manushi also took the responsibility for redesigning the vending platforms to improve their functionality, and aesthetic appeal.

On April 10, 2003, Supreme Court gave a go-ahead to MCD to execute two pilot projects but the police succeeded in sabotaging one of them at inception.

For the second one, we were able to get the municipal corporation to sign an official Agreement with Manushi on April 7, 2004. This empowered Manushi to implement and manage a pilot project at Sewa Nagar to create a model hawker market.

⁵⁵⁷ It is noteworthy that while in the case of rickshaws we battled hard to get the Court and policy makers to accept that owning multiple rickshaws ought not to be treated as a crime, in the case of street vendors, the draft law mandates that no one be allowed to own more than one stall. It also mandates an exit policy for vendors whereby they cannot hold a vendor registration beyond a 15 year period whereas for rickshaw owners there is no such requirement. This in itself poses a tough challenge for the implementation authority.

The Sewa Nagar project started in October 2004 amidst violence and repeated assaults from the police and local extortionist mafia for the following reasons:

1. Since membership of the project gave legal protection to vendors who are members of the Manushi pilot project vendors stopped paying monthly bribes. The police as well as the local mafia panicked at the long term implication of letting a disciplined, self regulated “Bribe Free Zone” survive because it would create a “dangerous” role model.
2. Manushi refused to give in to threats, violent attacks and blackmail tactics of local mafia including intervention by the municipal councilor, Member of (State) Legislative Assembly (MLA) and Member of (Union) Parliament of the area, each of who wanted a certain number of stalls to be handed over to “their men” who act as local touts for bribe collection and play a “helpful” role in elections.

As a result, the new civic infrastructure was repeatedly damaged and the new pavements, drains and stalls were time and again vandalized during and even after construction. Project members were repeatedly subjected to violence, intimidation and life-threats to make them abandon the project. When the terror tactics failed, the mafia approached the High Court for a stay order on the basis of bogus and flimsy allegations. The High Court refused to grant a stay. But the goons keep filing more and more bogus objections to harass and tire us out.

Despite the violent attacks and endless harassment, we managed to create India’s first “Bribe Free” well ordered hawking zone. It was selected as a role model by the UN Commission for Legal Empowerment of the Poor. That certification, however, seems to have endangered us further and triggered off more violent attacks. Unable to grab stalls through violence or blackmail, the local mafia developed a new strategy. Due to the absence of credit facilities, many vendors are indebted to the mafia. Even when vendors pay hefty installments, the debt keeps mounting because the interest rate is astronomical. The money lending mafia began to surreptitiously take over the stalls of some of the indebted vendors by making them sign off their rights on Rs 100 denomination stamp paper.

When these illegal transfers of stalls came to the knowledge of Manushi, we requested the Deputy Commissioner of Central Zone to seal the stalls, which had been ‘purchased’ illegally from vulnerable project members. Therefore, on January 4, 2007 eleven stalls were sealed by the MCD. This firm action aimed at the mafia unleashed a new and more deadly wave of violence and terror against Manushi.

The reason for the violence is understandable. Due to the transformation of Sewa Nagar from a slum-like hawker market to a neat and well-developed area, the market value of each stall and the combined value of the entire pilot project area is today worth several crores. Each stall already commands a black-market price of Rs.5 to 15 lakhs (500,000 to 1,5 million) depending on its location. Before Manushi took charge of the area, the vending spots used to sell for prices ranging from Rs 1 lakh to 1.5 lakhs (100,000 to 150,000) each.

Since April 30th 2007, none of us can enter that area without risking our lives. Several pilot project members were beaten out of the area. I myself faced several murderous attacks by the local goons. Even though the Lt. Governor of Delhi as well as the Prime Minister's Office intervened to demand strict action against the antisocial elements, the pilot project eventually collapsed because the police ganged up with local politicians and failed to take necessary action against them. In fact, the police gave full support to anti-social elements in registering false criminal cases against me and key members of the pilot project to browbeat Manushi into yielding to their demand. These cases started in 2007 are not likely to conclude any time soon.

The ultimate failure of the Sewa Nagar project taught us once again the limitations of legal measures for empowerment of the poor without an honest and effective implementation and monitoring machinery in place. Therefore, when asked to help with drafting model legislation for street vendors by the Urban Development Ministry and later the Delhi State Government, I had to go beyond scrapping the restrictive licensing regime. The draft law I prepared mandates the creation of an autonomous body capable of not only institutionalizing transparent procedures for ensuring that only those who are actually vending on the streets themselves are registered as vendors but also creating adequate and functional hawking zones with the required infrastructure in place. In addition, the draft law envisages hi-tech monitoring through CCTV cameras to ensure that those allotted stall spaces do not end up getting evicted forms of coercion.

The Proposed Draft Act on Street Vending and Hawking

The purpose of this Act is not to “control” but to “to protect the Constitutional right to earn a livelihood of persons engaged in street vending and hawking in Delhi; to include street vendors as an integral, lawful, legally protected and necessary part of the urban economy; to implement the National Policy for Street Vendors (NPSV) to create legally protected hawking zones and hawking clusters; to plan space for street vendors in consonance with the Delhi Master Plan-2021; to constitute a “Street Vendor Protection and Regulation Authority”(SVPRA) to ensure the implementation of the street vendor protective provisions of the NPSV in the National Capital Territory of Delhi; to end illegal harassment, beatings and confiscations of goods of street vendors; and for matters connected therewith or incidental to the above.

Key features of the proposed law are as follows:

1. **Quota free registration:** There shall be no numerical limit placed on granting registration for vendors and hawkers.
2. **Rules for registration:** The SVPRA will establish simple, transparent rules and procedures for registration of vendors within a specified time frame
3. **Deemed registration:** If on completion of the specified period, no response is received by the applicant about rejection or deficiencies in the application, the applicant shall be deemed to have been registered.

4. **No arbitrary refusal:** The Vending Authority shall not summarily reject the application without giving the applicant an opportunity to rectify deficiencies, if any.
5. **Grievance Redressal Cell:** Any person aggrieved by the decision of the Zonal Vending Authority may, prefer an appeal to the Grievance Redressal Cell which will have to decide the case within a specified time frame.
6. **Only one vending site per applicant:** A person will be entitled to only one vending site or mobile vending registration. The I Card or Vending Certificate issued at the time of registration will carry the photograph of the vendor.
7. **Disciplinary Action against malafide denial:** The failure of the SVPA to provide registration or the Deficiency Memo within the prescribed time limit as well as the failure to include the applicant in the digitalized waiting list shall invite disciplinary action against the concerned officer as per the rules prescribed under this Act.
8. **Validity period of vending:** A vending registration will be valid for a period of 5 years. It may be renewed for a further two terms (a total of 15 years) after which the vending holder will surrender all claims to that site.
9. **Vending is non-inheritable:** Vending sites shall not be ordinarily inheritable, except in case of demise of the registered vendor during the 15 year term. In case of the death or incapacity of the registered vendor, it shall be incumbent upon the legal heirs of the person to inform the concerned Authority. Any move to illegally sell off or rent that vending site shall lead to eviction from the site.
10. **Surrender of registration:** If the Vending Authorization holder leaves the City, gets a full time job or becomes incapable of vending on account of illness or other family compulsions, he/she shall surrender the vending registration within the time frame mandated in the Rules under this Act.
11. **Draw of lots for registration:** The Zonal Vending Authorities will decide on new registration by a draw of lots held every six months for hawking zones and clusters under the respective jurisdiction of each Zonal Authority.
12. **Registration data to be available on website:** Each Zonal Vending Authority (ZVA) will provide on its website the exact data about the number of vendors registered in that Zone along with photograph, name, address of the registered vendor and the exact location of his vending site. It shall also provide the names and addresses of vendors whose registration has been suspended, cancelled or revoked along with the reasons for the above mentioned disciplinary action. The SVPRA will provide the comprehensive, combined data provided to it by ZVAs on its website along with all relevant information regarding vending applications, registration procedures and waiting list of Vending applicants.
13. **Pending applications:** The ZVA website shall also provide on its website the names and addresses of all the pending applicants for vending sites or for mobile vending and list the reason for delay in granting a vending site.
14. **Assessment of Holding Capacity:** The SVPRA shall regularly assess the holding capacity of each zone to absorb street vendors in a manner that provides avenue for gainful employment to the maximum possible number of vendors without causing undue inconvenience to other road users.
15. **Deficiency Memo:** If the application does not fulfill the stipulated requirements, a Deficiency Memo, in respect of vending registration, as the case may be, shall be

provided to the applicant instantly. As soon as the deficiency is complied with, the applicant shall be entitled to be put on the waiting list for vending site.

16. **Year round applications:** Application forms for vending will be made available on the website of SVPRA and accepted on all working days of the year at all the ZVAs.
17. **The draft law** tries a delicate balance between easy entry into this occupation for new migrants to the city and the need to maintain civic discipline by preventing a free for all situations in the city by earmarking three kinds of zones:
18. **“Green Zone”** means an area notified by the SVPRA or the Zonal Authority where a vendor may start hawking without the necessity of prior registration and without prejudicing the vendor’s right to apply for registration in an “Amber Zone”
19. **“Amber Zone”** means a clearly delineated area notified by the SVPRA or the Zonal Vending Authority (ZVA) where a vendor must have prior registration in order to occupy a designated space for setting up his/her vending stall.
20. **“Red Zone”** means a clearly demarcated area where vending is altogether or partially prohibited during certain hours or days by SVRPA.

Despite all these “safeguards”, there is very little chance of an effective street vendors law getting enacted and even less of a chance of it being implemented with sincerity because elected representatives are not willing to accept a system where they do not have ultimate authority deciding who gets registered and who does not, as well as administering the location of hawking zones. With land being scarce and a very high priced resource, vendor stalls have become highly valued assets. This occupation, especially in big cities, provides an entry point into the world of entrepreneurship and avenue for upward mobility.

Yet, as of now, political mafias often exercise control over vending spots in collaboration with the police. To break this unholy nexus, far reaching police and judicial reforms must ensure law and order machinery supports lawful practices and acts in accordance with the Constitution. Reform must also ensure courts have the capacity to offer effective and speedy protection to people whose rights are violated. In addition, radical electoral reforms need to ensure money and muscle power do not dominate politics and the machinery of governance and that elected representatives cannot manipulate the administrative machinery for building illegal empires of wealth and patronage for themselves.

Human Rights and Poverty in Development Programming

Alison Graham

1. Why human rights in development programming?

The understanding of poverty has moved beyond previous definitions of insufficient income. It is now understood as a result of mutually reinforcing deprivations including feelings of powerlessness, entrenched discrimination, marginalisation and a lack of access to essential social services such as education and health. As the Committee on Economic, Social and Cultural Rights, *'in the recent past, poverty was often defined as insufficient income to buy a minimum basket of goods and services. Today, the term is usually broadly understood as the lack of basic capabilities to live in dignity. This definition recognizes poverty's broader features, such as hunger, poor education, discrimination, vulnerability and social exclusion.'*⁵⁵⁸ Following the indivisibility of human rights, each of these deprivations affects and reinforces the others and perpetuates the cycle of poverty. Understanding poverty in this way, as the Independent Expert on human rights and extreme poverty⁵⁵⁹ has recognised, demonstrates human rights and extreme poverty as being linked in at least three ways: (a) poverty can be both a cause and a consequence of human rights violations; (b) the realization of all human rights and efforts to eliminate extreme poverty are mutually reinforcing; and (c) human rights norms and principles provide the framework for poverty reduction and/or eradication.⁵⁶⁰

2. The international human rights normative framework:⁵⁶¹ Human rights principles & standards, and monitoring mechanisms

Individuals' and peoples' human rights are recognised and guaranteed by international human rights treaties dealing with, amongst others, civil and political rights; economic, social and cultural rights; and the elimination of racial discrimination. Several human rights treaties also address the situation of particularly groups, many of which are especially

558 See *Poverty and the International Covenant on Economic, Social and Cultural Rights*, adopted by the Committee on Economic, Social and Cultural Rights on 4 May 2001, E/C.12/2001/10.

559 The Independent Expert is one of the thematic special procedures of the Human Rights Council.

560 See *Progress Report of the independent expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona, on the draft guiding principles on extreme poverty and human rights A/HRC/15/41*, 6 August 2010

561 While in Africa, Latin America and Europe there are regional human rights systems, there is no such regional system in the Asia-Pacific Region.

vulnerable to human rights violations and are often subsequently living in precarious situations including extreme poverty. These include the Convention on the Rights of Persons with Disabilities; the Convention on the Rights of all Migrant Workers and Their Families; and the Convention on the Elimination of Discrimination against Women.

Human rights most often denied or jeopardised for persons living in extreme poverty include the rights to: recognition as a person before the law; privacy and protection from intrusion in family life; life, personal security and physical integrity; equal and effective access to justice; an adequate standard of living, including access to food; safe drinking water and sanitation; adequate housing, security of tenure and protection from forced evictions; the highest attainable standard of physical and mental health; work and rights at work; social security; education and take part in cultural life.⁵⁶²

UN Monitoring mechanisms at the global level

The UN has developed a number of monitoring mechanisms aimed to review States implementation of human rights obligations. These include:

Treaty monitoring bodies⁵⁶³

Each human rights treaty has a monitoring mechanism. The job of the treaty monitoring bodies is to assist States' party's implementation of the respective human rights treaty. Each State party is reviewed by the treaty body on a periodic basis, usually every 4-5 years. The review is based on the State party's own report and information submitted by civil society and non-governmental organisations (parallel or shadow reports). After concluding its review the treaty body issues Concluding Observations/Recommendations to help assist States implement their obligations. To also assist States, treaty bodies develop authoritative interpretations on the content of rights and provisions contained in their respective treaties. These are called General Comments/Recommendations. Many of the treaty bodies are also able to consider individual complaints.⁵⁶⁴ By helping states realise human rights, all of these treaty monitoring bodies deal with issues related to the MDGs but several are particularly relevant such as the Committee on the Elimination of Discrimination against Women, the Committee on the Elimination of Racial Discrimination and the Committee on the Rights of the Child, the Committee on Economic, Social and Cultural Rights. All of these address issues such as the right to food, health, education and the vulnerable situation of marginalised populations.

562 These have been identified by the Independent Expert on human rights and extreme poverty. See *Progress Report of the independent expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona, on the draft guiding principles on extreme poverty and human rights A/HRC/15/41*, 6 August 2010

563 For more information on the human rights treaty monitoring bodies see *Simple Guide to the UN Treaty Bodies*, International Service for Human Rights, 9 July 2010. Available at www.ishr.ch

564 The Committee on the Rights of the Child cannot consider individual complaints.

The Special Procedures of the Human Rights Council⁵⁶⁵

The term 'special procedures' is the general name given to mechanisms established by the Human Rights Council to address either specific country situations or thematic issues in all parts of the world. Currently, there are 33 thematic and eight country mandates. Special procedures' mandates usually call on mandate holders to examine, monitor, advise and publicly report (including to the Human Rights Council and sometimes the General Assembly) on human rights situations in specific countries or territories, known as country mandates⁵⁶⁶, or on major phenomena of human rights violations worldwide, known as thematic mandates.⁵⁶⁷ Various activities are undertaken by special procedures, including responding to individual complaints, conducting studies, providing advice on technical cooperation at the country level, and engaging in general promotional activities. The importance of special procedures on the Human Rights Council has already been acknowledged by UNDP. For instance, UNDP has asserted the Human Rights Council's special procedures are valuable in 'assist(ing) UNDP Country Offices in determining possible new programme areas in a particular country.'⁵⁶⁸ In recent years, these Special Procedures have increasingly begun to reflect and refer to the importance of human rights in achieving the MDGs. On 17 September 2010, just prior to the High Level Summit on the Millennium Development Goals, UNDP released a press release entitled "Without human rights, Millennium Goals will fail."⁵⁶⁹

The **Universal Periodic Review** mechanism is a new mechanism of the Human Rights Council that comprehensively reviews implementation of all human rights obligations of a given State on the basis of: reports submitted by the State itself, civil society and information contained in the reports of independent human rights experts and groups known as the Special Procedures, human rights treaty bodies, and other UN entities. Following its review, the Human Rights Council issues an 'outcome report' providing a summary of the actual discussion. The report consists of questions, comments and recommendations made by States to the country under review, as well as responses by the reviewed State including whether or not it accepts the recommendations. During the UPR process, States are increasingly recognising links between poverty, the MDGs and human rights. During Bangladesh's review, for instance, a number of delegations welcomed significant advances towards universal free primary education. Specific reference was made to schoolbooks being free of charge, annual budget allocations for education (15 per cent of the general budget) impressive gains in the high net enrolment rate, positive enrolment ratio of girls to boys, and a decrease in girls' school drop-out rates.⁵⁷⁰

565 For more information see <http://www2.ohchr.org/english/bodies/chr/special/index.htm>

566 The country mandates include: Iran; the Occupied Palestinian Territories; Haiti; Sudan; Cambodia; Myanmar; the Democratic People's Republic of Korea; and Somalia.

567 Thematic issues covered by Special Procedures include the rights to adequate housing, health, food, education, freedom of assembly; extreme poverty and human rights; arbitrary detention; sale of children; extrajudicial executions; and torture.

568 See *Human Rights in UNDP: Practice note*, UNDP April 2005 p 17

569 Available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10344&LangID=E>

570 See A/HRC/11/18, 5 October 2009

3. Useful tools for development practitioners

Each of these monitoring systems has a number of tools that can be used by development practitioners in adopting a human rights based approach, particularly in the context of working to achieve the MDGs:

Treaty body system:

Concluding Observations are extremely useful for development practitioners to gain an idea of priority problems for human rights implementation in a particular country and are often of particular relevance to the MDGs. For example, the Committee on the Rights of the Child has frequently noted issues of concern such as child malnutrition and quality of maternal healthcare. The Committee expressed concern over the Maldives' high rates of child malnutrition, the quality and accessibility of maternal health care, and the unavailability of essential medicines on many of the small islands. Concluding Observations/Recommendations typically consist of three sections: acknowledgement of positive steps; identification of problematic areas; and practical steps for States to improve compliance with the respective treaty. While not legally binding, they are authoritative since by ratifying the relevant treaty, State parties accept the competence of the treaty body to review their compliance with the treaty. Development practitioners can also use jurisprudence arising from various individual complaints mechanisms and the General Comments/recommendations to gain more information about how a specific right should be implemented. Of particular interest for development practitioners are the General Comments of the Committee on Economic, Social Cultural Rights elaborating the content of rights such as the right to health, water, food, social security and work.

Special procedures:

Each Special Procedure produces a number of reports and recommendations on both thematic and country specific issues. Each of these reports can be used by development practitioners to identify many issues affecting people, especially poor individuals and families vulnerable to human rights abuses and violations. Many of the Special Procedures have also specifically dealt thematically with the issue of poverty and the MDGs. The Independent Expert on human rights and extreme poverty drafted a Progress Report regarding guiding principles on extreme poverty and human rights, which specifically addresses how States should implement human rights obligations with regards to people living in extreme poverty. This provides assistance for removing barriers facing the poor in their attempt to escape poverty.⁵⁷¹ The Special Rapporteur on the issue of human rights obligations related to access to safe drinking water and sanitation report to the 2010

⁵⁷¹ See *Progress Report of the independent expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona, on the draft guiding principles on extreme poverty and human rights A/HRC/15/41*, 6 August 2010

General Assembly focused on how human rights, in particular human rights for water and sanitation, can help realize the Millennium Development Goals.⁵⁷²

Universal Periodic Review Mechanism:

As the outcome of a unique universal State-led review mechanism, the Outcome Document carries significant weight as the voice of the international community of States. UN agencies can play a critical role supporting states following-up the review process and implementing recommendations contained in the Outcome Document including translating and disseminating recommendations, providing technical support and helping mobilize necessary resources for implementation

⁵⁷² See the *Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation*, Catarina de Albuquerque, A/65/254 6 August 2010

Overview

Monitoring/enforcement mechanisms	Types of rights	Tools available	Website
<i>Human rights treaty monitoring bodies</i>			
Human Rights Committee (CCPR or HRC)	Monitors the implementation of the International Covenant on Civil and Political Rights by State parties	Concluding Observations Jurisprudence from the individual complaints mechanism General Comments/recommendations	http://www2.ohchr.org/english/bodies/hrc/index.htm
Committee on Economic, Social and Cultural Rights	Monitors the implementation of the International Covenant on Economic, Social and Cultural Rights by State parties		http://www2.ohchr.org/english/bodies/cescr/index.htm
Committee on the Elimination of Racial Discrimination (CERD)	Monitors the implementation of the Convention on the Elimination of Racial Discrimination by State parties		http://www2.ohchr.org/english/bodies/cerd/index.htm
Committee on the Elimination of Discrimination against Women (CEDAW)	Monitors the implementation of the Convention on the Elimination of Discrimination against Women CEDAW contains the most comprehensive set of norms on substantive equality and women's human rights, though it does not specifically cover freedom of association, trade union participation, and freedom of information.		http://www2.ohchr.org/english/bodies/cedaw/index.htm
Committee against Torture	Monitors implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by its State parties.		http://www2.ohchr.org/english/bodies/cat/index.htm

Monitoring/enforcement mechanisms	Types of rights	Tools available	Website
Committee on the Rights of the Child (CRC)	Monitors the implementation of the <i>Convention on the Rights of the Child</i> by State parties		http://www2.ohchr.org/english/bodies/crc/index.htm
Committee on Enforced Disappearances (CED)	Monitors implementation of the <i>Convention on Enforced Disappearances</i> by State parties		http://www.ohchr.org/EN/HRBodies/CED/Pages/CEDIndex.aspx
Committee on Migrant Workers (CMW)	Monitors implementation of the <i>International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families</i> by State parties		http://www2.ohchr.org/english/bodies/cmw/index.htm
Committee on the Rights of Persons with Disabilities (CRPD)	Monitors implementation of the <i>Convention of the Rights of persons with Disabilities</i> by State parties		http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx
<i>Special Procedures of the Human Rights Council</i>	The Special Procedures cover a number of rights including rights to adequate food, housing, health, education, freedom of assembly, expression and belief, as well as thematic issues such as extreme poverty and human rights. There are currently eight special procedures on country situations namely: Iran; the Occupied Palestinian Territories; Haiti; Sudan; Cambodia; Myanmar; the Democratic People's Republic of Korea; and Somalia	Reports and recommendations	Overview: http://www2.ohchr.org/english/bodies/chr/special/index.htm Thematic: http://www2.ohchr.org/english/bodies/chr/special/themes.htm Country specific:
<i>Universal Periodic Review (UPR) Mechanism</i>	The UPR assesses the extent to which States respect their human rights obligations set out in: (1) the UN Charter; (2) the Universal Declaration of Human Rights; (3) human rights instruments to which the State is party (human rights treaties ratified by the State concerned); (4) voluntary pledges and commitments made by the State (e.g. national human rights policies and/or programmes implemented); and, (5) applicable international humanitarian law.	The "outcome report" provides a summary of the actual discussion. It therefore consists of questions, comments and recommendations made by States to the country under review, as well as responses by the reviewed State.	www.ohchr.org/EN/HRbodies/UPR/Pages/UPRmain.aspx

Relinking the MDG Acceleration Framework with Human Rights and Democratic Governance: Proposals for widening the scope of the MDG agenda in Asia-Pacific

Marcus Brand

1. Introduction

This paper⁵⁷³ is written in the context of discussions within UNDP and the wider development community in Asia-Pacific on how to structure programmes aimed at meeting the Millennium Development Goals (MDGs) by 2015. As per UNDP's 2010 MDG Breakthrough Strategy, renewed and concerted efforts are to be made to help developing countries accelerate progress towards reaching the Goals, but also to ensure longer term sustainability of the progress made, and to ascertain overall progress made by countries also reaches the poorest of the poor, marginalized people and those otherwise left behind.

The article discusses the MDGs within the context of the Millennium Declaration and revisits debates of the past decade on the complex relationship between the Millennium Declaration, the MDGs and Human Rights. The article also highlights the dimension of democratic governance for the MDGs. Following this rather conceptual and normative perspective, a brief summary outlines actual progress made in the context of the MDGs a decade into the new Millennium and offers an interim view on the effectiveness of MDGs to implement the Millennium Declaration's aspirations. With less than five years to go before reaching the 2015 target date, the article captures main features of the 2010 review and various efforts aimed at breakthroughs and acceleration. In doing so, the document finds that while the relationship between human rights, governance and the MDGs has been dealt with exhaustively at the conceptual level, in practice there has been a mixed record integrating the two frameworks.

At the global level, the MDG process appears to have moved away somewhat from the language of human rights and democracy, but has nevertheless taken up an important component of a human rights approach, namely the identification of disparities and inequalities within countries as a main issue to be addressed within the MDG context. However, the paper also finds linkages between human rights, governance and the MDGs

573 The paper was drafted by Marcus Brand, consultant on governance and the MDGs in Asia Pacific, for the Democratic Governance Group of the UNDP Asia Pacific Regional Centre. It is based on the author's analysis and draws from a comprehensive review of the relevant documents and secondary literature on the subject published in the past decade, as well as from numerous formal and informal exchanges with UNDP staff and other development and governance experts in the region. The opinions expressed herein are those of the author, and do not reflect the official position of UNDP.

were not incorporated into the MDG Acceleration Framework (MAF) to the extent they could have been, and much of the current reporting and programming on MDGs still fails to take this connection fully into account. Finally, the paper proposes a number of concrete steps how ongoing and future MDG-related efforts could benefit from stronger linkages to human rights and democratic governance. The paper ends with a tentative outlook and some reflections for a possible post-MDG development agenda, which needs to be more fully aligned with the values and principles of the Millennium Declaration, and should integrate a human-rights-based approach, governance dimensions and human development more comprehensively from the outset.

2. The MDGs within the context of the Millennium Declaration

In order to carry out meaningful work at the country level in the context of the MDGs, it is essential to fully understand and appreciate the origins, strengths and weaknesses of the MDGs, as well as the broader context under which they were developed and have matured. The relationship between the MDGs, human rights, and democratic governance is of particular relevance here because these two areas constitute both values and principles included prominently in the Millennium Declaration. The goals are fully rooted in the broader framework of human rights law and standards but are also essential ingredients for achieving the MDGs in a sustainable, equitable and effective manner.

Despite having become one of the most persuasive “big ideas” of the global development discourse in a generation, the origin, nature and content of the MDGs, as well as their relationship with other sets of international standards and commitments, remains a subject of debate.⁵⁷⁴ Some of the earlier discussions, in particular on the relationship of the MDGs with human rights and democratic governance, have again come to the fore with a renewed focus regarding the MDGs in the international development arena as the 2015 deadline line for their achievement edges closer.

When Heads of State and Government met at the UN General Assembly in New York in September 2000, they adopted the Millennium Declaration.⁵⁷⁵ With the hope of galvanising genuine political commitment at the turn of the millennium, the Declaration built on many previously-made commitments which had resulted from a number of global conferences led by the UN in the 1990s related to human rights, women, the environment and development. With the Cold War receding into history, new waves of democratization increasing the number of electoral democracies to a majority of all Member States, alongside the forces of globalization, it seemed like a unique opportunity to unite global efforts to reduce and ultimately eliminate extreme poverty, achieve human development and guarantee human rights for all.

574 See for instance, the conference on the MDGs and Human Rights at Harvard University in March 2010. Conference Report at <http://www.jus.uio.no/smr/english/about/programmes/serp/conferences/docs/mdg-2010.pdf>

575 For an overview and a collection of all relevant documents, see the UN web-portal on the MDGs at <http://www.un.org/millenniumgoals/bkgd.shtml>

Indeed, the Millennium Declaration goes far beyond what would later become a rather bland and technical approach of the MDGs. In the Millennium Declaration, world leaders committed they would “*spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development.*”⁵⁷⁶

The MDGs were presented in 2001, aiming to introduce an implementation plan for goals generally outlined in the Millennium Declaration a year earlier.⁵⁷⁷ They included, as an additional element, targets and indicators, which were to be applied not only globally, but also at the country level, with respect to the countries considered to be developing countries.⁵⁷⁸ The MDGs, in significant contrast to both international human rights law and the Millennium Declaration itself, address developed and developing countries differently, and are therefore, not entirely universal. Whereas Goals 1-7 are understood and applied only to developing countries, Goal 8 refers to a partnership between developing and developed countries, and is generally understood as a commitment by wealthier countries to boost their levels of development aid to poorer ones. The MDGs also included a number of changes to the wording and emphasis of the Millennium Declaration.⁵⁷⁹

The General Assembly’s review meeting of 2005 formally endorsed the MDGs and the related process proposed by the UN. As agreed in the Millennium Declaration in 2000, the review meeting in 2005 was to explicitly assess progress made in implementing the provisions of the whole Declaration, rather than only the MDGs. The Secretary General was asked to issue periodic reports for consideration by the General Assembly. In contrast, the 2010 review meeting addressed only the MDGs.

576 Text of the Millennium Declaration: <http://www.un.org/millennium/declaration/ares552e.htm>

577 The Millennium Declaration has eight sections: I. Values and Principles; II. Peace, Security and Disarmament; III. Development and poverty eradication (from which most of the MDGs were later derived, with some changes); IV. Protecting our common environment; V. Human Rights, democracy and good governance; Protecting the vulnerable (with a focus on assistance for assistance and protection in humanitarian emergencies); Meeting the Special Needs of Africa; and VIII. Strengthening the United Nations.

578 The relevance of the MDGs may not have been part of the original concept, according to some. At the March 2010 Harvard conference on the MDGs and Human Rights, Jan Vandemoortele, formerly UNDP, explained that the MDGs were an attempt to “revive” the Millennium Declaration, and were not originally intended to be operationalized at the national level or used as uniform yardsticks or as an analytical framework. Rather, they were designed as rallying points.

579 Critics consider it unfortunate that the UN, in its official communications about the MDGs, continues to blur this distinction. Its MDG web-portal states: “*In September 2000, (...) world leaders came together at UN Headquarters in New York to adopt the UN Millennium Declaration, committing their nations to a new global partnership to reduce extreme poverty and setting out a series of time-bound targets—with a deadline of 2015—that have become known as the Millennium Development Goals.*”

Differences⁵⁸⁰ between the Millennium Declaration, the MDGs, and the process in which the MDGs were developed and presented a year after the Declaration have been described as less-than-optimal. However, this did not stop the MDGs from becoming the single-most important reference framework for the global development agenda in our time. This was significantly enhanced by the advocacy of Jeffrey Sachs and others closely involved in the drafting process who promoted the beginning of a “decade of bold ambition” to “end poverty”, as per the title of one of Sachs’ widely read books. This decade of bold ambition was to consist of unprecedented and coordinated efforts to mobilize resources, build capacity and strive towards concrete targets and indicators. Accordingly, the 8 Goals were accompanied by 21 targets and an even larger number of indicators. The targets and indicators were slightly amended in 2007.⁵⁸¹

While the first years into the past decade were characterized by a number of national level reports and rather disjointed and selective efforts by the development community to operationalize the Goals, in 2005, the UN Member States decided in the General Assembly “to adopt, by 2006, and implement comprehensive national development strategies to achieve the internationally agreed development goals and objectives, including the Millennium Development Goals.”⁵⁸² Technically, this was the first time Governments explicitly committed themselves to the MDGs, as they had not yet been included in the Millennium Declaration. However, the fact that Governments were committed to them, and that they should be considered as country-level targets and indicators had already come to be established by 2005. What was still missing was the grand strategy, proposed in 2005 in the form of the Report of the Millennium Project already commissioned at that time by the UNSG for this purpose.

The Millennium Project Report was never formally endorsed by the UN. However, it inspired efforts, in particular by the UN agencies including UNDP, to make the MDG agenda a core priority, align all development programmes accordingly, and focus on the MDGs and their targets and indicators in their reporting and advocacy. This has remained the case ever since, at least at the level of public policy statements.

580 These differences have already been discussed extensively in the context of analyzing the MDG framework from a human rights perspective. See, for instance, OHCHR’s *Claiming the MDGs* (2008), which found slippage on areas such as children, water and trade, or the 2010 Harvard conference on Human Rights and the MDGs. For instance, Thomas Pogge of Yale University, critiqued the massaging of the MDG 1 targets which have resulted in hiding the increase in poverty since 1990. He recalled that the grand promise in the Millennium Declaration in 2000 was to halve poverty by 2015 but the change in the MDGs was to halve the proportion not the number, and this has been helped along by population growth. Pogge also pointed out that by backdating the baseline for the MDGs to 1990, the development community “*changed the goal rather than changed in the world*”.

581 For instance, a target on “achieving, by 2015, universal access to reproductive health” was added on to MDG 5.

582 2005 World Summit Outcome

3. Past debates revisited: The Millennium Declaration, the MDGs and human rights

The MDGs had originally not been a product of the traditional human rights establishment within the UN and elsewhere. While the aspiration of the MDGs is largely congruent with the human rights movement, the MDGs purported to do things differently, and had a much stronger emphasis on results, rather than normative considerations. This may have been a reason why the MDGs were originally not necessarily embraced by the human rights community. The reaction to the MDGs from a human rights perspective developed slowly from ignorance to criticism and finally incorporation into the larger human rights discourse. What follows is a short summary of how the process unfolded.

From the outset, debates existed regarding how MDGs relate to the much broader normative and organizational context of human rights. When reading the MDGs together with the Millennium Declaration, it may be surprising how a question about the relationship to human rights and democratic governance could have arisen. The Declaration emphasizes human rights and democratic governance unreservedly, and posits the development goals (the third of its eight sections) clearly in this broader context. The Goals are aimed at translating the shared values of freedom, equality and solidarity into actions.

The early years of the new Millennium also witnessed commitments to democracy and human rights unprecedented in their clarity and elaboration by the UN and its agencies.⁵⁸³ The landmark human development reports of that period are perhaps the most prominent, but far from the only example for development. And yet, the MDGs, which had been presented as the single most important set of development goals of the international community and thus also the UN when they were announced, came under criticism from human rights groups and the human rights establishment even within the international system.

One early critical observation was the Statement of the Asia-Pacific Civil Society Forum on the MDGs and the Eradication of Extreme Poverty and Hunger, in Bangkok, held from 6-8 October 2003. In its recommendations to the UN, it stated, i.e., the following:

"The MDGs sideline the critical and important issue of human rights. Certain norms are particularly pertinent in addressing the problem of poverty, such as effective non-discrimination, the recognition of vulnerable groups, the right to an adequate standard of living, the right to freedom from hunger, the right to economic self-determination

⁵⁸³ The general commitment of the UN and its member states to human rights and democracy dates back much further, of course. For instance, the Universal Declaration of Human Rights of 1948 already included the following: *"The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."*

and the right to development. The Committee [on Poverty Reduction] should affirm and operationalize rights-based approaches to poverty eradication.”⁵⁸⁴

“The MDG itself formulates the problem of poverty too narrowly in terms of vision, scope and direction. It cannot simply be reduced to a numerical target to be achieved by a certain date and by technical fixes. Durable and sustainable solutions to poverty will require the active involvement of the poor and civil society, a more comprehensive understanding of the root causes of poverty and its multidimensional and diverse consequences and the right policies.”⁵⁸⁵

Similar concerns were also raised within the UN itself. In 2003, a UN interagency meeting on human rights approaches stated, *“there is a concern that, taken in isolation, the MDGs might lead us back into a technocratic (input/output) approach to development. But this worry would be allayed if Human Rights Based Approaches were applied to MDG processes, both in reporting and in programming to achieve the MDGs.”⁵⁸⁶* A commitment was adopted soon after and in the 2003 **“Common Understanding on the Human Rights Based Approach to Development Cooperation”⁵⁸⁷** UN Agencies agreed:

1. *All programmes of development co-operation, policies and technical assistance should further the realisation of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments.*
2. *Human rights standards contained in, and principles derived from, the Universal Declaration of Human Rights and other international human rights instruments guide all development cooperation and programming in all sectors and in all phases of the programming process.*
3. *Development cooperation contributes to the development of the capacities of ‘duty-bearers’ to meet their obligations and/or of ‘rights-holders’ to claim their rights.*

It was also due to UNDP’s leadership that the interlinking of human rights, poverty and development had already preceded the Millennium Declaration and the discussion on the MDGs. In 1998, UNDP adopted its policy of “Integrating Human Rights with Sustainable Human Development”. Subsequently, in 2000 and 2002, the **Human Development Reports** affirmed human development is essential for realising human rights, and human rights are essential for full human development.⁵⁸⁸

584 Statement of the Asia-Pacific Civil Society Forum on the MDGs and the Eradication of Extreme Poverty and Hunger, Bangkok, 6-8 October 2003. (<http://www.un-ngls.org/orf/Anti%20Poverty%20or%20Anti%20Poor.pdf>)

585 Ibid.

586 Report of the Second Interagency Workshop on Implementing a Human Rights Based Approach in the Context of UN Reform (Stamford, USA, 5-7- May 2003).

587 www.undg.org/archive_docs/6959-The_Human_Rights_Based_Approach_to_Development_Cooperation_Towards_a_Common_Understanding_among_UN.pdf

588 This was evident already in the subject areas and titles chosen of the HD reports of that period: 2000–*Human Rights and Human Development* and 2002 – *Deepening Democracy in a Fragmented World*, and was also emphasized in the 2003 HD Report on *Millennium Development Goals: A Compact Among Nations to End Human Poverty*.

In 2003, a **UNDP Practice Note on Poverty Reduction and Human Rights**⁵⁸⁹ was prepared through an intense consultative process, including a dialogue on three UNDP Knowledge Networks: the poverty network, the governance network, and the human rights network.⁵⁹⁰ In this Practice Note UNDP stated integrating human rights into poverty reduction strategies does not entirely change ‘what’ is to be done as to ‘how’ and ‘why’ activities are undertaken. In the Note, UNDP said it would take the following six concrete steps to further contribute to the realisation of human rights and the reduction of poverty:

1. *Governments and other actors will be encouraged to adopt a human rights-based approach in tailoring and customising the MDG targets to the local context.*
2. *Development assistance will focus on the capacities of duty-bearers, at all levels, to meet their obligations to respect, protect and fulfil rights; as well as the capacities of rights-holders to claim their rights.*
3. *A country’s ability to reduce poverty is intimately linked to its capacity for democratic governance and the strength of its civil society. As such, UNDP will enhance the synergy between poverty reduction and democratic governance. Programmes for local governance, access to justice, capacity of human rights institutions, grassroots initiatives for community development, and human rights education will be included among pro-poor poverty programming.*
4. *UNDP will engage in the work of UN Human Rights Treaty Bodies and in particular, strive to incorporate selected and relevant recommendations as a result of periodic reviews into programme development.*
5. *Rights-sensitive participatory assessment methodologies will be developed to link rights, obstacles and strengths around which poor people can secure their livelihood.*⁵⁹¹
6. *In-house capacity will be built to undertake multi-disciplinary reviews and analyses maximizing meaningful participation of poor women, indigenous groups and disadvantaged people.*

Selim Jahan, the Director of the UNDP Poverty Group, made very similar arguments related to the MDGs and human rights in a number of articles and debate contributions at the time.⁵⁹² He observed part of the challenge was changing the mind-set of those who consider human rights and poverty reduction as two separate issues and to pursue more convincing analytical work. He identified issues such as methodologies, standards and norms as inhibiting a more comprehensive integration of the two frameworks with many unanswered questions hindering a broader consensus. In operational terms, he saw challenges with regard to advocacy, awareness-building and human rights education.

589 [http://www.beta.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/poverty-reduction-and-human-rights-practice-note/HRPN_\(poverty\)En.pdf](http://www.beta.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/poverty-reduction-and-human-rights-practice-note/HRPN_(poverty)En.pdf)

590 The UNDP Practice Note was a joint product of what was then called the Socio-economic Development Group (SDG) and the Institutional Development Group (IDG) of the Bureau for Development Policy (BDP). It was developed with support of HURIST, the joint UNDP/OHCHR human rights strengthening programme.

591 A concrete example of participatory methodologies is South Africa’s “Speak Out on Poverty Hearings”.

592 Selim Jahan, *Human Rights-Based Approach to Poverty Reduction – Analytical Linkages, Practical Work and UNDP*, 2003

Challenges also existed in terms of concrete practical work in terms of rights-based approach to programming, which had just been formally agreed among UN agencies. One area emphasised as requiring refocusing was bringing a human rights-based approach into the Poverty Reduction Strategy papers (PRSPs) – both in terms of content as well as the process.

As previously mentioned, in 2002 the UN Secretary-General commissioned the Millennium Project to develop a concrete action plan for the world to achieve the MDGs. In 2005, the independent advisory body headed by Jeffrey Sachs, presented its final recommendations to the Secretary-General in a synthesis volume entitled, **“Investing in Development: A Practical Plan to Achieve the Millennium Development Goals.”** The Millennium Project Report made a number of important recommendations with regard to governance and human rights.

As part of its recommendations on how to support governments in poor countries with the genuine will to implement the MDGs, the Report listed “Promoting Human Rights” as one of the pillars of a governance strategy. This in itself was seen as essential for any successful MDG-based development framework. The Millennium Project “*fully endorsed*” the commitment of the Millennium Declaration to fully protect social, cultural, economic and political rights for all, including the right to development, and stated the belief that *“a human rights framework, as outlined, for example, in the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women, is an essential prerequisite to achieving all the Goals.”*⁵⁹³ The Report, however, acknowledged *“there has been no systematic effort to integrate development planning with a human rights framework, even though such integration has tremendous potential and relevance.”*

More specifically, the Report recommended ensuring the Goals are applied in a manner consistent with human rights. Governments need to recognize the relevance of their human rights obligations, encourage community participation, and develop human rights-based accountability mechanisms.

With regard to human rights obligations, the Report suggested each country make reference in its MDG-based poverty reduction strategy to the international human rights obligations it has voluntarily undertaken. Going beyond the mere listing of international instruments, this should *“take the form of a human rights assessment”*. Moreover, national MDG-based strategies should be consistent with the principles of equality and non-discrimination, implying *“strategies are designed to reach the entire underserved population, irrespective of ethnicity, religion, regional background, or gender.”* It also suggested *“taking steps to ensure the most underprivileged and marginalized sections of society can exercise their rights.”* The Report also implied *“strategies and actions do not worsen existing inequities.”*⁵⁹⁴

With regard to community participation, the Report clarified *“such participation should always include the right to criticize official policy positions”*. Governments needed to

593 Millennium Project Report, 2005

594 Ibid.

identify mechanisms to allow groups commonly excluded from the political process to participate actively in decision-making, especially in countries with rich social diversity and indigenous and tribal populations.⁵⁹⁵

In terms of human rights-based accountability mechanisms, the Report called for an appropriate legal framework to ensure the Goals are met on the basis of respect for human rights. An important role for national human rights institutions, and additionally, international human rights mechanisms, was recommended. The importance of disaggregated reporting to take account of such disparities as gender, regional differences, and the situation of the most disadvantaged groups, was highlighted in this respect.

When present discussions on the MDGs often call for a more tailored approach to specific country situations and a stronger emphasis on people left out at the bottom end of the spectrum, it is worth recalling the Millennium Project already recommended as much in its 2005 report:

*"Achieving the Goals will require national stakeholders to agree the Goals constitute a minimum set of objectives that can be more ambitious in different contexts. And it will require implementing the Goals in a way that focuses on reaching marginalized and underprivileged groups and regions. (...) If the concerns of excluded or marginalized groups are not articulated during the policy debate, national MDG-based poverty reduction strategies will likely miss the very people whose needs they are designed to address."*⁵⁹⁶

During the four year period following the launch of the MDGs, national reports were prepared by a large number of countries around the world. International development banks and agencies took on a leading role in promoting the concept, and began to integrate an MDG dimension on general development plans and reports.

The September 2005 General Assembly World Summit to review the implementation of the Millennium Declaration again brought together more than 170 Heads of State and Government. The agenda was based on a set of proposals outlined in March 2005 by Secretary-General Kofi Annan in his report **"In Larger Freedom: Towards Security, Development and Human Rights for All"**. The report was the first comprehensive five-year report on progress toward achieving the MDGs, but it also included other important issues emanating from the Millennium Declaration as well, such as human rights (a unified system of reporting and the creation of the Human Rights Council) and the rule of law (the responsibility to protect and rule of law unit), democracy (the creation of the Democracy Fund) and UN reform (the UN resident coordinator system). It also drew on the Millennium Project and its reports.

595 For a more detailed analysis of the issue of indigenous peoples and the MDGs, see Millennium Campaign and UNDP APCR, *Millennium Development Goals and Indigenous Peoples* (Bangkok, 2010) which also takes into account the 2007 UN Declaration of the Rights of Indigenous Peoples (DRIP).

596 Millennium Project Report, 2005

In the 2005 Summit Outcome Document, the General Assembly reaffirmed *“good governance is essential for sustainable development sound economic policies, solid democratic institutions responsive to the needs of the people and improved infrastructure are the basis for sustained economic growth, poverty eradication and employment creation; and freedom, peace and security, domestic stability, respect for human rights, including the right to development, the rule of law, gender equality and market-oriented policies and an overall commitment to just and democratic societies are also essential and mutually reinforcing.”*⁵⁹⁷

For a number of years, the human rights community apparently refrained from fully engaging with the MDG agenda, and the MDG framework itself emphasized the comparison of aggregate statistics, and rather narrowly defined interventions to meet specific MDG targets. One of the most prominent and influential critiques of the relationship between the MDGs and human rights as two separate frameworks was composed by the Australian human rights lawyer Philip Alston in 2005.⁵⁹⁸ In his **“Ships Passing in the Night”** article, he described how neither the human rights nor development communities had embraced the linkage between the two with enthusiasm or conviction. Alston called for a new approach to ensure a complementary relationship between human rights and the MDGs. He addressed much of his criticism to the human rights community itself, who, he said, had not been especially supportive of the mainstreaming agenda. However, serving as the Special Advisor to the UN High Commissioner for Human Rights on the MDGs at the time, Alston stressed *“the MDG initiative is of major relevance for human rights”*.

Alston described in his article how the UN Commission on Human Rights and its Special Rapporteurs had taken minimal account of the MDGs until then, and also how the wealth of information provided by various human rights monitoring and reporting mechanisms could be used in assessing the degree to which MDGs had been fulfilled. That potential had not been mobilized. He argued it was both possible and desirable to insist on a contextualized MDG approach located within a human rights framework, flexible and able to be adapted to local needs and changing circumstances. A human rights approach to the MDGs, in his view, would also require an insistence upon the state as the actor with ultimate responsibility for ensuring respect for human rights, despite the growing relevance of the private sector in the economy.

Alston also defends the MDGs and their proponents against human rights critiques focusing on issues such as *“the perceived technocratic nature of the process”*, the *“limited goals that are set”*, the *“lack of a full human rights framework especially in relation to civil and political rights”*, and *“inadequate monitoring and follow-up”*. He argues most, if not all, of these criticisms *can* be adequately addressed within the MDG framework. In 2005, Alston concluded *“the framework within which the MDGs are being promoted at the national level in the great majority of developing countries does not currently take adequate account of*

597 2005 World Summit Outcome at <http://www.un.org/summit2005/documents.html>

598 Philip Alston, “Ships Passing in the Night: The Current State of Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals”, *Human Rights Quarterly* (2005). The article followed and built upon a number of others by the same author making similar arguments.

the various human rights dimensions."⁵⁹⁹ Perhaps, it is time, six years later, to ask whether this has actually occurred and whether what is foreseen as part of the activities for the remaining timeframe until 2015 is sufficiently addressing the shortcomings identified.

It was not long before the UN's own institution with a particular human rights mandate reacted to the critique and made efforts to actively integrate the two frameworks. In 2006, UNDP's Human Rights Policy Network (HuriTalk) and the MDGNet hosted a **six week e-discussion titled: 'How to Effectively Link the MDGs and Human Rights in Development?'** The e-discussion among practitioners examined complementarities and differences between the MDGs, human rights and related processes, and explored how the links could be strengthened in practical programming work. A resounding conclusion of the e-discussion was that the link between the MDGs and human rights is both necessary and beneficial. At the same time, practitioners identified the key concerns and 'tensions' when applying these links in their work and expressed the need for more guidance on how to make them operational in MDG-based programming, analytical and advisory work. Based on the findings and recommendations of the discussion, UNDP developed the **Primer: "HR and MDGs–Making the Link"**.⁶⁰⁰ It stated "*while the policies of aid agencies increasingly emphasise the connection between human rights and development, in practice the two concepts often remain on separate, parallel tracks. Indeed, many observe that, in practice, the operational link between MDGs and human rights is tenuous at best.*"⁶⁰¹

UNDP unequivocally stated "*linking human rights and MDGs does matter. The human rights framework provides an important tool for achieving the MDGs by helping to ensure the Goals are pursued in an equitable, just and sustainable manner.*"⁶⁰² On the basis of the six-week e-discussion and drawing from the collective expertise of UNDP at the time, the main contributions of adopting a human rights based approach to the MDG agenda were identified to lie in the following four areas:

- *A Lens of Analysis:* Improving ways of 'how to look' at the policy dimension of achieving the MDGs.
- *A Framework for Guiding and Influencing State Action:* Providing principles and parameters for 'how to address' MDG progress.
- *Setting Minimum Standards of Service Delivery:* Providing standards for 'how to judge' the quality of MDG services.
- *Emphasizing the Accountability of all Relevant Actors:* Framing MDG progress in the context of an internationally agreed legal and normative framework.⁶⁰³

As another result of these efforts, and for practitioners seeking more information on how to link human rights and the MDGs, a web-portal was set up (HuRiLink WebPortal: <http://hurilink.org>), which hosts a collection of practitioner experiences, intended to guide and

599 Ibid.

600 UNDP, *Human Rights and the Millennium Development Goals–Making the Link* (2006)

601 Ibid.

602 Ibid.

603 Ibid.

inspire efforts to link human rights and the MDGs in development practice. The website is organized into sections presenting narrative examples, common strategies, challenges and lessons learned, as well as tools and resources developed or recommended by practitioners.⁶⁰⁴ Unfortunately, the site has not been updated since 2007 and has therefore not taken into account the important developments related to the MDGs and human rights since then, and has not been adequately incorporated into the elaboration of the MDG Acceleration Framework and related processes.

In 2008, OHCHR formally and fully entered this debate with its report **“Claiming the Millennium Development Goals: A Human Rights Approach”**. Louise Arbour, then UN High Commissioner for Human Rights, summed up the prevailing scepticism expressed by many others: *“Disembodied from the human rights context and purposes in the Millennium Declaration, I would question how far the MDGs will ultimately take us.”* This was perhaps the most scathing criticism any high level official of the UN system had uttered of how the MDG agenda was being implemented in practice. OHCHR underlined *“human rights have not yet played a significant role in supporting and influencing MDG-based development planning”* and the MDG agenda has been criticized for departing too much from the Millennium Declaration because of the *“key concerns that the MDG targets are not sufficiently focused on the poorest of the poor or on inequality within a country”*.⁶⁰⁵

Another criticism mentioned in the OHCHR’s report stated *“the setting of the MDGs has partly ignored the legal force and instrumental value of human rights”, that “aggregate figures can mask gross discrepancies”, that “the contents of some MDG targets are not consistent with human rights”*⁶⁰⁶, that *“the international accountability mechanisms for the MDGs are particularly weak”,* as well as the fact that the *“MDGs are also primarily focused on developing countries, whereas international human rights standards are of comprehensive content and universal application, thus possibly shifting too much focus away from poverty that persists in many developed countries, as well as middle-income States that can more easily meet the MDGs.”*⁶⁰⁷

604 Both the Primer and the website were developed as a follow up to the “UN e-Discussion: How to Effectively Link MDGs and Human Rights in Development?” (hosted by the UN Networks-Huritalk and MDG-net from April to June 2006: http://www.undg.org/archive_docs/8073-e-Discussion_MDGs_and_HR_-_Final_Summary.doc) and the “Report of the Working Group Meeting “Human Rights and the MDGs-Theoretical and Practical Implications”. The Primer also listed as a source the deliberations of the Working Group Meeting: “Human Rights and the MDGs-Theoretical and Practical Implications”, held at the Oslo Governance Centre, UNDP in September 2006 (http://www.undg.org/archive_docs/8991-Linking_Human_Rights_and_the_Millennium_Development_Goals__theoretical_and_Practical_Implications.doc)

605 OHCHR, *Claiming the Millennium Development Goals: A Human Rights Approach*, 2008

606 OHCHR critically observed that Goal 2 ignores the requirement of free primary education, essentially reducing it to a strategy. Goal 3 sets women’s empowerment as the objective but the related target 3.A is narrowly concerned with education. Target 7.D focuses on improving the lives of 100 million slum-dwellers but a human rights-based approach would put greater focus on *basic* security of tenure *for all*, which may actually be more affordable.

607 OHCHR, *Claiming the Millennium Development Goals: A Human Rights Approach*, 2008

Perhaps the most pointed criticism expressed by OHCHR hinted at something even more fundamental:

“The overly technocratic nature of the MDGs and closely associated institutions has been questioned. The MDG project places great emphasis on the mobilization of financial resources and technical solutions, but less on transforming power relations that are partly responsible for current levels of poverty in developing, and developed, countries. The World Bank has also observed that it is becoming clear in many situations that the real barriers to progress on the MDGs are social and political. Realization of human rights is therefore a precondition for development.”⁶⁰⁸

OHCHR recommended the following elements for a more genuine human rights approach to the MDGs:

1. *Align the Goals with human rights* by harmonizing MDG targets and indicators with human rights standards. This includes ensuring targets and indicators effectively correspond to economic, social and cultural rights, that gender equality is mainstreamed, and that efforts are adequately directed towards marginalized and disadvantaged groups. This may mean some countries should *go beyond* the MDGs, while others may need to adopt more modest though reasonable and human rights-consistent goals and targets.⁶⁰⁹
2. *Be transformative, not technocratic*, by adopting a human rights-based approach to empowerment and participation in target-setting, policymaking and implementation. In order to create conditions for effective participation and good governance, civil and political rights must be effectively respected.
3. *Prioritize rights* by making policy choices and resource-allocation decisions within a human rights framework. MDG-related policies should do no harm (for example, choosing to build a dam to reach a goal must not violate human rights), evaluated as to whether they will actually reduce inequality and poverty, and sufficient resources should be provided to reach human rights-consistent goals.
4. *Claim the MDGs* by ensuring enforceable rights, accountability mechanisms and sustainable strategies. The human rights framework offers a relatively objective and comprehensive framework for legal empowerment and accountability, to help ensure the MDGs are not only reached but the achievements are sustained after 2015.

OHCHR stressed the MDGs should be considered *indicative*, for country level monitoring, and should be *nationalized, localized, tailored* and *contextualized*. This would suggest a much less rigid approach to applying the Goals and in particular the target. It would also suggest determining whether a country *is* or *is not* meeting the Goals, is ‘*on-track*’ or ‘*off-track*’, would require a much deeper analysis and cannot be done simply on the basis of looking at single figures provided by national statistics. It would need to include governance and human rights considerations as well.

608 Ibid.

609 The examples of Thailand, which adopted an MDG “plus” framework, and disaggregated national indicators according to regional and ethnic disparities, and Malaysia, which developed a similar approach, are mentioned as positive examples.

OHCHR's report makes detailed recommendations for each of these points, and also analyses every goal and target from a human rights perspective. It positions the MDGs clearly within a context of social and economic rights and elaborates on the many parallels between the two. For social and economic rights, OHCHR clarified that according to the ICESCR, a minimum of the right in question must be achieved immediately. The full right must be progressively realized within the State's maximum available resources. Progressive realization also means the level of realization of the right cannot decline without strong justification (principle of non-regression).

Social and economic rights are sometimes portrayed as positive obligations of states to actively provide services. While this is doubtless, in cases for some aspects of social and economic rights, they should not be seen as exclusively related to a state's welfare services and programmes, but should also include economic freedoms allowing individuals to pursue their own livelihoods with minimal interference by the state. At a 2010 symposium on human rights and the MDGs, Jean Pierre Chauffour of the World Bank and formerly the IMF, presented evidence demonstrating a causal link between economic freedom and economic growth. He also mentioned studies showing the shape not the size of social spending matters most for both equality and growth, and actual government spending was not necessarily a good indicator of the level of public services people receive.⁶¹⁰

The High Commissioner also addressed an issue related to process, or participatory governance, which had already been highlighted by the Millennium Project a few years earlier. In fact, the Millennium Declaration already called for "*genuine participation*". And yet, in 2008, the OHCHR found:

"Too often, participatory processes are cosmetic, reduced to mere consultation. Participatory processes should therefore be critically assessed, according to standard human rights criteria, to see whether they:

- *Reflect minimum standards for the process, which should be agreed on by all participants;*
- *Operate at all stages, including the design, implementation and monitoring of development strategies;*
- *Include women and marginalized groups and develop specific channels of participation if this is necessary;*
- *Prevent elite capture and reinforcement of existing social hierarchies and power relations;*
- *Are transparent and provide sufficient and accessible information;*
- *Provide accountability mechanisms to ensure the participatory process is held to these standards."*

In 2005, both Alston and the Millennium Project suggested a more formal link between various human rights mechanisms and the MDGs framework, at very least to draw mutual recognition of each other. Following a review of the relevant human rights reports

610 MDGs and Human Rights, International Symposium – Conference Report, Harvard Law School, 22-23 March 2010.

prepared within UN human rights machinery (Treaty Bodies, Special Rapporteurs) in 2005, Alston still came to the conclusion *"none of the treaty bodies thus far appears to make any significant use of any part of the MDG apparatus."* The concluding observations *"revealed no references to the MDGs, and no attempts to encourage governments to attach any particular importance to their MDG commitments."* Concurrently, proposals were being brought forward to include in the core document by governments on their human rights treaty obligations a *"reference to the MDGs and also including relevant statistical and other data generated by the MDG process"*.⁶¹¹

It took formal human rights mechanisms a relatively long time to acknowledge and take position on the MDGs. The various treaty bodies and Rapporteurs either ignored or underemphasized the relevance of the MDGs. Only recently has this trend been reversed. The now fully established and tested Universal Periodic Review mechanism (UPR) incorporates the MDGs in its reports, its debates and follow-up discussions. Given the reservations that existed vis-à-vis the MDGs among the human rights community only a few years ago, this is doubtless a remarkable development.

A question demanding further examination is whether the MDG-related programmes, reports and initiatives of the past decade have lived up to the letter and spirit of the inter-agency agreement on a Human Rights Based Approach with credibility and rigour. Also, whether or not scope exists for revisiting these agreements in the context of discussions about breakthroughs, acceleration and scaling up for the remaining years until 2015. For instance, the Common Understanding called for identification of the *"immediate, underlying and structural causes of the non-realization of rights"*. As Alston pointed out, this involved *"not simply the adoption of a new methodology but also a willingness on the part of governments to address a range of issues that they have systematically refused to confront in such contexts."*

The key question that arises is whether efforts aimed at achieving the MDGs in the remaining years, with a focus on acceleration and sustainability, sufficiently build on intrinsic linkages established between the MDG agenda and the broader human rights framework—both conceptually and with serious engagement regarding the MDGs on behalf of the human rights community. Can the linkages between human rights and the MDGs be addressed in the context of analysing country contexts, or identifying bottlenecks on the way to meeting the MDGs?

Alston also observed *"there must be a greater awareness that calling for a rights based approach effectively demands a paradigm shift on the part of the development community. The problem, of course, is that paradigm shifts are rarely achieved on the basis of gentle appeals*

611 Alston, 2005, fn237

or of bureaucratic check lists".⁶¹² However, in her introduction to the 2010 Breakthrough Strategy for the MDGs, UNDP Administrator Helen Clark called for nothing less than a paradigm shift, when she pressed development practitioners to approach the remaining MDG agenda as "*business unusual*".⁶¹³

4. Democratic governance and the MDGs

Democratic governance⁶¹⁴ is closely related to the human rights dimension of the Millennium Declaration and the MDGs. Constitutional reforms, structural political reforms, reorganization, establishment of independent institutions, increased transparency, functioning and accessible judicial bodies, accountable public management, and an empowered and informed citizenry are all ends in themselves but are crucial for sustainable progress in terms of poverty reduction, in particular as seen through a lens of equity and equality. In 2002, UN Secretary-General Kofi Annan held "*good governance is perhaps the single most important factor in eradicating poverty and promoting development*".⁶¹⁵

The Millennium Declaration reaffirmed among the values essential to international relations in the 21st century that "*men and women have the right to live their lives and raise their children in dignity, free from hunger and from the fear of violence, oppression or injustice*" and it added "*democratic and participatory governance based on the will of the people best assures these rights*." The Declaration links poverty reduction with democratic governance: In the section on "*Development and poverty eradication*", States resolved to create an environment at the national level conducive to development and to the elimination of poverty adding "*success in meeting these objectives depends, inter alia, on good governance within each country*." In its section on "*Human rights, democracy and good governance*", States agreed to "*work collectively for more inclusive political processes, allowing genuine*

612 Alston is also realistic enough to be cautious in his expectations: It should be understood that there is "*a need for a demonstrable grounding in human rights law of any principles put forward, a degree of modesty acknowledging that a human rights approach will not in fact have clear answers, or perhaps any answers, in relation to at least some of the more intractable problems, the need for a judicious blend of process and outcome requirements, specificity in the sense of a list of requirements that is able to be stated with reasonable certainty or clarity, and manageability in terms of a list of requirements that is not utopian and does not impose impossible demands upon the relevant processes*." (2005)

613 See, for example, Helen Clark's remarks at a March 2010 lecture at the LSE at <http://content.undp.org/go/newsroom/2010/march/helen-clark-meeting-development-challenges-in-the-21stcentury.en?sessionId=aGEsCWTxrgvf>

614 On the more general debate regarding the relationship between development and governance, see the good overview on ODI Briefing Paper of March 2006: *Governance, Development and Aid Effectiveness: A Quick Guide to Complex Relationships*. Among other things, it called for the development of more rigorous and comprehensive governance assessments to overcome the problem of inadequate indicators resulting in poor measurements.

615 UN Secretary-General Kofi Annan, UNDP Human Development Report 2002

participation by all citizens in all our countries" and "to ensure the freedom of the media to perform their essential role and the right of the public to have access to information".⁶¹⁶

The close interrelationship between human rights, democratic governance, poverty reduction and development has been at the centre of many studies, debates and policy documents in the past ten years. While there is broad consensus, as expressed in the Millennium Declaration, an important connection exists between these concepts. There is much debate about the details, in particular when it comes to programmatic work, and the content and positioning of development efforts around the world. This section aims to highlight some of the principal discussions, and extrapolates on a few major concepts helpful for understanding how best to design programmes aimed at 'MDG acceleration' in the years to come.

The interrelationship between poverty reduction, human rights and democratic governance was perhaps best encapsulated and most profoundly elaborated in UNDP's 'human development' concept, expressed in a series of **Human Development Reports** at the global, regional and county level since the mid-1990s.⁶¹⁷

An adequate conception of human development cannot ignore the importance of political liberties and democratic freedoms. Indeed, democratic freedom and civil rights can be extremely important for enhancing the capabilities of people who are poor. They can do this directly, since poor people have strong reason to resist being abused and exploited by their employers and politicians. And they can do this indirectly, since those who hold power have political incentives to respond to acute deprivations when the deprived can make use of their political freedom to protest, criticize and oppose.⁶¹⁸

The importance of capable democratic state institutions and democratic practices of decision-making and accountability has been recognised as crucial by the human rights community. OHCHR considers it *"necessary to build strong democratic institutions and safeguard the rights to vote, freedom of expression and freedom of association, all of which are crucial to ensuring that the MDGs are reached in almost all contexts."*⁶¹⁹ Indeed, while the commitment to democratic governance per se is much less explicit in international law and standards, governments rarely remain undemocratic without serious and sustained violations of internationally codified human rights law, from genuine elections, to the freedom of association, assembly and speech and the prohibition of discrimination.

616 Millennium Declaration, 2000

617 First developed by economist Mahbub ul Haq in 1990 for UNDP's Human Development Reports, the concept had the explicit purpose *"to shift the focus of development economics from national income accounting to people centered policies"*. A number of prominent economists further developed the concept and its application, but it was mainly Amartya Sen's work on state capabilities and governance that provided the underlying conceptual framework for the linkages to human rights and democracy. Sen also laid out these ideas in his 1999 book *"Development as Freedom"*, which is likely to have influenced the thinking behind the Millennium Declaration.

618 UNDP Human Development Report 2000 *"Human Rights and Human Development"*

619 OHCHR, *Claiming the Millennium Development Goals: A Human Rights Approach*, 2008

The 2005 World Summit Outcome also reaffirmed “good governance is essential for sustainable development; that sound economic policies, solid democratic institutions responsive to the needs of the people and improved infrastructure are the basis for sustained economic growth, poverty eradication and employment creation; and that freedom, peace and security, domestic stability, respect for human rights, including the right to development, the rule of law, gender equality and market-oriented policies and an overall commitment to just and democratic societies are also essential and mutually reinforcing.” It thus provided an official confirmation by governments of the prevalent understanding among the development community, in particular as expressed by numerous human development publications of UNDP, that not only is there a conceptual link between development and democratic governance, but development efforts must aim at improving the capabilities and performance of governance institutions in order to create a basis for sustainable, people-centred economic development.

As already stated in the preceding chapter, in 2005, the Report of the Millennium Project⁶²⁰ presented ten key recommendations for implementing the MDGs. They included a number of recommendations aimed directly at improvements in governance and at a stronger role for human rights in the context of poverty reduction, education and health policies:⁶²¹

Recommendation 2: The MDG-based poverty reduction strategies should anchor the scaling up of public investments, capacity building, domestic resource mobilization, and official development assistance. They should also provide a framework for strengthening governance, promoting human rights, engaging civil society, and promoting the private sector. The MDG-based poverty reduction strategies should, i.a.:

- Focus on women’s and girls’ health (including reproductive health) and education outcomes, access to economic and political opportunities, right to control assets, and freedom from violence
- Promote mechanisms for transparent and decentralized governance
- Involve civil society organizations in decision-making and service delivery, and provide resources for monitoring and evaluation
- Mobilize increased domestic resources by up to four percentage points of GNP by 2015

Recommendation 3: Developing country governments should craft and implement the MDG-based poverty reduction strategies in transparent and inclusive processes, working closely with civil society organizations, the domestic private sector and international partners

- Civil society organizations should contribute actively to designing policies, delivering services, and monitoring progress.

620 The UN Millennium Project (2002-2006) was commissioned by the UN Secretary-General and sponsored by the United Nations Development Programme on behalf of the UN Development Group. The report is an independent publication.

621 Only a selection of human rights and governance related recommendations is presented here. The full text of the recommendations can be found at <http://www.unmillenniumproject.org/reports/fullreport.htm>

- Private sector firms and organizations should contribute actively to policy design, transparency initiatives, and where appropriate public-private partnerships.

Recommendation 5: Developed and developing countries (...) should launch a massive effort to build expertise at the community level. The extensive training programme of community-based workers should aim to ensure, by 2015, that each local community has:

- Expertise in health, education, agriculture, nutrition, infrastructure, water supply and sanitation, and environmental management.
- Expertise in public sector management.
- Appropriate training to promote gender equality and participation.

Recommendation 6: Developing countries should align national strategies with regional initiatives. Regional development groups should:

- Be encouraged to introduce and implement peer-review mechanisms to promote best practices and good governance.

The Report recommended a strategy for strengthening governance be included in every developing country's long-term MDG framework, recognizing no one-size-fits-all approach exists for undertaking highly contextualized approaches based on local needs. The Report also added it was the responsibility of countries themselves to strengthen their own governance systems and advocated *"the upgrading of public administration will take centre stage in the scaling up of public investments and services to meet the Goals"*. This point was also later reiterated by a UN study on Governance and the MDGs:

*"Many donors view capacity constraints as barriers to scaling up their financial commitments. In such cases the focus should initially be on capacity building. Capacity for service delivery can be increased through investments in human resources, physical infrastructure and management systems. In the medium to long term, people can be trained, infrastructure built, and new management systems—consisting of effective processes and structures for service delivery – put in place to enable a country to deliver and manage services at the scale required to meet the MDGs."*⁶²²

The Millennium Project Report sets aside an entire chapter on "Governance to achieve the Millennium Development Goals". It contextualizes and categorizes countries according to their governance characteristics and recommends using the MDGs to promote and measure progress makes sense only in some, not all, countries, depending on the quality of democracy and effective rule of law. The report comes to a number of conclusions which may be difficult to accept at the intergovernmental level of the United Nations. This may be a reason why subsequently, the emphasis on governance within the MDG's context appears to have receded, and why so many MDG related reports and publications are rather silent about these issues.

⁶²² UN, *Governance for the Millennium Development Goals: Core Issues and Good Practices*, January 2007- This report will be discussed in more detail below.

The report recognizes difficulty “quantifying and measuring” elements constituting good governance. It lists a number of approaches developed for assessing governance. These include the country policy, institutional assessments and other governance related sources from the World Bank and the Millennium Challenge Account of the US Government. Two prominent non-governmental outfits were also included namely Freedom House and Transparency international. Notably, this was written before major advances had occurred in systematically and transparently assessing democratic governance indicators, an area on which UNDP has invested considerably in recent years.⁶²³ It is also unfortunate, but in light of the previous chapter not completely surprising, that the wealth of country reports emanating from the UN’s human rights system was not mentioned as a possible source of information for assessing governance in this regard by the Millennium Project.

A particular difficulty remaining in this context is to separate the “intention” of governments from their capacity to govern well. The Millennium Project Report acknowledges available indicators only partially reflect the will and actions of policymakers, but nevertheless the Report concludes two broad sources of inadequate governance have occurred: “*bad volition and lack of capacity*”.

The Report recommended that in countries with “*genuinely ‘corrupt’ governments where political power is held by larcenous leaders, where the state may be run for the personal plunder of a narrow elite, a particular interest group, or an ethnic group*”, or countries “*with a truly rapacious government leadership*”, including some that are the “*outcome of deeply flawed political processes*”, the international community can play a role in humanitarian assistance and deliver aid through NGOs, but there was little hope for achieving the Goals. At the other end of the spectrum, the Report saw a “*category of countries that suffer from weak governance, not because of the ill will of the leaders, but because the state lacks the resources and capacity to manage an efficient public administration.*” While not mentioning any countries specifically, the Report merely adds “*most countries are somewhere in between these two extremes, and it is difficult to determine levels of volition, but the distinction is critical for understanding a country’s governance challenges and for shaping the appropriate responses.*”⁶²⁴ It also states “*bold MDG-based investment programs cannot be scaled up in developing countries with extremely poor governance*”.

From a purely moral perspective, the distinction seems to be clear enough. Unfortunately, few practitioners in the fields of development, governance or human rights have found this analysis sufficiently precise to follow its recommendations. For example, where exactly is the line between countries on both ends of the spectrum? Who determines it? This is all the more important as the Report proposes a package of major investments for “*poor countries with well-intentioned governments*” i.e. “*countries where the political*

623 The *Governance Assessment Portal* of UNDP provides extensive information in this regard and has links to most developments in this sector in recent years: <http://www.gaportal.org/>

624 In another section of the Millennium Project Report, some countries lacking “volition” are identified by name: “*For countries like (...), Myanmar, the Democratic People’s Republic of Korea*” aid should be directed to humanitarian efforts, while any aid directed through the government should be conditional on significant improvements in human rights and economic policies.

will genuinely exist to meet the Goals”, including investments in public administration (ODA to support civil service pay scales, ongoing worker training and capacity building, and physical infrastructure), strengthening the rule of law (institutional mechanisms for respecting basic rights, and a clear and transparent outline of roles, responsibilities and limitations of different branches of government)⁶²⁵, promoting accountability and transparency (democratic mechanisms to prevent concentrations of power, regular and fairly conducted elections, a free press, access to government information), promoting human rights, promoting sound economic policies in support of the private sector (a favourable legal and regulatory environment, a functioning judiciary, a rational public administration with limited corruption, and support for the informal economy), and partnering with civil society (political freedom to express views, organize and participate in development process, including monitoring of MDG-based strategies). In practice, it would also be politically difficult, if not impossible, for UNDP to draw the line. Therefore, including governance assessments in all its programmatic work in order to address cross-cutting challenges in this regard is extremely important.

Similar to the discussion on linkages between Human Rights and the MDGs, UNDP was a frontrunner for establishing linkages between the MDGs and democratic governance as a field of practical engagement with developing countries. In 2008, UNDP organized an e-discussion on **“Rethinking Democratic Governance and Leadership for Achieving the Millennium Development Goals”**.⁶²⁶ Discussions in the ‘Phase I: Strengthening Democratic Governance Engagements with the MDGs Achievement Process’ focused on the role of government institutions to achieve the MDGs. Discussions in the ‘Phase II: Leadership and Innovation for the Achievement of the MDGs’ firmly endorsed the critical needs of both the ‘*innovation in leadership*’, and, the ‘*leadership in innovation*’, and ‘*leadership support to innovation*’.

“Champions and change agents are rarely created; they emerge from the society following either an enabling environment for their rise or a desperate situation that pushes natural leaders to stand up for the rights of the people. However, governments, international community, private sector, media, NGOs, CSOs- all stakeholders could forge a meaningful partnership to achieve MDGs, and, more importantly, to look beyond the 2015 timeline.

Strengthening governance institutions is necessary for MDG achievement process. But, governance interventions and institutions cannot be replicated and these have to be anchored to the regional/national/local context. It is necessary to understand the underlying political economy consideration and political dynamics shaping the behaviour of the various actors / stakeholders within the existing institutional framework.

625 Although not specifically mentioned here, this essentially points to what in other contexts may be called constitutionalism. See, for instance, the relevant recommendations by Yash Ghai and Jill Cottrell in *“The Millennium Declaration, Rights and Constitutions”* (2010).

626 UNDP, *Reference Note–Rethinking Democratic Governance and Leadership for Achieving the Millennium Development Goals*, 2008

Technical fixes alone will not do it. There is a need to expand the constituency that can scrutinize public policy and anchor government commitments to goals beyond growth and FDI. Availability of resources alone is not enough in the absence of transparency in public management and public investment.”⁶²⁷

The challenge of combining the MDG agenda with democratic governance was also taken up by the UN Secretariat’s Department of Economic and Social Affairs (DESA), which leads the organization’s efforts to bring governments together on a variety of public policies. In 2007, DESA’s initiative “Reinventing Government” produced a study which aimed at promoting good governance towards the realization of the MDGs: **“Governance for the Millennium Development Goals: Core Issues and Good Practices”**.⁶²⁸ The report argues achievement of the MDGs will require substantial scaling up of investment in developing countries, which in turn requires good governance for proper utilization of additional resources. The report proposes a number of reforms to improve and strengthen governance in the context of the MDGs:

- i. Developing a poverty reduction policy framework which provides an appropriate mix of macroeconomic and sectoral policies. The former should focus on macroeconomic stability, high growth and employment, and the adoption of a poverty reduction strategy as a road map for the attainment of the long-term development vision based on achieving the MDGs.
- ii. MDGs have to be contextualized and disaggregated to the local level. Their prioritizing, timing, and sequencing need to be attuned to local political, socio-economic and geographical conditions.
- iii. Reforming public administration by focusing on four “building blocks:” first, strong central capacity for formulating and coordinating policy; second, reforms of institutions for the delivery of services; third, motivated and capable staff and leadership development; and, fourth, effective mechanisms for interface among the public sector agencies. These will require investment in personnel (increase in salaries/rewards, training, capacity building, etc.) and improvement in systems (ICT hardware and software, simplification of processes, etc).
- iv. Moving towards decentralized local governance is the most effective mechanism for achieving sustainable improvements in service delivery.
- v. Specific/targeted interventions in critical areas like education, child and maternal health care, HIV/AIDS, water supply and sanitation, slum improvement etc., aiming to expand coverage, improve quality and enhance affordability, are essential.
- vi. Free and fair elections accompanied by strengthening of representative and responsive governance institutions, opening up of media and information flows and giving a voice to the people is essential for improved accountability and transparency.

627 Ibid.

628 UN, *Governance for the Millennium Development Goals: Core Issues and Good Practices*, January 2007, presented at the 7th Global forum on Reinventing Government, 26-29 June 2007, Vienna, Austria (ST/ESA/PAD/SER.E/99). The author of the report is Aisha Ghaus-Pasha is of the Social Policy Development Center (SPDC) in Karachi, Pakistan. G. Shabbir Cheema, who is also the editor of the Government Reinvention Series, and Meredith Rowen edited the text.

- vii. Combating corruption on the basis of a comprehensive strategy that combines prevention, enforcement and public awareness with easy access to information, free media and a dynamic civil society.
- viii. Strengthening the legal system by a separation of the power of different branches of government and enhanced societal respect for the role of an impartial judiciary along with the formulation and enforcement of laws which remove discrimination and enable access of the poor.
- ix. Implementing MDGs in a human rights-based framework.
- x. Creating legal, political and institutional space for civil society to express its views, organize and participate in the development process.

The 2010 regional MDG report⁶²⁹ underlined the importance of a governance dimension within overall MDG priorities for the Asia-Pacific region. The Report suggested quality of public services to the poor is “*undermined by a number of issues related to governance. These indicate the need for effective decentralization, achieving greater policy coherence, reducing corruption, strengthening regulations, generating better data, increasing accountability and stakeholder participation.*”

Only some sources providing conceptual underpinnings for linkages between democratic governance and the MDGs are mentioned. Many other sources, including World Bank publications, explore this relationship from various angles. Hereafter, three areas of particular importance to the programming of UNDP in developing countries are mentioned – the issue of scaling up and support of country-level development policy, participation and decentralization are briefly discussed.⁶³⁰

Scaling up

One of the concepts often referred to is the idea of “scaling up” innovations proven to work in a given context. This idea is frequently drawn on in the 2010 review meetings and various MDG reports, and has also found entry into the thinking on MDG acceleration. However, the idea is far from new and critical reflections must accompany recommendations towards “scaling up” successful projects. Such recommendations often fall short of fully acknowledging significant governance limitations, in terms of resources, capacity, structural constraints and insufficient collective political will and consensus-building, and therefore tend to remain in the realm of wishful thinking. The simplistic message of 2010 on the MDGs – “we know what works, we just need to scale it up” – may therefore need to be taken with a good dose of caution, and may need to be calibrated with a more realistic approach of governance constraints.

629 Ibid.

630 The selection is limited only due to space constraints, but it should be said that many other areas, such as anti-corruption, women’s participation in politics, and access to justice programmes, provide opportunities for practical linkages. The three areas selected here maybe of broader relevance as cross-cutting issues, however.

The UN Millennium Project strongly recommended CSOs participate in the design implementation and review of MDG based poverty reduction strategies. This relates both to the articulation of needs of the most marginalized groups and regions in society, but also to the important area of “*scaling up service delivery*”. The Project recommended “*civil society partner with governments to help scale up investment through four main channels: engaging local communities, building human capacity, strengthening local governance, and leading implementation and service delivery*”.⁶³¹ The idea being “*CSOs innovate to establish successful delivery models that governments can replicate on a larger scale, often offering lessons for hard-to-reach areas and conflict regions*”, which resonates so much with the basic concept of the new MDG acceleration framework, can therefore be traced back some years. It was already included in the Millennium Project Report in 2005, which itself reflected insights from many years of development cooperation.

While this is essentially logical and easy to follow, the hard part remains determining how “scaling up” is to occur and carving out the roles of various institutions involved—the state (central, provincial, local), development partners and external donors, and non-governmental groups – could be. What has the record been with efforts to scale up successes in more limited areas? Do we have enough understanding of what it takes to successfully scale up local innovations, in particular when their nature as “local” projects was an essential ingredient in their success? Basically, it constitutes a challenge of governance because it involves the major and long-term mobilization of public funds, a predictable and rule-based cooperation between different tiers of government, and the application of good governance principles such as transparency, accountability and rationality.

The Millennium Project Report also recognized most low-income countries require technical support from the international system to put forward scaled-up investment plans to achieve the Goals. But the report also acknowledges “*the international agencies that are the global repositories of sector specific knowledge – such as FAO, or IFAD for agriculture, UNICEF for child health, UNIDO for industrial development, or WHO for health systems and disease control –are usually asked instead to focus on small pilot projects. In general, the technical UN agencies on the ground are not prepared to help countries scale up national programs*”.⁶³²

Whether this is still a correct observation in most cases, there certainly remains an element of caution regarding how the UN can mount sufficient leverage for scaling up major investment programs, in particular since significantly scaled up funding flows do not appear to be likely at this point. Working with key players like national planning commissions and central level coordinating bodies might be a good starting point. However, a more profound understanding of the political economy of major social and economic policies and the interrelations between different tiers of government will be key to successfully advocating for any scaling up of individual projects or programmes.

631 Millennium Project Report, 2005

632 Ibid.

Scaling up practically always entails a significant increase of funding for certain activities, mainly in the form of investments in infrastructure, expansions of major social policies for services such as health and education or the provision of social protection programmes.

The particular governance related challenges for social protection programmes in Asia have recently been analysed in a recent World Bank study. It identifies a number of governance risks and constraints which, if removed, could improve the outcome of social safety nets as they are scaled up.

Such governance problems include “coordination issues between agencies and decentralized levels of government in the overall social protection system; unclear institutional responsibilities that translate into diffusion of responsibilities, ambiguous and non transparent “rules of the game” that increase opportunities for discretion, conflicting systems of accountability, lack of voice, low implementation capacity and inadequate monitoring and evaluation and grievance redress systems among others.” The study recommended addressing these governance challenges would lead to a more effective use of scarce resources and reduce unwanted outcomes such as poor targeting, limited coverage, and prevalence of error fraud and corruption.⁶³³

Participation and better public services

In 2003, UNDP stated the notion of participation is at the centre of a human rights-based approach to poverty reduction. *“The poor must be considered as the principal actors of development; they can no longer be seen as passive recipients; they are strategic partners rather than target groups. Human rights change in a fundamental way the relationship between service providers and service recipients, and between claim-holders and duty-bearers.”*⁶³⁴

*“Improving public services will thus require a greater commitment not just to spend more but to spend wisely – to increase both efficiency and equity. This will mean opening up services to a wider range of providers – and to greater public participation and scrutiny.”*⁶³⁵

However, for public services and investments to be truly beneficial for the poor and improve their lives on a sustainable basis, an even more subtle understanding of the political economy of participation and representation, and of government expenditure policies, is necessary. Even in democracies and countries with the basic political will to reach the MDGs, policymakers regularly divert spending away from areas benefitting the poor, or fail to implement policies that improve services known to disproportionately benefit poor people. In a 2005 article, World Bank economists Keefer and Shemani explained this as the result of three political market imperfections particularly important for understanding government incentives to serve the poor: lack of information among voters about the

633 Sara Giannozzi and Asmeen Khan, *Strengthening Governance of Social Safety Nets in East Asia*, World Bank Social Protection Discussion Paper, August 2011

634 UNDP Poverty and Human Rights Practice Note, 2003

635 ADB/ESCAP/UNDP 2010 Regional MDG Report: Paths to 2015 – MDG Priorities in Asia and the Pacific

performance of politicians, social fragmentation among voters manifested in identity-based voting, and the lack of credibility of political promises to citizens.⁶³⁶ They also showed how health and education – the largest public sectors relevant for the MDGs – are the most vulnerable to these distortions. These imperfections – information asymmetries, social polarization, and non-credibility of political promises – undermine the role of elections in guaranteeing accountable and responsive government, and are highlighted here because they are all endemic in Asia Pacific countries:

*“Information constraints reduce the ability of citizens to hold politicians accountable and encourage politicians to cater to special interests, thus distorting incentives to provide social services to poor people. Even if poor people actively participate in the political process, imperfect information about politicians’ contributions to social service improvements can distort incentives. Broad segments of the poor population might be particularly disadvantaged in accessing information – because of illiteracy, limited mobility, and underdeveloped media for mass communications – creating space for organized and informed special interests to push for narrowly targeted policies at the expense of broad services.”*⁶³⁷

External interventions, such as supporting independent public policy research institutes, data collection, analysis, and publication, journalist training, subsidized information transmission, or information campaigns by civic society organisations may all be useful in promoting the diffusion of information needed for political accountability, and therefore the improvement of public services for the poor.

Social services for poor people also suffer when societies are deeply divided. In many countries, identity characteristics along ethnic, linguistic, and religious lines dominate political behaviour and electoral politics.

*“Like uninformed voters, polarized voters are less able to hold politicians accountable for their performance in office. There is compelling evidence to show that the provision of public goods suffers under these conditions.”*⁶³⁸

The nature of a political environment as a set of patron-client relationships is another factor prevalent in many developing countries, including nations within Asia and the Pacific region. Patron-type politicians, socially if their credibility emanates from belonging to a particular ethnic or social group, have relatively weak incentives to provide non-targeted public good because they benefit clients as well as non-clients. In such situations *“promises of buildings and government jobs become the currency of political competition at the expense of universal access to high-quality education and health care.”*⁶³⁹

636 Philip Keefer and Stuti Khemani, “Democracy, Public Expenditures, and the Poor: Understanding Political Incentives for Providing Public Services”, The World Bank Observer, vol.20, no.1 (spring 2005)

637 Ibid.

638 Ibid.

639 Ibid.

Decentralization

The relevance of subnational and local government for the MDG agenda has also been understood for many years, and a number of specific initiatives have been launched in order to understand this relationship better. The 2005 world summit outcome document underlined the important role of local authorities in contributing to the achievement of the internationally agreed development goals, including the MDGs. A 2007 MDG-Net e-discussion on *'Strengthening Efforts to Eradicate Poverty and Hunger'* (March 2007) manifested a need to strengthen the democratic governance dimension of the MDGs. It drew attention to the political nature of many policies aimed at reducing poverty, with special reference to decentralization as a means of attending to equality through formulas redistributing and securing transfers among regions. Another joint e-discussion of the Poverty Reduction Network (PR-Net) & MDG-Net on *'Fiscal Space'* (June 2007) came to a similar conclusion. It drew particular attention to the types of bottlenecks requiring removal in order to develop the local capacity for spending and delivering. As fiscal resources often finance expensive salary bills, the issue of civil service reform becomes pertinent. Often, this is not just a technical problem.

"Decentralization and de-concentration of decision making and implementation is necessary for achieving MDGs at local levels. At the same time, capabilities of local partners and institutions are limited and therefore, training, support and capacity building efforts are required."⁶⁴⁰ Similarly, in 2007, UN DESA stated "the prioritizing, timing and sequencing (of the MDGs) need to be attuned to local political, socio-economic, and geographical conditions. Awareness campaigns have to be innovative, persistent and contain messages with a local flavour."⁶⁴¹

Many factors determine the success of decentralization including: a clear and coherent set of rules delineating the powers, responsibilities and resources of each level of government; appropriate government policies, including an enabling legal framework and an increase in local autonomy with proper checks and balances and institutional structures; partnership among different actors at the local level; leadership at the local level; and administrative capacity and adequate financial resources.⁶⁴² In turn, these factors determine the capacity to effectively roll-out national programmes, encourage local level innovations as well as identify and scale up successful programmes in other contexts.

However, the improvement of services sometimes cannot wait for the right conditions to emerge. This describes a fundamental tension between the humanitarian approach (viz. "development emergency") to the MDGs, with a focus on meeting the Goals by a certain target date ("acceleration"), versus considerations of longer-term sustainability, both in institutional or financial terms.

640 UNDP, *Reference Note—Rethinking Democratic Governance and Leadership for Achieving the Millennium Development Goals*, 2008

641 UN, *Governance for the Millennium Development Goals*, 2007

642 Ibid.

*"Some arrangements, such as enclave approaches to delivering services to poor people, may bring short-term improvements but not be sustainable in the long run. Often driven by donors, such initiatives can undermine normal accountability relationships. If the accountability of the national policymaker/provider is weak, contracting out services – such as using nongovernmental organizations for delivering primary health care – may be the preferred arrangement. But incremental activities – pragmatic improvisation to make services work even in a weak institutional environment – need to be pursued to create more favourable conditions for reform in the longer run. Temporary "work-arounds" cannot and should not substitute for creating conditions for fundamental reform."*⁶⁴³

The importance of sub-national and local governments to achieve the MDGs has become increasingly clear at the country level all over the world in recent years. An example of this is the 2010 national strategy of Cambodia, the findings of which may well be applicable far beyond the context of Cambodia itself:

*"While the strategic framework is clear, it is now becoming increasingly clear from accumulated worldwide experience that MDG targets can only be achieved fully if critical services and inputs are available to, and managed by, local governments and communities and if their capacities to do so are further developed. It is also becoming clear that while the front line action is at the sub-national level, this cannot happen without coordinated policy and institutional support at the national level, in particular in the sectoral ministries that are responsible for specific MDG targets, and without some form of delegation of authority, within these sectoral agencies, to the sub-national level."*⁶⁴⁴

This also has implications for MDG-related programming and in particular, efforts aimed at MDG acceleration. The focus must be on delivery of services in critical sectoral areas, particularly lagging MDG areas, with clear linkages between the national policy level, the local service delivery level and a systematic identification and removal of bottlenecks along the MDG "supply chain". This includes fiscal transfers; administrative reform and incentives; human resource development and deployment, especially in under-served and lagging areas; planning monitoring and evaluation capacities; and service delivery capacity.⁶⁴⁵ Therefore, the Government of Cambodia and development partners have agreed:

*"A large part of a national MDG acceleration strategy will be to assist the emerging sub-national entities to develop their own MDG-based strategies, to assist sectoral line ministries to decentralise and give more responsibility and resources to their sub-national offices, and to integrate sectoral actions into the overall sub-national plan. For the national level, the focus also needs to be on adopting policies and procedures that support sub-national service delivery, and on considering various regional needs and developing specific strategies for regional development."*⁶⁴⁶

643 Ibid.

644 Government of Cambodia, "Achieving Cambodia's MDGs: 2010 Update", at <http://www.un.org.kh/undp/media/files/CMDG%20Report%202010.pdf>

645 Ibid.

646 Ibid.

Along the same lines, the 2010 Regional MDG Report recommended Governments allocate budgets wisely to spend more where services are urgently needed, such as teachers in rural areas and high productivity inputs such as medicines and textbooks. They may also be able to “ensure services better match demand, especially from the poor, by moving away from overly-centralized systems of both financing and service provision, and decentralizing more functions to local administration.”⁶⁴⁷ This is particularly important for public infrastructure investments, often seen as critical for further progress on the MDGs:

*“In many countries, most of infrastructure investment related to the MDGs is likely to come from the public sector. But this can only be effective if it is accompanied by reforms in governance and also by efforts to increase capacity, especially in local government in countries that have achieved extensive decentralization. (...) While new major infrastructure is typically created by the central government, the task of maintenance generally falls to local administrations which have fewer financial or human resources to fulfill this responsibility.”*⁶⁴⁸

In summary, the dimensions of governance capacity (including motivation and incentives among the public administration), genuine participation, and multi-level governance relations are all key factors for any successful development strategy, including strategies aimed at meeting the MDGs in a sustainable and equitable manner, rather than a side-effect of rapid economic growth. Governance considerations must therefore be central to efforts to accelerate the MDGs and make progress and poverty reduction more inclusive.

5. A decade into the new Millennium – How far have we come on the MDGs?

Previous sections looked at conceptual linkages between human rights, democratic governance and the MDGs, and outlined debates surrounding these issues. This section inquires how far we have come in terms of fulfilling the commitments of the Millennium Declaration, meeting the MDGs, and in integrating the MDG framework with human rights and governance considerations as has frequently been recommended. When asking, what the progress has been on the MDGs, we must also ask: “How do we know?”, “What do we know on how the progress has been achieved?” With regard to human rights and governance, we can mainly look at the reports and strategies specifically referring to the MDGs and at various policy and programme documents and ask “to what degree have human rights and governance factors be considered?” What emerges is a mixed picture in all respects. While many opportunities appear to have been missed, there is room for a fresh look at the MDGs, and a renewed effort to link the MDGs with human rights and governance might be key to reinvigorating the agenda and making progress sustainable and irreversible.

The 2005 Report of the Millennium Project, coordinated by Jeffrey Sachs, famously included the recommendation that high-income countries should increase official development

647 ADB/ESCAP/UNDP 2010 Regional MDG Report: *Paths to 2015 – MDG Priorities in Asia and the Pacific*

648 Ibid.

assistance (ODA) from 0.25 percent of donor GNP in 2003 to around 0.44 percent in 2006 and 0.54 percent in 2015 to support the MDGs. Overall, developed countries should also make efforts to reach the long-standing target of 0.7 percent of GDP. Sachs essentially called for a doubling of aid, to finance the investments necessary to reach the MDGs he described in the Millennium Project Report. The Report stated, *“poverty in the poorest countries can be dramatically reduced only if developing countries put well-designed and well implemented plans in place to reduce poverty – and only if rich countries match their efforts with substantial increases in support. No well-intended but impoverished country is to be left, under “business as usual”, solely left to its own devices.”*⁶⁴⁹

The Report emphasized the Millennium Declaration and the MDGs are intended to support the poorest countries making the least progress, not nations making the most progress even without the Goals.⁶⁵⁰ Also, the poorest countries are left in what Sachs described as the “poverty trap”, from which they cannot escape without significant external assistance.

As previously mentioned, the 2005 Report of the Millennium Project called for a “decade of bold ambition” and stated achieving the MDGs could not be done on the basis of a “business as usual” approach. *“Without a bold breakthrough (in 2006), a large number of countries that could still achieve the Goals will be consigned to failure,”* the report said. It recommended a number of MDG fast track countries be identified (by 2005), *“that are ready for scale-up”*. It used a series of parameters (“governance qualification”)⁶⁵¹ to recommend a list of more than 60 countries including the following in Asia Pacific: Bangladesh, Bhutan, Cambodia, India, Indonesia, Lao PDR, Nepal, Pakistan, Philippines, Sri-Lanka, Timor-Leste, Vanuatu and Vietnam. Preliminary MDG needs assessments were carried out by the Millennium Project (including in Bangladesh and Cambodia in the Asia Pacific region. The methodology was also applied for assessments at the subnational level in India, for the states of Madhya Pradesh, Rajasthan, and Uttar Pradesh.)⁶⁵² The results of the assessments at the country level projected *“a step increase in investment levels during 2006, to be funded largely through official development assistance”*, combined with a substantial increase in domestic resource mobilization by governments and households.

The report also stated *“the confluence of the 0.7 (percent of GNP spent on ODA by the developed countries) target and the Goals is an important one”* implying a follow-through on commitments already made would make the Goals affordable. It would have required a *“doubling of annual development assistance to USD 135 billion in 2006, rising to USD 195 billion by 2015”*. These proposals, which were also mirrored in Sachs’ 2005 book *“The End of Poverty”*⁶⁵³, received significant attention and inspired many, but also met some important criticism from sceptics of such an approach.

649 Millennium Project Report, 2005

650 Ibid.

651 The criteria were inclusion in the following: African Peer Review Mechanism (for countries in Africa), HIPC completion point, Millennium Challenge Corporation qualifier, Millennium Challenge Corporation Threshold, Poverty Reduction Strategy Paper, and World Bank Absorptive Capacity Study. No country met all these conditions, and all the ones proposed for Asia met only one or two.

652 This was done by the Indian Institute of Management in Ahmedabad.

653 *The End of Poverty—Economic Possibilities for Our Time*, by Jeffrey D. Sachs

Before looking at how financial commitments have materialized and to what degree they have contributed to meeting the Goals, it is worth recalling the intellectual debate about the “big push”-philosophy underlying the Millennium Project’s approach, which was not universally shared among academics and development practitioners. William Easterly criticized Sachs, and thus indirectly the thrust of the Millennium Project Report and the MDG agenda overall, for what he described as Sachs’ *“favoured approach of ‘utopian social engineering’ and ‘shock therapy’: a comprehensive package of economic reforms attempting to ‘fix all problems simultaneously and quickly’ and a ‘conviction that the West should always give a lot of money to support these packages.’*”⁶⁵⁴ He juxtaposes the more promising and more realistic *“piecemeal democratic reform”*, in reference to Karl Popper who was similarly critical of the 20th century’s projects of large scale top-down social reform and *“Great Leaps Forward”*: *“Large-scale crash programs, especially by outsiders, often produce unintended consequences. The simple dreams at the top run afoul of insufficient knowledge of the complex realities at the bottom. The Big Plans are impossible to evaluate scientifically afterward. Nor can you hold any specific agency accountable for their success or failure. Piecemeal reform, by contrast, motivates specific actors to take small steps, one at a time, then tests whether that small step made poor people better off, holds accountable the agency that implemented the small step, and considers the next small step.”*⁶⁵⁵

Whatever the merits of this discussion may be, it is now clear the big push in the form of doubling development aid never came and neither have the drastic reforms suggested by the Millennium Project in terms of governance and state capacity been made, at least not to the extent proposed by Sachs. The OECD recently published figures demonstrating the combined effect of increases has been to raise ODA by 37 per cent in real terms since 2004, or about USD 30 billion (in 2004 dollars). However, when comparing the 2010 ODA outcome with the promises made in 2005, this still represented a shortfall of about USD 19 billion. Only a little over USD 1 billion of the shortfall can be attributed to lower than expected GNI levels due to the economic crisis. The remaining gap of USD 18 billion was due to donors not meeting their ODA commitments.⁶⁵⁶

The OECD has conducted a comprehensive survey of donors’ future spending plans which provides an indication of the collective forward programming of bilateral and multilateral donors through 2013. It shows that it is rather unlikely donors will catch up with the Millennium Project’s proposals, or their own long-standing commitments in terms of funding volumes any time soon. Rather, the preliminary findings based on DAC members’ returns to the forward spending survey suggest slower aid growth ahead. Global country programmable aid is planned to grow at a real rate of 2% per year from 2011 to 2013,

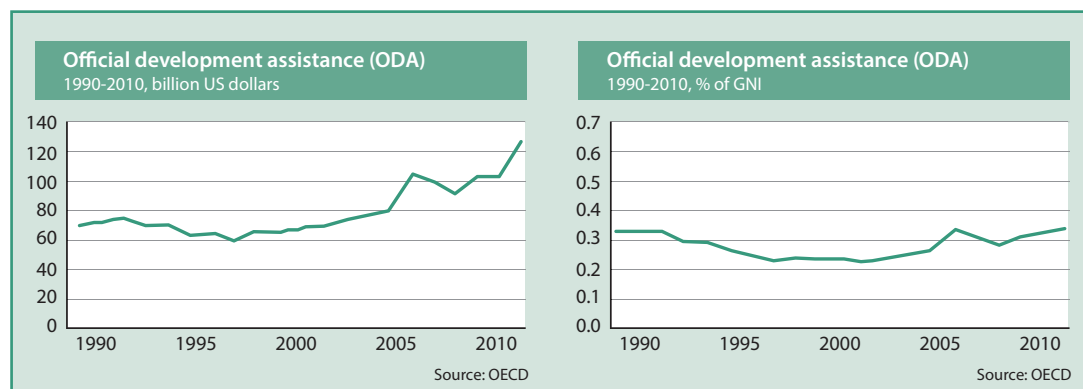
654 Washington Post article: <http://www.washingtonpost.com/wp-dyn/articles/A25562-2005Mar10.html>.

See also William Easterly, *“The Big Push Deja Vu – A Review of The End of Poverty”*, Journal of Economic Literature, Vol.44/1, March 2006

655 Easterly is not outright dismissive of what Sachs proposed in detail. He pointed out that many of Sachs’s specific recommendations such as vaccination campaigns might make sense as piecemeal reforms — i.e., if done one at a time in small steps, with subsequent evaluation and accountability.

656 OECD Aid Statistics at http://www.oecd.org/document/35/0,3746,en_2649_34447_47515235_1_1_1_1,00.html

compared to 8% per year on average over the past three years. For DAC countries' bilateral aid only, the projected increase is slightly lower at 1.3% per year.⁶⁵⁷



There is also evidence that targeting of aid to countries most in need and to those who most deserve it, by making significant reforms in terms of governance and human rights, is not occurring in the manner proposed by the Millennium Project. The OECD-DAC itself refers to a large body of literature on the empirical determinants of foreign aid, trying to disentangle the influence of geo-political ties and donor self-interest from recipient needs and their ability to make use of aid. It overwhelmingly concludes the former two factors outweigh the latter, though responsiveness to need has also been seen as growing since the end of the Cold War. A recent study using DAC bilateral data finds that almost half of the predicted value of aid is determined by donor-specific factors, one-third by needs, a sixth by self-interest and only 2% by performance.⁶⁵⁸

One may argue reaching the MDGs may not be as dependent on a significant boost of aid-money as suggested by Sachs and the Millennium Project. However, it is hard to convincingly argue the difference between the MDGs and earlier development goals is the character of a 'deal' between the developed and the developing world, where both parties live up to specific commitments. A more realistic assessment may conclude the MDG agenda has not fully lived up to the highest expectations. It is still fair to say the MDGs mobilized unprecedented amounts of funds and focused minds like no other development concept before. It is easy to see that not only the developed world has fallen short on commitments. Also, developing countries have yet to deliver significant internal governance reforms outlined by the Millennium Project.

If the key ingredient for success to reach the MDGs is not the amount of donor money provided, but instead the quality of growth and the inclusive nature of poverty reduction and economic development, then the quality of governance and the degree to which

⁶⁵⁷ Ibid. The deceleration is likely to be more marked for low income countries and for Africa, where CPA is projected to increase at about 1% per year in real terms, compared to a 13% annual growth rate in the past three years. Thus, additional aid to these countries is likely to be outpaced by population increases.

⁶⁵⁸ *OECD Development Brief—Aid Orphans: Whose Responsibility?*, Andrew Rogerson and Suzanne Steensen, OECD Development Co-operation Directorate at <http://www.oecd.org/dataoecd/14/34/43853485.pdf>

human rights are engrained in a country's efforts to empower the poorest of its citizens is also very important. Human rights and governance should indeed be included in considerations regarding how MDGs have been met, and why others have not been met.

Already in 2005, before many countries developed MDG-based development strategies and presented their national MDG reports, the Millennium Project Report identified the following as overarching reasons for shortfalls in achieving the goals: *"Sometimes the problem of poor governance is, marked by corruption, poor economic policy choices, and denial of human rights. Sometimes the problem is a poverty trap, with local and national economies too poor to make the needed investments. Sometimes progress is made in one part of the country but not in others, so that sizeable pockets of poverty persist. Even when overall governance is adequate, there are often areas of specific policy neglect that can have a monumental effect on their citizen's well-being."*⁶⁵⁹ As stated above, Sachs' analysis and recommendations have at times been criticized for too strong a fixation with poverty traps, and his idea of a "big push" to "end poverty". However, when taking a closer look at the Report of the Millennium Project, the emphasis on governance failures, pockets of poverty and areas of policy neglect sounds strikingly familiar and in line with the latest cross-dimensional thinking on the Goals.

"The rule of law involves security in private property and tenure rights, safety from violence and physical abuse, honesty and transparency in government functions, and predictability of government behaviour according to law. Too many countries fail to achieve these basic standards, sometimes due to authoritarian rulers who use violence and corruption to hold on to power – but often because upholding the rule of law requires institutions for government accountability, and those institutions are missing.

*Political and social rights should ensure equality before the law and fairness in society across groups. These rights must be substantive and not merely formal. The poor must have a meaningful say in the decisions that affect their lives. Women and girls must be assured freedom from violence and from legal, economic, and social discrimination. In many places, access to public good and services is restricted to certain groups. Minority groups, for their language, religion, or race, suffer discrimination at the hands of more powerful groups."*⁶⁶⁰

In order to address governance failures inhibiting progress to achieve the MDGs, the Millennium Project noted *"accountable and efficient public administration requires transparency and administrators who are qualified, motivated, and adequately paid. It also requires efficient management systems, to disburse and track large investments, and monitoring and evaluation systems."* The link between achieving the goals and properly addressing all these areas of governance was clearly expressed. *"There is no excuse for any country, no matter how poor, to abuse its citizens, deny them equal protection of the law, or leave them victims of corruption, mismanagement or economic irrationality. Some improvements in governance do not cost money, if any, and some actually save money. Some improvements in economic outcomes are therefore available at low cost, and such opportunities must not be squandered."*⁶⁶¹

659 Millennium Project Report, 2005

660 Ibid.

661 Ibid.

In terms of addressing gross disparities within countries, in particular with regard to regional and ethnic diversity, the Millennium Project Report stated *“the major policy implication for middle-income countries is to ensure that critical investments – in infrastructure, human capital, and public administration – get channelled to lagging regions, including slums, and to social groups excluded from the political process and economic benefits.”*

In terms of areas of specific policy neglect, the Millennium Project report pointed out policymakers are sometimes unaware of the challenges, unaware of what to do, or neglectful of core public policy issues. The areas of environmental policy and gender biases in public investment and social and economic policies were highlighted, with weak law enforcement, considerable deficiencies in information, and in the capacity to act on credible information as key factors. *“Policymakers and civil society must take the opportunity to identify the key areas of public policy and public investment that have been left behind. (...) All regions and policy areas will need to be part of any national strategy to achieve the Goals.”*⁶⁶²

The 2005 Review Summit not only formally acknowledged the MDGs and their targets, but also committed countries to develop national MDG based strategies and report regularly on progress made. From looking at these reports, and the data presented therein, it is clear many countries were far from incorporating a human rights and governance dimension. In 2006, UNDP stated the *“MDGs are not embedded into the development psychology of Governance. The MDGs have not been integrated into national planning, development strategy making and budgeting processes. This was sighted as one of the reasons of failure of timely achievement of MDGs.”*⁶⁶³

Turning to progress on the MDGs, and the question regarding to what degree the various targets are being met, it is best to look at the global MDG reports published by the UN. The 2010 MDG Report⁶⁶⁴ concluded *“without a major push forward, many of the MDG targets are likely to be missed in most regions.”*⁶⁶⁵ While the world on the whole was *“still on track to meet the poverty reduction target”* the combined global financial, economic, food, fuel and climate crisis has slowed progress. Employment has declined, and more workers have been forced into vulnerable employment. Hunger spiked as a result of the 2009 food and financial crisis, and progress to end hunger had been stymied in most regions. Hope was dimming for universal education by 2015, with education remaining elusive for girls in some regions. Child deaths are falling, but not quickly enough to reach the target. The sanitation target appears to be out of reach. The report also highlighted the particular plight of people in armed conflict, and the large populations of refugees. It emphasized the added vulnerability resulting from climate change. Regarding gender equality, progress

662 Ibid.

663 E-discussion on poverty and governance, 2006

664 The UN's global MDG report presents its data on the basis of “developed regions” and “developing regions”. The latter are disaggregated into nine sub-regions, including, for what for UNDP constitutes the Asia-Pacific region, the following: Southern Asia (including Iran), Eastern Asia (including the Republic of Korea), South Eastern Asia, and Oceania.

665 UN MDG Report 2010

has been sluggish on all fronts and the number of undernourished people has continued to grow. What constituted the main emphasis of the report was perhaps the *“increasing inequalities between rich and poor”*.⁶⁶⁶

This can only be read as a rather sobering assessment, and provides little ground for optimism. Since 2005, the ADB, ESCAP and UNDP have been publishing MDG reports with a focus on the Asia Pacific region.⁶⁶⁷ The 2010 regional MDG report, **Paths to 2015 – MDG Priorities for Asia and the Pacific**, emphasized that despite some notable progress, economic growth needs to be more inclusive *“with the fruits shared more equally among different social and economic groups. This too would require a deliberate change in course – both in the growth pattern and in government policies.”* It further explained *“even in countries where significant progress has been made towards the MDGs, there are often disparities within the country – between urban and rural areas, between rich and poor, between women and men, and girls and boys.”*

In Asia Pacific, recent years have experienced dramatic growth overall, and the region has emerged as an anchor of the global economy as a result of significant economic changes in the past two decades. However, as underlined by a series of recent reports, this growth has not always specifically reduced poverty as inequality within countries has sharply risen and gains in terms of overall income appear fragile in a context of climate change, resource depletion, food and fuel crises, and growing public discontent with the status quo in many countries around the world.

The 2010 Asia Pacific Report on MDG priorities stated *“even in countries where significant progress has been made towards the MDGs, there are often disparities within the country – between urban and rural areas, between rich and poor, between women and men, and girls and boys”* In some countries, belonging to certain social groups, indigenous communities or regions can be a significant cause for poverty and deprivation.

It is disheartening the report’s findings still suggested *“many countries do not regularly report sex-disaggregated data that would help track the gender dimensions of MDG targets and indicators, the available data on outcome indicators of poverty, such as education, nutrition, health and child mortality”* although evidence from case studies suggest gender disparities.

Subsequent sections of this paper attempt to reflect whether lessons from discrepancies between the MDGs and human rights and governance in the early phase of the MDG agenda were learned, whether the bridges with the human rights agenda, as encouraged by UNDP and others were actually built, and whether we currently look at an MDG framework, fully aligned with broader human rights and democratic governance principles emphasized in the Millennium Declaration.

666 Ibid.

667 The definitions of what constitutes Asia-Pacific differ between these bodies, however.

An analysis of the first generation of national MDG reports identified a “large discrepancy in the ways in which human rights issues are dealt with in the context of MDG reporting. (...) When moving from the policy domain to examine the programmatic side, the discrepancy between rhetorical references to human rights and actual program context becomes even more marked.”⁶⁶⁸ In UNDP’s own 2003 Assessment of the early MDG reports provided by governments, it was stated “it may be unreasonable to expect a government to discuss ‘sensitive’ issues, such as documenting human rights violations, discrimination against marginalized communities, neglect of remote areas, or to discuss unresolved conflicts, especially closer to the time of elections.”⁶⁶⁹ Alston identified this as the crux of the human rights critique of MDG reporting:

*“If these reports fail to address, or even acknowledge, existing human rights problems they will often be excluding the very issues that are crucial to understanding the principal obstacles that are inhibiting the realization of the MDGs. If it is not possible to mention sensitive issues such as deeply entrenched discrimination against women, the effective exclusion of certain racial, religious, linguistic or other minority groups from the development process, or the systematic harassment of anyone expressing dissenting or alternative viewpoints, the report not only will be unrealistic in nature but will also be unable to address the critical steps that need to be taken if the MDGs are to be met.”*⁶⁷⁰

Also with regard to global reports, Alston found that “unfortunately, the great majority of analyses undertaken on the MDGs [until 2005] do not approach them as being situated within a human rights framework.”⁶⁷¹ He commented in more detail on the World Bank and IMF Global Monitoring Report of 2004, which was characteristic for many similar reports on the global and regional level. It called for the acceleration and deepening of reform in many countries if the MDGs were to be realized, and identified four priority areas where such reforms were deemed to be essential; however, “while a human rights dimension would appear to be both obvious and unavoidable in relation to each of them, the reports succeed in either ignoring that dimension or addressing it clandestinely.”⁶⁷²

It is worth recalling what Alston identified as elements of a genuine human rights perspective to the first priority—improving the enabling climate for private sector activity.

668 Philip Alston, “Ships Passing in the Night” (2005). Alston notes that the Human Development Reports constitute an exception, in that they highlight the close relationship between human rights, democratic governance, human development and the MDGs.

669 UNDP, Millennium Development Goals Reports: An Assessment (2003)

670 Philip Alston, “Ships Passing in the Night” (2005)

671 Ibid.

672 Ibid. The priorities the report proposed were: Improving the enabling climate for private sector activity; Strengthening capacity in the public sector and improving the quality of governance; Scaling up investment in infrastructure and ensuring its effectiveness; and Enhancing the effectiveness of service delivery in human development. (http://siteresources.worldbank.org/INTGLOBALMONITORING/Resources/GMR_2004.pdf)

- Elimination of laws and practices designed to exclude certain ethnic, linguistic, religious, or other minority groups in their efforts to compete in the market place on an equal footing with the dominant groups in society,
- The removal of discriminatory laws and practices keeping women from owning land and acting as fully empowered economic agents,
- Measures designed to ensure freedom of association and freedom of speech,
- The provision of judicial and other remedies in response to cases of discrimination,
- Efforts to ensure the free flow of information, including a free press, access to economic statistics, and alternative sources of information, all of which are essential ingredients for an effective market economy, and
- Efforts to reform the police service to ensure the rule of law provides security to all citizens so private life, including business, can proceed effectively.

For the second priority, the strengthening of public sector capacity and the improvement of the quality of governance, Alston offers the following elements of a human rights perspective:

- ways of ensuring free and fair elections
- actions aimed at promoting and upholding free speech
- the maintenance of a free press,
- the establishment of national institutions to promote respect for, and an understanding of, the human rights commitments, undertaken by the government in question, and
- The creation of institutional arrangements to provide redress to aggrieved citizens.

Alston reserved his strongest criticism for the third and fourth priorities put forward in the WB/IMF report, namely the scaling up of infrastructure investment and improving its effectiveness, and to *“better target education, health, and social assistance services toward poor people, addressing governance related impediments to service equality and effectiveness, increasing community participation”*. It is interesting to mention these as well as Alston’s critique in full, as the issues and challenges remain more or less identical to how they had been identified in the immediate follow-up to the launching of the MDG agenda—despite the slightly different terminology used almost a decade later. Alston takes issue with the fact that MDG-related reports speak of “participation” in order to avoid any overt reference to the human rights implications of what is being proposed. *“Instead of discussing it as the quintessential civil and political rights issue that it is, the [World Bank and IMF Report on the MDGs] presents the problem of grossly unequal rights and capabilities to participate in decision making in terms of a technocratic challenge to find better techniques for “scaling up on the basis of successful programs”*.

“The systematic suppression of women’s voices, the exclusion of minorities from the political and economic spheres, the brutal suppression of dissent, and the resulting prevention of debate over alternative policies to achieve the agreed objectives, are all commonly present elements that would render ineffectual any well-meaning project-based efforts, no matter how assiduously designed, unless the broader human rights policy dimensions are addressed. Unlike human rights norms, concepts such

as community involvement, participatory inputs, and consultative mechanisms are, in part, appealing precisely because they cannot be clearly defined, by reference to objective or fixed standards. Such concepts are almost always invoked in relation to initiatives, that are undertaken on an individual project basis, as though a participatory process could effectively be implemented within a broader context in which, for example, women's voices are ignored, minority groups are excluded, and political dissent is not tolerated."

Taking another look at the text of the Millennium Declaration, on the basis of which the MDGs were later developed, offers an interesting insight pertaining to the issue of inclusiveness and equity already considered as core values and principles at the time. World leaders recognized their collective responsibility to uphold the principles of human dignity, equality and equity, and leaders had a duty to the people around the globe, especially the most vulnerable, in particular children. The Declaration also recognized while globalization offers great opportunities, at present its benefits are very unevenly shared, and its costs are unevenly distributed.⁶⁷³

Have the human rights concerns expressed by OHCHR and others been addressed? Have the MDGs been aligned with a human rights approach? Have efforts to implement the MDGs in practice around the world been transformative, rather than technocratic, as Louise Arbour suggested in 2008? For one, the debate on the connection between human rights and the MDGs has continued throughout the past decade, and the human rights institutions within the international system have paid increasing attention to the MDG agenda.

At a March 2010 high-level gathering of human rights experts to discuss the relationship between the MDGs and human rights, participants agreed evidence existed proving the MDGs had so far not contributed to improving equality, and in some cases may have even contributed to further marginalisation.⁶⁷⁴ Gay J. McDougall, UN Independent Expert on Minority Issues, emphasized MDG reports still demonstrate a dearth of attention towards minorities and indigenous persons, with less than a third noting ethnic discrimination.⁶⁷⁵ She advocated for integrating non-discrimination into the assessment of every goal and measurement of progress indicators. Giorgia Rosa of Amnesty International detailed how the reporting on targets and indicators of the MDGs and the human rights framework continue to occur on separate tracks, how MDG reports make little reference to the human rights framework and treaty obligations, and also fail to use a human rights approach in the substantive parts.⁶⁷⁶

In 2010, OHCHR published **"Human Rights and the Millennium Development Goals in Practice: A Review of country strategies and reporting"**—a follow-up to its 2008 report

673 Millennium Declaration, 2000

674 MDGs and Human Rights, International Symposium – Conference Report, Harvard Law School, 22-23 March 2010.

675 Ibid.

676 Ibid.

"Claiming the MDGs". It analyses recent national MDG progress reports and pertinent national development strategy documents from 15 countries, including Bangladesh, Cambodia, India, Indonesia, the Lao PDR, Nepal, Thailand and Viet Nam in the Asia Pacific region.⁶⁷⁷ The commissioned quantitative and qualitative research, secondary literature, as well as consultations at regional dialogues (including one in Bangkok for Asia), brought out a number of common challenges in regards to integrating human rights in MDG implementation efforts, along with *"innovation and positive examples that may be replicated elsewhere"*.

The report concludes that despite increasing recognition of the theoretical and operational links between human rights and the Goals, *"in many ways the full potential of the rights-based approach, as set out in Claiming the Millennium Development Goals, has yet to be fully explored at the country level."* While there have been a number of improvements on the level of general awareness and the linkages between human rights and the MDGs at level of global commitments,⁶⁷⁸ there have also been some notable failures. Initial examination of the selected MDG reports in most countries under review was considered *"not particularly encouraging"*. A number of countries are recognized for departing from the rather narrow conception of the original MDGs. Thailand's MDG plus model has set specific targets for women and marginalized regions⁶⁷⁹, and Bangladesh⁶⁸⁰ has acknowledged the Goals imply halving share of the poorest quintile in both national income and consumption, and further acknowledged it was not meeting this target despite having succeeded in halving income poverty. However, none of the other countries in the sample attempted to introduce targets of the poorest of the poor and excluded. Only few countries disaggregated data by region. With regard to the hunger target, none provided hunger data disaggregated by gender, ethnicity, indigenous ancestry, rural/urban divide, agro-ecological zone, administrative region, social class, caste or religion.

The assessment is not much more positive for the other Goals and targets either. On education, the OHCHR found that no country reviewed has set targets for other aspects of the right to education such as a quality, free and compulsory primary education system. While many countries provide primary schooling without school fees, other costs often make it hard for families to send their children (especially girls) to school. However, there is no attempt to set targets for or measure the affordability of primary school education. With regard to maternal mortality (*"of all the Goals, the furthest from being achieved"*), the report found that MDG reports and country policies *"indicate a general trend to begin to recognize the importance of emergency obstetric care (EmOC) in strategies, but it is generally neglected in MDG reports in terms of indicators or development of targets"*. In India, discrimination on

677 OHCHR, *Human Rights and the Millennium Development Goals in Practice: A Review of country strategies and reporting, 2010*

678 OHCHR mentions the 2005 World Summit Outcome which contained clear and unprecedented commitments by Member States to mainstream human rights in their national policies.

679 Reducing by half the under-five mortality rate in highland areas, selected northern provinces and the three southernmost provinces by 2015.

680 Millennium Development Goals: Mid-Term Bangladesh Progress Report 2007

the basis of caste and ethnicity seems to be under-measured, suggesting a critical need to disaggregate the indicators according to caste and tribal group.⁶⁸¹

Notably, there has been some progress in target setting, monitoring and reporting on water and sanitation targets. For example, the right to water and international standards on sanitation have been increasingly accepted, progressive and disaggregated monitoring methods and steps to measure progress for the poorest of the poor have been developed.

With regard to empowerment, also recommended by both the Millennium Project and OHCHR to enhance the human rights dimension of the MDG agenda, the findings are inconclusive. One reason is MDG reports generally provide little information about the broader question of legal and political empowerment and genuine participation in policy formulation. OHCHR found participation in decision-making, where it exists, has primarily been limited to established NGOs, rather than active engagement of representatives of vulnerable and marginalized groups. It noted *"in order to increase participation in policy formulation at the outset, there needs to be enforceable guarantees for public access to a wide range of information, especially for the very poor, along with clear standards for participation and capacity-building to ensure active and informed participation of vulnerable and marginalized groups."* Participation and empowerment should not be reduced to mere consultation with hand-picked stakeholders. Rather, decision makers should *"reach out to the poorest, remotest and most excluded groups, and actively invest in capacity-building and institutionalizing participation through existing democratic institutions."*⁶⁸²

The OHCHR report does not make any reference to MDG 6 and the issue of halting the spreading of HIV/AIDS. This is unfortunate, as it is potentially one of the areas where a pragmatic human rights approach has contributed, among other factors, to the relative success of meeting the Goal, at least in the Asia-Pacific region. The experiences with HIV, human rights and the MDGs also provide particular insights to non-discrimination and efforts to reduce inequality effectively. Clifton Cortez, leader of the HIV, Health and Development Team at the APRC, recently unveiled a presentation on stigma and discrimination-reduction strategies for stopping the spread of HIV.⁶⁸³ He also underlined the importance of data and data gathering which is critical for advancing this particular agenda. The most vulnerable individuals and groups are sometimes not even on the government radar. People, particularly women, living with HIV; sex workers; men who have sex with men (MSM); drug users; transgendered people; are often 'most at risk' of contracting HIV and being invisible to policy makers. The contextualized and evidence-supported human rights based approach followed in recent years is a key contributing factor to why the MDG itself may be closer within reach than others.

On a more general note, OHCHR identified a key challenge for many countries to recognize the link between MDG-related policies and their possible harm to human rights,

681 OHCHR, 2010

682 Ibid.

683 UNDP Asia Pacific Regional Centre Dialogue Bangkok, 6-7 September, 2011: *Human Rights for Development: Ways and Means—Workshop Report (DRAFT)*

recommending it may be necessary in many cases to carry out independent human rights impact assessments of policies before they are approved.

In many reports “accountability is equated with monitoring and evaluation and mechanisms are not always particularly strong. Even so, it is clear that there are real gaps and challenges in just ensuring basic monitoring of programmes and data collection.”⁶⁸⁴ Many countries still “lack effective independent and easily accessible complaints mechanisms to address denials of, or interference with, economic and social rights.” OHCHR acknowledges in some countries, litigation has helped to mobilize constituencies to monitor government performance in delivering social services, “but access by individuals is heavily dependent on access to lawyers or access to local administrative mechanisms”, which are often heavily biased against marginalized groups. Therefore, provision of effective remedies through legal recognition of all human rights, improvement of the courts, the rule of law and access to justice should be seen as integral components of the overall development policy agenda for the sake of greater accountability.⁶⁸⁵

*The more widespread ratification and implementation of international human rights treaties may help to fill accountability gaps in the MDG policy and institutional architecture. However, the impact of this will depend upon the strength of complementary components of the national human rights system, including the existence of an independent and functioning judicial system, a free press, and a constitutional and legislative framework aligned with international human rights law.*⁶⁸⁶

Among the key observations and conclusions of OHCHR features an aspect not commonly recognized as a human rights concern per se. It nevertheless constitutes one of the main areas to improve if a genuine human rights and democratic governance approach are to be integrated in the MDG agenda: the issue of collecting and publicizing reliable, disaggregated data and making information on the connections of these data to policies and expenditures easily available.

*While a lack of national resources—both financial and human—is an obvious constraint on realizing the Goals, the limited availability of reliable, quality data can make human rights-based analysis difficult for many countries. Often, the situation of the poorest and most marginalized people, including indigenous and minority groups, is not captured in official statistics and household and demographic surveys. Available data mostly remain at too aggregated a level and indicators frequently measure only “average” progress and hence hide patterns of discrimination, inequality and disparities in outcomes. Poverty indicators and other social measurements insufficiently reflect local context and specificities, and hence frustrate both intra-country and cross-country comparisons.*⁶⁸⁷

684 OHCHR, 2010

685 Ibid.

686 Ibid.

687 Ibid.

*Accountability for MDG progress is undermined in many countries by the lack of access to information and transparency in public policymaking, budget processes and the use of aid. The human rights principles of equality and non-discrimination must underpin the implementation of all the Goals. Resource allocations, as a direct reflection of power relationships and policy choices, must be thoroughly monitored and analysed.*⁶⁸⁸

A number of “special procedures” of the UN Human Rights Council, including those dealing with extreme poverty, health, indigenous peoples, and water and sanitation, have been actively engaging with the Goals. This is one of the most encouraging developments with regard to the linking of human rights to the MDGs in recent years. In 2005, Where Alston still saw “ships passing each other in the night” it appears the human rights community, both in terms of the UN’s formal mechanisms and in terms of advocacy and reporting, has by now fully embraced the MDGs and includes MDG-references as a matter of routine in its work.

The creation in 2006 of the **Universal Periodic Review (UPR)** is one of the most significant innovations of the new Human Rights Council (HRC).⁶⁸⁹ Under this system, for the first time, the fulfillment by each UN Member State of its human rights obligations and commitments is regularly reviewed through a mechanism of the HRC. Each state undergoes the review every four years, meaning 48 states are reviewed per year. Each country review is based on three documents: a report prepared by the individual State and two reports prepared by OHCHR, i.e. a compilation of UN information and a summary of stakeholders’ input. The UN information report is prepared by OHCHR by compiling information contained in the reports of treaty bodies, special procedures and other relevant official United Nations documents, including those published by all UN entities such as national Human Development Reports and MDG Reports.

Homayoun Alizadeh, the Regional Representative of OHCHR in Bangkok, presented the Three-Pillar Strategy of the international human rights mechanisms in relation to the MDGs at a regional workshop to discuss the linkages between human rights and the MDGs.⁶⁹⁰ The UPR became operative in 2008 and now, with 175 members having undergone the process, is moving into its second round of reviews. It seems the UPR may have been initially underestimated in its effect, particularly in the Asia region. A number of the recommendations relate directly (and indirectly) to the MDG targets. The UPR also goes beyond national MDG targets and considers a disaggregated country process, focusing on the most marginalized people. It is also notable that contrary to the relatively strong divide between the human rights and the MDG frameworks around a decade ago, human rights mechanisms, reports and the UPR itself routinely addresses and includes references to the MDGs.

688 Ibid.

689 It was created by the General Assembly under resolution 60/251 of 15 March 2006 as part of UN Reform.

690 UNDP Asia Pacific Regional Centre Dialogue Bangkok, 6-7 September, 2011: *Human Rights for Development: Ways and Means—Workshop Report (DRAFT)*

The recent report by the UN's independent expert on the question of human rights and extreme poverty, Magdalena Sepulveda Carmona, mandated by the Human Rights Council, is a good example of this development.⁶⁹¹ The Council had asked the expert, i.e., *"to submit recommendations that could contribute to the realization of the MDGs"*. The report highlights the importance of social protection measures in the MDG agenda, and stresses social protection measures, *"designed, implemented and evaluated within the framework of a rights-based approach"* are more likely to ensure achievement of the MDGs and result in long term achievements.

Another example is the report of the UN special rapporteur on the issue of human rights obligations related to access to safe drinking water and sanitation, Catarina de Albuquerque. In a recent report she expressed concerns that the global MDG target on access to water and sanitation would still leave 672 million people without access to *"improved"* water sources and 1.7 billion people without access to sanitation by 2015.⁶⁹²

To sum up this brief analysis of reports measuring progress made on the MDGs, it is hard to escape the conclusion that focus is slowly shifting from looking at country-level aggregate results, to a more fine-grained analysis of pockets of poverty, regional disparities, growing inequalities within societies and long-standing and exacerbating cases of discrimination and marginalization. This was not built into the original concept of the MDGs. It was a perspective advocates of a human rights approach to the MDGs have always claimed as lacking. As recently as this year, in her report on human rights and extreme poverty, the UN independent expert Sepulveda emphasized *"the human rights approach is fundamental in channelling policies related to the MDGs towards those who are most vulnerable and suffer most from direct and indirect forms of discrimination."* However, she also concluded at present, *"such channelling is an element missing from the MDG agenda."*⁶⁹³

Could it therefore be some countries are winning the numbers battle and losing the war on poverty? There are creeping doubts, especially among globally connected civil society networks following the MDG progress, that the focus of the MDGs needs to be adjusted and move away from country level aggregates statistics towards a quest for equality and equity. A series of reports related to the MDGs at the global and regional level appear to point in the same direction. Therefore, it is this context that will shape and inform the MDG-related efforts over the coming years.

6. The persisting data gap

Before moving to questions concerning how human rights and governance can be effectively integrated in ongoing and future efforts related to the MDGs, it is necessary to ask how one could possibly know whether they were met or not – which brings up

691 UN GA, A/65/259, 9 August 2010, *Human rights and extreme poverty – Report of the independent expert on the question of human rights and extreme poverty*

692 <http://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWWater/Pages/SRWWaterIndex.aspx>

693 Ibid.

the crucial issue of ‘measuring’ progress on the MDGs. In fact the MDGs have often been juxtaposed and compared favourably to human rights and other global commitments because the targets and indicators made the goals very easy to measure. However, this presupposes reliable information or data exists in this context and allows comparisons between countries and over time, is sufficiently disaggregated to understand a context beyond national averages. Here lies one of the major shortfalls in the overall MDG framework despite many efforts to correct it, as the gap between reality and assumption remains large.

In fact, early criticism of the MDG agenda related to the measurability of the goals. The ability to accurately measure data is also a prerequisite within the context of accountability.⁶⁹⁴ In 2005, Attaran argued *“many of the most important MDGs, including those to reduce malaria, maternal mortality, or tuberculosis (TB), suffer from a worrying lack of scientifically valid data. While progress on each of these goals is portrayed in time-limited and measurable terms, often the subject matter is so immeasurable, or the measurements are so inadequate, that one cannot know the baseline condition before the MDGs, or know if the desired trend of improvement is actually occurring. (...) In short, five years into the MDG project, in too many cases, one cannot know if true progress towards these very important goals is occurring. Often, one has to guess.”*⁶⁹⁵

Attaran indicated it was particularly hard to get sufficient and reliable data for the health MDGs, whose quantification he considered irretrievably flawed: *“Even the most basic life indicators, such as births and deaths, are not directly registered in the poorest countries. (...) Without reliable vital registration systems to track even the existence of births or deaths, naturally the data for the medical circumstances of those births or deaths—or the lives in between—are unreliable. Accordingly, most of the available data on the health MDGs come from methods of estimation, censuses, specialised household surveys, or all of these together.”*

The idea regarding aggregate comparisons giving incomplete pictures has already been emphasized by UNDP in its Human Development Report of 2002: *“When considering human development, within-country inequality must be taken into account because simple comparisons of per capita GDP assume that everyone in a country has the same income. Data on within-country inequality, based on household surveys, are often not comparable across countries or over time, so conclusions must be tentative.”* UNDP then suggested reasonable estimates can be made, and studies have found, that long-term trends in interpersonal inequality, using PPP exchange rates, prove the world has become much more unequal. The limited available evidence indicated that worldwide, within-country income inequality had been increasing for the past 30 years. However, this evidence only underlines the importance of going beyond national aggregates and vastly improving data collection and analysis. In 2002, UNDP found *“studies of inequality trends within countries suffer from a lack of reliable, comparable data”*, and while inequality itself seems to have grown, much

694 Attaran, Amir (2005) *An Immeasurable Crisis? A Criticism of the Millennium Development Goals and Why They Cannot Be Measured*, in Public Library of Science, an online journal. (<http://www.plosmedicine.org/article/info:doi/10.1371/journal.pmed.0020318>)

695 Ibid.

of the data necessary to have a full understanding of the facts still suffer from being unreliable, unavailable, or incompatible for comparisons.

There is more to the availability of data and government information than its seemingly technical nature might suggest. There is a clear linkage to transparency and accountability, which was already emphasised in the Report of the Millennium Project in 2005: *"In practice, accountability depends on citizens' awareness of the Goals and their corresponding rights and information about government actions. Governments need to introduce greater openness and provide full access to official data and performance indicators. They should produce timely publications of the fully audited accounts of the central bank and of the main state enterprises, such as those related to extractive industries. Other information for publication includes laws, regulations, budgets, procurements rules, incomes and assets of public officials and parliamentarians, and public access to parliamentary voting records and political funding contributions."*⁶⁹⁶

The 2005 Millennium Project Report stated, *"Investments in statistical services are urgently needed. Today's ad hoc international statistical efforts are unreliable – often duplicative, inconsistent, and burdensome to national governments. Sustainable statistical capacities must be available to run population and housing censuses, conduct household surveys, set up vital statistics and health information systems, and compile indicators on food, agriculture, education, and the economy, among other areas."*⁶⁹⁷

The 2006 e-discussion on democratic governance and the MDGs conducted by UNDP highlighted the significance of evidence in policy processes and monitoring the pro poor impact of policy. The discussion underscored the need for updated and credible data for establishing responsive governance. Citizens need valid, reliable information to be able to hold governments accountable. Planning at sub-national levels is carried out using national level aggregate data, resulting in fallacious planning. Also, it was highlighted that qualitative assessment and lessons learned are equally important along with statistical/quantitative analysis. The lack of data at the sub-national level was identified as the weakest link when it comes to monitoring and evaluation.

*Institutional capacities to collect, compile, analyze and use statistics for policy and project formulation and management are weak. Such weaknesses make it impossible for leadership to make the right decisions based on accurate timely information.*⁶⁹⁸

*Developing institutional capacities to produce quality statistics would not only facilitate monitoring and reporting on MDGs, but also contribute to greater transparency and accountability.*⁶⁹⁹

The connection between disaggregated data, human rights and non-discrimination has also been understood some time ago and was highlighted by UNDP in 2006:

⁶⁹⁶ Millennium Project Report 2005

⁶⁹⁷ Ibid.

⁶⁹⁸ UNDP, Reference Note DG and MDGs, 2006

⁶⁹⁹ Ibid.

“Efforts to monitor progress in relation to human rights or MDG targets depend crucially on statistics-based evidence. Moreover, the data collected needs to be disaggregated, making it possible to judge whether as many girls as boys attend primary school, or whether maternal mortality falls in all regions of a country, or among all groups, including minorities. Not all states collect reliable statistics, and few do so with the objective of identifying discrimination. Accordingly, in order to track whether MDGs are being achieved equitably, there is a need for increased investment and capacity building in monitoring systems. In many cases, this is a necessary first step towards applying a human rights lens to MDG programming.”⁷⁰⁰

In 2008, the UN report on Governance and the MDGs previously referenced found that in order to properly contextualize the MDGs at the national and local level, they must be disaggregated. The Report also identified a need to develop a monitoring methodology, identify benchmark surveys, and collect disaggregated data through development of statistical capacity. The focus should also be on effective and widespread dissemination whereby MDG reports are used as a mirror for the concerned civil society, which in turn, can put pressure on policy makers to take the steps necessary to fill remaining gaps.⁷⁰¹ Disaggregation of data would also provide an additional test to the credibility of the figures presented by governments.

The Millennium Project Report highlighted significant disparities on the subnational level when looking at target-related indicators.⁷⁰² For instance, when listing investment priorities for reaching the MDGs in various global regions, the Report highlights how *“pockets of the region (of South East Asia), especially in Lao PDR, Cambodia, and parts of Indonesia remain trapped in poverty.”*⁷⁰³ The stark regional imbalances in China and India are also pointed out (and illustrated in maps). Taking another look at these maps today, only half a decade later, it is strikingly obvious these regional imbalances have expanded.

In 2005, the Minority Rights Group International (MRG), the *“focus on aggregate results, rapid development and achieving the greatest good for the greatest number could mean that the particular needs of the most excluded groups – of which minorities form a major part – will be ignored in the interests of meeting the targets on paper”*.⁷⁰⁴

The Millennium Project Report also makes a very clear and vivid connection between an MDG-focus on marginalized groups and disadvantaged regions and conflict prevention. *“To prevent conflict, MDG-based scale-up programs need to narrow rather than widen existing ethnic, regional, or communal divides. In practice, countries must ensure the equitable provision of services and infrastructure to all groups in society, including people in disadvantaged*

700 UNDP, *Human Rights and the Millennium Development Goals–Making the Link* (2006)

701 UN, *Governance for the Millennium Development Goals*, 2007

702 See for instance, the maps on infant mortality and underweight children (p.17 and 170), per capita incomes in provinces of China (p-160), or literacy rates for girls and boys in India (p.164).

703 Millennium Project Report 2005

704 MRG, *The Millennium Development Goals: Helping or Harming Minorities?* (2005), as quoted in UNDP, *Human Rights and the Millennium Development Goals–Making the Link* (2006)

regions, minorities, and those with special needs, such as refugees. Major projects in countries at risk should conduct regular peace and conflict impact assessments to ensure they do not exacerbate existing tensions and increase the risk of conflict."⁷⁰⁵ In order to carry out this task, the Report urged countries to "*undertake disaggregated reporting on how different regions or groups within a country are progressing toward the Goals in order to shed light on patterns of inequality across groups and help mainstream conflict prevention.*"⁷⁰⁶

Moreover, in terms of the content and quality of the public investments to be considered in this regard, the Report deviates far from the classic 'MDG-interventions', and focuses right on core governance functions. It recommends MDG-based strategies "should include specific investments aimed directly at enhancing peace and security. Measures are needed to strengthen state capacity, including investments in justice and security." This would include training and providing incentives to "the police and military to provide accountable and rights based public services" which itself should be a priority for development planning.⁷⁰⁷

The 2010 Global MDG Report stated,

*The lack of good quality surveys carried out at regular intervals and delays in reporting survey results continue to hamper the monitoring of poverty. (...) Only with more timely data can accurate reports on progress towards the MDGs be provided.*⁷⁰⁸

*Improved data and monitoring tools are crucial for devising appropriate policies and interventions needed to achieve the MDGs. Although some progress is being made, reliable statistics for monitoring development remain inadequate in many poor countries, and the challenge of building in-country capacity to produce better policy-relevant data is enormous.*⁷⁰⁹

A March 2010 symposium on the MDGs and human rights also urged states to collect disaggregated data in particular with regard to children with disabilities and minorities.⁷¹⁰ A recent UN report on human rights and extreme poverty signalled, "*States must conduct a comprehensive and disaggregated gender analysis assessing vulnerabilities of both genders as potential beneficiaries*" of social protection policies. "*The collection of disaggregated data, in terms of both sex and age, is essential not only for the design of effective social protection systems, but also for the unmasking of gender dynamics underpinning – and often undermining – achievement of the MDGs.*"⁷¹¹ Indeed, a prerequisite for effective social protection is

705 Millennium Project Report 2005

706 Ibid.

707 This recommendation actually goes back to one UNDP already made in 2002 in its global Human Development Report.

708 2010 Global MDG Report

709 Ibid.

710 MDGs and Human Rights, International Symposium – Conference Report, Harvard Law School, 22-23 March 2010.

711 UN GA, A/65/259, 9 August 2010, *Human rights and extreme poverty – Report of the independent expert on the question of human rights and extreme poverty (Magdalena Sepúlveda Carmona)*

accurate identification of the poor and their needs as well as a deep understanding of the circumstances in which poverty occurs.

7. Five years to go: The 2010 review, “breakthrough” and “acceleration”

The 2010 Global MDG Report, presented in preparation of the September 2010 review summit, concluded *“the Millennium Development Goals are still attainable. The critical question today is how to transform the pace of change from what we have seen over the last decade into dramatically faster progress. The experience of these last ten years offers ample evidence of what works and has provided tools that can help us achieve the MDGs by 2015.”* The “MDGs summit” in September 2010 was seen as, *“an opportunity for world leaders to translate this evidence into a concrete agenda for action.”*⁷¹² At an intergovernmental meeting on the MDGs in Asia-Pacific, the UN SG also declared one of the main goals of the September Summit was to *“showcase what works — in order to scale it up.”*⁷¹³

In September 2010, UN Member States reconvened for their ten-year review of the Millennium Declaration. Essentially, what they reviewed was a relatively narrow conception regarding progress towards achieving the MDG targets. *“While expressing deep concern that it falls far short of what is needed”,* they welcomed the progress made since 2005, and *“recognize developing countries have made significant efforts towards achieving the MDGs and have had major successes in realizing some of the targets.”* However, the General Assembly also warned, *“without substantial international support, several of the Goals are likely to be missed in many developing countries by 2015.”*⁷¹⁴

An analysis of the text of the September 2010 outcome document reveals a number of interesting changes in the form and focus of the debate since 2000. For one, the 2005 outcome document unequivocally reaffirmed the Millennium Declaration, and addressed all aspects of development; peace and collective security; human rights and the rule of law; and strengthening of the United Nations. The MDGs were addressed under the chapter of development. In contrast, the 2010 outcome document is entirely devoted to

712 UN MDG Report 2010

713 Secretary General’s message at the “Special Ministerial Meeting for MDGs Review in Asia and the Pacific: Run up to 2015” on 3-4 August in Jakarta, Indonesia

714 September 2010, Summit Outcome Document

*"Keeping the Promise" to achieve the Millennium Development Goals.*⁷¹⁵ References to the Millennium Declaration are minimal and indirect: *"We reaffirm our resolve to work together for the promotion of the economic and social advancement of all peoples, recalling the development goals and commitments emanating from the UN Millennium Declaration (...)"*. The MDGs take absolute centre stage and the values and principles of the Declaration are understood in the context of achieving the MDGs.⁷¹⁶

The term *"human rights"* features in the 2005 outcome document 49 times, whereas it is mentioned only 13 times in the 2010 outcome document. Of course, the number of times a word is used in a document does not directly co-relate to the quality of the references. However, further analysis of the context and the quality also points in the same direction. Democracy, which appeared 14 times in the 2005 document, was mentioned only twice in 2010. In the 2010 outcome document States reaffirm the *"importance"* of freedom, peace and security, respect for all human rights, including the right to development, the rule of law, gender equality *"and an overall commitment to just and democratic societies"* for development. The only other reference to democratic governance in the text is with regard to ensuring official development assistance is used effectively.⁷¹⁷

One cannot help but notice a certain shift in emphasis when comparing the Millennium Declaration and the 2005 Secretary-General's report and outcome document with the 2010 Secretary-General's report and review meeting outcome documents. While the technical aspects of the MDGs are treated more elaborately with further detail, the 'transformative' agenda of the Millennium Declaration termed in language of human rights and democratic governance appears to have waned.

However, the 2010 summit was described as a success and indeed provided some renewed impetus to the MDG agenda. The official UN web-portal for the MDGs states the following: *"The 2010 MDG Summit concluded with the adoption of a global action plan — Keeping the Promise: United to Achieve the Millennium Development Goals — and the announcement*

715 High-level Plenary Meeting of the General Assembly *"on the Millennium Development Goals"*. The Millennium Declaration included a commitment of its review at regular intervals. The 2005 Summit was a review of the Declaration as a whole. The 2010 Summit, however, was a review of progress made on the MDGs. The Outcome Document asked the GA *"to continue to review, on an annual basis, the progress made towards the achievement of the Millennium Development Goals, including in the implementation of the present outcome document"*, asked the SG to *"report annually on progress on the MDGs until 2015"* and requested a special event of the GA on the MDGs in 2013. The 2008 forewarning of the OHCHR of the *"forgotten Millennium Declaration"* thus appears to have been fulfilled at least with regard to the formal MDG review process.

716 *"We reaffirm that our common fundamental values, including freedom, equality, solidarity, tolerance, respect for all human rights, respect for nature and shared responsibility, are essential for achieving the Millennium Development Goals." (...) the respect for and promotion and protection of human rights is an integral part of effective work towards achieving the Millennium Development Goals." (...) the importance of gender equality and empowerment of women to achieve the Millennium Development Goals."*

717 A similar statement avoids the reference to democracy and human rights: *"We acknowledge that good governance and the rule of law at the national and international levels are essential for sustained, inclusive, and equitable economic growth, sustainable development and the eradication of poverty and hunger."*

of a number of initiatives against poverty, hunger and disease.”⁷¹⁸ Notwithstanding their expressed concern, States remained “convinced the MDGs can be achieved including in the poorest countries” and “committed to making every effort to achieve the MDGs by 2015” including through new actions, policies and strategies in support of developing countries, in particular “those countries that are lagging most behind” and “those Goals that are most off-track, thus improving the lives of the poorest people.”⁷¹⁹

Despite cautious references to human rights and democracy, the 2010 document also represents significant advancement in terms of integrating a human rights focus into work related to the MDGs. This is due to the problem that inequality has now been amply recognized as a priority and issues such as addressing the poorest of the poor, reaching the most marginalized and reducing internal disparities are woven into the text’s substantive sections. For example, the 2005 document called for “sustained economic growth” yet in 2010 this was reformulated as “sustained, inclusive and equitable economic growth”.

On the basis of the “lessons learned and the successful policies and approaches in the implementation and achievement of the Millennium Development Goals” and recognizing “with increased political commitment these could be replicated and scaled up for accelerating progress”, States agreed to pursue, among others, the following:

- Adopting policies and measures oriented towards benefiting the poor and addressing social and economic inequalities;
- Promoting universal access to public and social services and providing social protection floors;
- Improving capacity to deliver quality services equitably;
- Implementing social policies and programmes, including appropriate conditional cash-transfer programmes, and investing in basic services for health, education, water and sanitation;
- Ensuring the full participation of all segments of society, including the poor and disadvantaged, in decision-making processes;
- Increasing efforts to reduce inequality and eliminate social exclusion and discrimination;
- Strengthening statistical capacity⁷²⁰ to produce reliable disaggregated data for better programmes and policy evaluation and formulation.⁷²¹

718 The statement also said that “in a major push to accelerate progress on women’s and children’s health, a number of Heads of State and Government from developed and developing countries, along with the private sector, foundations, international organizations, civil society and research organizations, pledged over \$40 billion in resources over the next five years.” It is unclear whether these sums were actually new pledges, and to what degree they have already been mobilized.

719 September 2010 Summit Outcome Document

720 Related to this point, States also stated that all countries required adequate, timely, reliable and disaggregated data, including demographic data, in order to design better programmes and policies for sustainable development. They committed to strengthening national statistical systems, including for effectively monitoring progress towards the Millennium Development Goals, and reiterated the need to increase efforts in support of statistical capacity-building in developing countries.

721 2010 Summit Outcome document

The document further elaborated attention must be focused on the large and increasing economic and social inequalities, *“between the rich and the poor, and between rural and urban populations”* which remain persistent and significant and needed to be addressed. Policies and actions must therefore *“focus on the poor and those living in the most vulnerable situations”*, so they may benefit from progress towards achieving the MDGs and need to provide more equitable access to economic opportunities and social services.

What the document fails to provide is clarity regarding how inequality can be concretely measured in the context of the MDGs, what specific goals, targets and indicators could be used to address these particular concerns, and how possible discrepancies between reaching the aggregate target at country level and aiming to prioritize the bottom rungs could be resolved. This, presumably, will have to be completed at the country level.

In 2010, governments also agreed to accelerate progress in order to meet the MDGs by *“addressing the root causes of extreme poverty and hunger”* as well as *“special actions to combat the root causes of the disproportionately high level of hunger and malnutrition among indigenous peoples”*. However, they did not identify what the root causes might be nor how they could be addressed. Judging from what has been learned in recent years about the linkages between empowerment and exclusion, discrimination, human rights and poverty, it is clear that explicitly enunciating root causes might be beyond the comfort zone for many governments at the General Assembly. Nevertheless, these commitments open a door to a more determined human rights based approach for identifying and addressing root causes at the operational level.

The 2010 outcome document introduces the dimension of geographic disparities and thus reemphasizes the need for area-specific programmes in order to fulfil the promise of the MDGs. States committed to *“providing and strengthening comprehensive and affordable community-based primary health-care services (...) while paying particular attention to poor people and populations, especially in rural and remote areas, with a view to extending health protection to all those in need”* and to *“strengthening basic infrastructure, human and technical resources and the provision of health facilities so as to improve health systems and ensure the accessibility, affordability and quality, especially in rural and remote areas, of health-care services, as well as sustainable access to safe drinking water and basic sanitation.”* Again, this provides an opportunity for targeting MDG specific initiatives at the subnational or local level, through area-based strategies.

For most UN agencies, 2010 was also a review year for progress made over the past decade, and an opportunity to reenergize and refocus their own efforts for the period up to 2015. UNDP’s approach in this regard has been laid down in a **Breakthrough Strategy** and the **MDG Acceleration Framework (MAF)** which has in the meantime, been endorsed by the UNDG as a UN system-wide tool.⁷²² The MAF was applied on a pilot basis in ten countries in Latin America, Africa, Asia Pacific and the CIS in 2010, and has been “rolled out” in the course of 2011 to several more. In the Asia Pacific region, only Lao PDR and Papua New Guinea participated in the pilot phase, but following a recent MAF workshop at the UNDP

722 See the UNDG website on the MAF at <http://www.undg.org/index.cfm?P=1505>

APRC in Bangkok, a number of additional countries in the region are expected to carry out MAF analyses and develop MAF Action Plans in the coming months.

UNDP launched its MDG Breakthrough Strategy several months prior to the September 2010 review summit.⁷²³ The document was pitched as a *"call to action for all UNDP staff"* and was described as the organization's highest priority to support countries in their efforts to fully achieve the MDGs. The document acknowledged, *"too many MDGs are off track and, in the current context of crisis, unlikely to be realized"*. However, the effort through to 2015 *"cannot be business as usual"*. The Administrator added: *"We do know what works and which actions can have the highest impact on MDG progress. When national commitment is combined with resources and know-how, amazing results can be achieved."*⁷²⁴

This essentially restates the underlying philosophy that has driven the MDG project from the outset, most elaborately explained in the 2005 Millennium Project Report and drawing on the ideas of Jeffrey Sachs. The approach is straight-forward and is based on a simple concept: begin with *"diagnostics that fully reflect reality"*, *"determine which policies will yield the best impact"*, and *"implement programmes to ensure faster progress and sustain hard-won gains"*. This is to be done by *"identifying the obstacles to progress"* and *"scaling up the specific, high value interventions that will make the biggest difference"*. Rather optimistically, it claims *"the international community has the knowledge, experience and resources to close the gap. It knows what works and where to invest to solve what is a development emergency."*

The strategy includes three main elements: 1) scaling up of initiatives in gender, energy, water and sanitation, education, health and sustainable agriculture with a focus on acceleration (by applying the MAF – see below); 2) interventions that address longer-term structural development constraints by investing in effective policies and institutions, improved conditions for peace, security and good governance, public private investments that accelerate pro-poor growth, an equitable framework on trade, technology and innovation and environmental sustainability; and 3) a rejuvenated advocacy campaign around the MDGs to bring about a groundswell of public and political support for closing the MDG gap. Subsequently, the focus has shifted almost entirely on the MAF itself, which is designed to be a tool for only part of the strategy. This may explain some of the scepticism facing the MAF region.

This rather broad and comprehensive strategy essentially covers all main areas of UNDP's operational involvement at the country level. Another way of framing the issue suggests work on the MDGs cuts across all thematic programmes, sections and practices. One cannot fail to notice, however, that the areas of human rights and democratic governance are less visible and prominent in the strategy than could have been expected based on past achievements of UNDP in these areas, and as its historic contribution as a leader on human development may have suggested.

723 UNDP, *"MDG Breakthrough Strategy – Accelerate and Sustain MDG Progress"*, May 2010

724 UNDP Administrator Helen Clark in her foreword to the MDG Breakthrough Strategy, May 2010

To be sure, the achievement of MDGs is very narrowly defined as meeting the targets and indicators at the country level within the parameters as defined in 2001 and revised in 2007. There is no explicit vision of implementing the broader scope of the Millennium Declaration as such. The metaphors and vocabulary used are drawn from medicine, engineering and transport. Although the vision consists of a “*historic opportunity*”, the action proposed resembles technical upgrading of a factory assembly line aiming to boost the quantity of output.⁷²⁵

Moreover, it is perhaps less clear than the strategy suggests that sufficient knowledge about the problems causing poverty and hunger in concrete circumstances, about cause and effect of certain public policies on certain statistical indicators and benchmarks, and in particular about “*what works and where to invest*” is at hand. It is true that the international development community has learned a great deal in the past decade, and deliberate efforts have been made to improve the collective understanding. But it is also true that prescriptive policy choices do not always flow easily from such insights. The developments in society measured by looking at certain indicators are often the result of a myriad of complex factors where the effect of well-intentioned interventions is not always easy to detect, especially not within rather short time frames. Furthermore, what has been the core of the learning process are the abstract, conceptual elements that can be deducted from particular country experiences. These need to be reapplied to every single concrete context, requiring local knowledge, data and an open mind. Adopting a short-term view focused on immediate results is often deceptive, as short term results can often not be sustained in the longer run, especially in countries with low levels of resources.

However, there are, of course, areas where the benefit becomes visible more quickly compared to others. It will not be hard to establish causal linkages between vaccination campaigns and the reduction of certain infectious diseases, or the availability of emergency obstetric care for birth-related mortality for instance. But there exists great doubt in the global development community that all problems and solutions are known and well-understood, and if only there were enough resources, all these problems could be solved on a sustainable basis. It appears this rather simplistic approach, which has underpinned the MDG concept from the outset, has lost much of its persuasive power.

At its core, the UNDP Breakthrough Strategy proposed to use what it called “*an innovative problem-diagnosing tool*” in the form of the **MDG Acceleration Framework (MAF)**.⁷²⁶ The MAF is a tool available for UN Country Teams led by their Resident Coordinators to support governments on MDG Acceleration.⁷²⁷ The MAF is based on the assumption governments are often unable to effectively prioritize and implement interventions required to meet the MDGs “*due in large part to policy, resource and/or service delivery constraints*”. Aligned

725 Similarly, the MAF uses the metaphor of a woman, a man and a girl running in the same direction, seemingly towards the goal of 2015. While this may well catch the concept of ‘acceleration’, it is hard to see how the dimension of longer-term sustainability might be reflected by this image.

726 MAF Operational Note at <http://www.beta.undp.org/content/dam/undp/library/Poverty%20Reduction/MDG%20Strategies/MAF%20Operational%20Note.pdf>

727 Ibid.

with earlier analyses, the governance dimension is crucial for areas largely dependent on input-based, top-down service delivery. However, the MDGs also depend on empowering people to independently improve their own lives through decent work that provides a livelihood, through exercising rights to make choices affecting their lives, to full participation in decision-making on public investments, and to have complete and timely information in order to do so. Sometimes, it is a question of the state getting out of the way, of abandoning overregulation, rent-seeking or practices that discriminate or harass poor people thus preventing them from ensuring their own livelihoods. These instances are hardly captured by the rather limited scope of “service delivery”.

The strategy assumes most governments and partners “*know the interventions required to meet the MDGs*” and identifies three factors constraining implementation: “*a lack of capacity to systematically identify and address bottlenecks/constraints; poor alignment of efforts to overcome bottlenecks; and limited accountability for government agencies and development partners*”.⁷²⁸ All three reside at the core of governance concerns and need to be addressed with determined and comprehensive efforts to address features of poor governance, including adoption of a human rights based approach. This valuable insight does not seem to be picked up in the strategy or the operational parts of the MAF. An opportunity to highlight UNDP’s particular expertise in these areas thus appears to be missed.



“WORK IN PROGRESS: MAF ROLLOUTS TO DATE”

- presented by UNDP BDP at the APRC Bangkok MDG Acceleration Framework Workshop, 6 October 2011

⁷²⁸ These observations are very similar to the findings of a study by the author of this paper done in 2008 for the Millennium Campaign on Nepal. The Country Facts and Campaign Guide Sheet is a reference work analyzing the political, social and economic context of the country, including policy drivers and obstacles to achieving the Millennium Development Goals (MDGs) by 2015. The Guide Sheet outlines key development issues and challenges and broad strategies for policy advocacy and campaigning.

The “guiding principles” of the strategy and the MAF can be summarized as follows: contextualize, and don’t follow a single blue-print, but identify the most “high-yield entry points” for MDG acceleration; prioritize “catalytic, high-value projects” that directly impact MDGs “at scale”, and “create MDG success stories” and scale them up. The “organizational implications” aim at ensuring MDG breakthrough becomes the central objective of its plan, formulating regional and country level MDG acceleration plans, aligning UNDP’s Country Programme Action Plans (CPAPs) and UN Development Assistance Frameworks (UNDAFs) to respond to off-track or slowly progressing MDGs. Human rights or democratic governance are not mentioned among the guiding principles or organizational implications. While there can be no doubt that MDGs should feature prominently in UNDAFs and similar documents, it is not convincing to argue they should be the only parameter. All other frameworks, commitments and policies should be submitted to and folded into an MDG agenda.

Seven areas of intervention are proposed as having the power to break down multiple barriers at once and are therefore particularly suitable to bring about progress on off-track and slow progressing MDG targets: 1) Investing in women and girls; 2) access to clean and affordable energy; 3) enhanced governance, 4) access to safe water and basic sanitation, 5) building infrastructure for peace, 6) unlocking institutional and human capacities (of NGOs implementing MDG programmes), and 7) development dimensions of HIV/AIDS and health. The proposal for “enhanced governance” is the following:

“In their efforts to reach the MDG targets, countries can optimize results by adhering to the fundamental norms and values set out in the Millennium Declaration, including human rights, gender equality, and democratic and inclusive governance. UNDP can help governments at all levels to address MDG gaps and reversals by strengthening their governance capacity and systems to be more accountable, transparent and responsive in support of individual MDG targets as well as across multiple MDGs.”⁷²⁹

The formulation that countries “can optimize results by adhering to the fundamental norms and values set out in the Millennium Declaration” can be seen as a step back not only from earlier UNDP reports and policy statements, in particular those related to human development, but also from language agreed at the intergovernmental level. This should not be optional, and the incentive should not be to ‘optimize results’. UNDP, along with all other UN agencies committed to a human rights based approach to development, have more of an obligation in terms of human rights and democratic governance than merely offering government assistance ‘to strengthen their governance capacity’ in order to achieve certain MDG targets. Democratic governance is not only a means to achieve MDGs. Systems also have to be more than “accountable, transparent and responsive” to be genuinely democratic. Unfortunately, the opportunity was missed to build on significant advances made earlier in aligning the MDGs with the human rights and democratic

729 UNDP 2010 MDG Breakthrough Strategy

governance agendas, and to learn lessons from criticism of an overly technocratic approach to the MDGs predominant in earlier years.⁷³⁰

The longer annex version of the strategy provides a few more references on governance. The strategy adds that UNDP will *"continue providing demand-driven support for democratic governance linked to MDG achievement"*. Democratic governance support, as has been explained in the previous sections, is both of intrinsic value and flows directly from the Millennium Declaration. It also acts as a means to ensure better and more sustainable progress on achieving the MDGs. However, it is not clear why support to democratic governance was not included more visibly and resolutely in the package of initiatives offered by the organization with regard to MDG acceleration.

The strategy further states *"at the country level, UNDP can help governments at all levels to address MDG gaps and reversals by strengthening their ability to be accountable, transparent and responsive—in particular to those traditionally excluded from services and the opportunities of citizenship. It is essential that citizens understand that their experience, voice and feedback inform and shape MDG interventions, so that they are empowered to take individual initiative, hold partners to account, and ensure that decisions are being made fairly."* This formulation carefully avoids referring to political will as the basis for accountability, transparency, and responsiveness. Democratic governance also includes exclusion and discrimination, in particular those lacking opportunities for citizenship, and empowering people to provide *"voice and feedback"* only if and when their basic human rights, including the rights of political participation, are fully respected.

The proposal emphasizing *"access to water and basic sanitation"* makes an important point, namely *"the principal driver that affects country progress lies in the area of governance and therefore improving sector governance needs to be a key focus of efforts to accelerate these MDGs."* Again, the connection is recognized, but the conclusion is not necessarily in line with a human rights based approach and lessons learned from the past. *"Improving sector governance"* says too little about the dimension of rights, in particular the human right to water. Governance problems causing poor access to water and sanitation are rarely limited to the sector of water and sanitation itself. Efforts to improve access must therefore look at the broader context.

There is, however, some recognition for such an approach in the last proposed areas of intervention – development dimensions of HIV/AIDS and health, where the need for broader approaches addressing underlying structural drivers of infection and a human rights context is highlighted. While this does not fully reflect the successful human rights based approach UNDP's work on HIV/AIDS has been following in recent years, it provides encouragement for integrating considerations in the context of MDG acceleration.

⁷³⁰ This is not to suggest that UNDP has a human rights monitoring role. In 2007, UNDP's Executive Board clarified that while UNDP does not have any normative or monitoring role with regard to human rights, UNDP will uphold universal UN norms and standards, including those related to human rights, by taking a human development-based approach to programming, and by designing its coordination and programmatic to reflect the commitment to support the realization of the values of the Millennium Declaration around the world. See: http://www.undp.org/execbrd/word/dp07-43_updated.doc

The strategy goes on to suggest the MAF “will contribute to identifying and implementing innovative and catalytic approaches to speed and sustain MDG progress”. Among these, “legal empowerment of the poor” is listed.⁷³¹ Even so, it remains somewhat unclear what exactly UNDP could do in terms of an innovation “to support legal empowerment of the poor”. The Strategy states UNDP will utilize multiple arms of its work across practices to sustain and accelerate MDG progress through legal empowerment. It also states by addressing the structural causes of poverty and exclusion, work designed to advance legal empowerment of the poor can help to sustain MDG progress. Again, a human rights issue is presented in its utility for MDG progress, while the text is silent on the intrinsic value of legal empowerment for more effective human rights protection. The text also recognizes “legal empowerment can be used as an instrument for ensuring that the poor can and do benefit from services and reforms” and it “offers an assessment methodology that can help clarify who benefits from which rights and identify bureaucratic bottlenecks that prevent the poor and excluded from exercising their rights.” The methodology of legal empowerment is therefore recognized “as a critical contribution to MDG diagnostics.”

While the connection between the MDGs and legal empowerment clearly flows from years of applying a human rights based approach to poverty reduction efforts, the enormity and complexity of the challenge is perhaps not fully acknowledged here. Addressing legal empowerment is, as the Strategy itself recognizes, a long-term structural problem, and may not be suitable for producing quick, visible results as intended with the overall purpose of “MDG acceleration”. From a human rights perspective, keeping in mind the new emphasis on inequality within the MDG debate, as well as a decade of leading human development issues, UNDP should not make legal empowerment of the poor merely an optional tool within its well-stacked MDG toolbox. Together, with the related goals of effective enjoyment of human rights and effective access to justice, legal empowerment should be central to all efforts related to the MDGs in all countries in the coming years, and would deserve to receive prominent inclusion among the priorities, guidelines and principles of MDG acceleration efforts.

The strategy does not provide adequate guidance on how to approach difficult choices likely to be made in view of a rather limited availability public finance, MDG-related or other development funds. Priorities need to be established between accelerating progress to meet the MDG targets by 2015 and investing in areas promising more sustainability beyond that date. Priority should also be given to areas which help to reach the poorest of the poor, or to areas most deprived of development, at the risk of lower overall acceleration measured by an aggregate target.⁷³² These are difficult choices to make but are common in any country where financial and human resources are limited. Essentially,

731 The Strategy introduces the point by saying that “approximately four billion people are currently excluded from the rule of law.” It is unclear from the text how this figure was calculated, and what exactly this statement entails. It only states that “that they live their lives without the protections and opportunities afforded by the legal framework and without access to the laws and formal institutions that underpin society.”

732 For instance, to reach an aggregate target, it would be more rational to invest in those already closer to reach it, and lift those above a target line, rather than investing in raising the indicators of those that are too far off to have a chance to meet the target in the short timeframe remaining.

some investments need to be prioritized over others. From a human rights perspective, it appears the latter, i.e. reaching out and focusing on the poorest of the poor, is the most ethical and urgent choice to prioritize. However, it may not be the choice leading to optimal MDG acceleration or even the option providing the best incentive for decision-makers in a given country.

The strategy also includes a section on resource implications. A UN MDG Acceleration Fund was proposed (but has not come to fruition as of yet). Through the strategy, UNDP was *“seeking supplemental resources in the form of multi-donor investment packages in the following areas: investing in women and girls, access to clean and affordable energy for the poor, unlocking institutional and human capacities, strategic governance reforms, and investments in the sub-national level for local development.”* Most, if not all, of these areas directly relate to democratic governance and/or human rights. It is also evident these dimensions could have been emphasized more in the formulation of the strategy itself and made extremely visible in the MDG acceleration framework.

What is perhaps the greatest missing link of the Breakthrough Strategy is the focus on in-country inequalities, the investment in better disaggregated data and analysis, and addressing the needs of the most marginalized. The omission is all the more unexpected, as many human development reports, MDG reports, including those prepared by UNDP, and even intergovernmental commitments such as the 2010 outcome document, increasingly emphasize this dimension. The inclusive and non-discriminatory manner in which the Goals are to be met in order to be fully in line with the spirit of the Millennium Declaration has perhaps even superseded the purely technocratic approach fixated at national aggregate target figures, in particular if they are based on questionable statistics. It may be considered unfortunate that UNDP's Breakthrough Strategy did not fully embrace this new thinking. While other forums and agencies base their MDG-related efforts at social protection with the specific aim of reaching people at the bottom of the economic and social order, the Breakthrough Strategy mentions social protection only twice, and it is clearly not central to the approach. As will be argued after a brief comment on the MAF, these apparent shortcomings may be overcome by a contextualized and flexible approach to MDG acceleration at the country level. It is encouraging to see that where the MAF has already been applied, countries did in fact often include a dimension of social inequalities, regional disparities and have hinted at underlying governance and human rights problems such as structural discrimination.

When trying to understand and analyse the MDG Acceleration Framework as proposed and outlined in the Breakthrough Strategy, the following documents need to be considered: the 2010 collection of case studies from the ten pilot countries that applied the MAF, which also includes a brief guide on the methodology used, **Unlocking progress: MDG acceleration on the road to 2015**, the more detailed **reports of the individual pilots published in 2011** and the **2011 Operational Note for UN Country Teams**.

The MAF itself should not be understood as a grand new strategy. It is designed to be ‘piggy-backed’ upon existing plans and strategies rather than duplicating or replacing them. It presupposes such plans exist, sufficient political will is in place to reach the

Goal, and to apply the MAF tool to achieve the goal. It is also presented with a significant disclaimer: *“An acceleration solution may not always exist, as complex political, social, economic and environmental issues that hamper progress may require time to resolve. (...) But if a solution exists, the MAF provides an orderly way of identifying it, and operationalizing its implementation.”*⁷³³ It essentially includes four steps: intervention prioritization⁷³⁴, bottleneck⁷³⁵ identification and prioritization, acceleration solution selection, and implementation planning and monitoring, each of which being quite narrowly defined.

The MAF analysis proceeds through four sequential steps, namely

1. Identify and codify the interventions required to meet the MDG targets
2. Help identify and prioritize MDG bottlenecks
3. Identify solutions to form an MDG Acceleration Compact that aligns and focuses stakeholders and resources on accelerating MDG progress
4. Implement and Monitor the MDG Acceleration Compact to ensure required impact⁷³⁶

The first is to **identify the relevant MDG target** (generally one that is off-track or unlikely to be met, based on current projections) and **enumerate the key interventions** considered necessary to reach it. *“In most countries, these interventions are known and have been implemented since early on in the MDG timeline. In fact, key interventions can often be drawn from the national development plan, sector strategies and plans, and any relevant policy and planning document related to the MDG target selected.”* Prioritization means selection. If one goal is prioritized over others, this means the MAF is not designed to be a tool to meet all MDGs at the country level, but only a technique to be used to achieve a particular goal, chosen and identified by relevant government counterparts.

This has also led to questions on how much the choice of interlocutors at the country level, the selection of a ministry, or the selection of a particular priority determines the way in which the MAF is applied, resources and political attention are channelled, and what the UN's role might be in this regard. It is also not clear what might trigger a subnational focus: is it up to the central government to decide to apply MAFs at the subnational level, or can the UN approach or be approached by subnational entities wanting to accelerate attainment of certain MDGs at their level? The MAF itself does not provide many answers to this question, as it takes the existence of an MDG-related policy (at the national country level) and the choice of certain MDG priorities as a given, rather than looking at a country setting in a broader context. Bottlenecks identified in the process are the obstacles to meet that particular MDG through a given policy (intervention), and not the broader, often systemic obstacles to reaching the MDGs in an accelerated, more inclusive and more sustainable manner.

⁷³³ Unlocking progress, 2010

⁷³⁴ An intervention is defined as “the delivery of a package of goods, services, and/or infrastructure to achieve development goals and targets within a set timeline”. The prioritization is to be informed largely by country/sector plans and focused on off-track or with slow-progress MDG targets.

⁷³⁵ Bottlenecks are broadly defined as proximate and removable constraints that impede implementation of MDG-related interventions.

⁷³⁶ Presentation on the MAF methodology by Shantanu Mukherjee of UNDP BDP at the APRC Bangkok MDG Acceleration Framework Workshop, 5-7 October 2011

For those MDG targets where the progress has been unsatisfactory, *“it is likely that there are bottlenecks that get in the way of realizing the full potential of these interventions on the ground.”* The second step is therefore *“to analyse the causes of the lack of complete success of each intervention, thus **identifying the bottlenecks**. Once identified, **bottlenecks should be prioritized** in terms of their potential impact on the MDG target, were they to be removed. In general, bottlenecks identified can either be cross-cutting in nature, selecting several MDGs at the same time, or specific, selecting primarily the MDG in question. Countries often find it useful to classify each specific bottleneck into one of the four categories—policy and planning, budget and financing, service delivery and service utilization—suggested under the MAF.”*⁷³⁷ Again, these findings may well point to more systemic issues related to governance and human rights in a country. However, the purpose is not to identify and address issues through the MAF but instead, focus on issues with the potential to be overcome by particular *“acceleration solutions”*. It also presupposes that for every MDG an equivalent central government ministry exists as the natural counterpart, which may not be the case for all MDG targets in the same manner. The approach unfortunately relates exclusively to central government executive branch agencies, and disregards any possible role of parliaments as legislative, budgetary or control bodies, the judiciary as ensuring effective access to justice, independent bodies such as national human rights institutions, as well as subnational and local government levels.

The focus on off-track MDGs risks missing areas where a MDG might be on-track or already met at the national level. The national government might therefore not attach importance to the goal any longer. However, there are still significant disparities in terms of social stratification and regional inequality.

The MAF recognizes but circumscribes the governance dimension: *“Whilst MDG financing gaps continue to be a critical bottleneck for scaling up services in many cases, the financing deficit is often compounded by inadequate institutional capacities for planning, monitoring and delivering services of adequate quality to meet local demand.”* Governance issues are circumscribed as *“service delivery (supply) bottlenecks”*. The February 2011 version of the MAF Operational Note states these *“are likely to occur in areas such as human resources availability and development, supplies and logistics, lack of decentralized capacity, technical and organizational quality, procurement systems, value chain analysis, sector management and institutions, and the absence of comprehensive monitoring and evaluation systems.”*⁷³⁸ As these are essentially governance questions, bottleneck analysis should make use of the full range of assessment tools available for these factors, including many prepared and used by UNDP itself.

The MAF Operational Note⁷³⁹ includes only minor references to human rights. It stated the MAF is *“fully consistent with the five interrelated UN principles that guide the UNDAF (i.e., the Human Rights-Based Approach, gender equality, environmental sustainability, capacity*

737 Unlocking progress, 2010

738 *Advanced Version, MDG Acceleration Framework and Operational Toolkit*, February 2011, endorsed by the UNDG and available at http://www.undg.org/docs/11788/MAF_MDG-2011_final.pdf

739 Ibid.

development, and Results-Based Management)”. While it would be hard to imagine that the MAF itself would be inconsistent with any of the UN principles, the analysis in this paper suggests that something more than compatibility should have been the objective. For example, a human rights based approach should indeed be an integral part of the MAF rather than an optional possibility.

In the section on “bottleneck identification and prioritization”, the note also includes some reference to human rights in the context of “*service use (demand)*”. It mentions “*bottlenecks in the use of goods and services on the ground from the demand side are likely to occur in the following areas: empowerment of users to use the services when available, information and education available to explain the service, advocacy, intervention promotion, physical distance (lack of transportation), affordability of services, and gender and cultural barriers (e.g., women may face unique difficulties in accessing services). As a matter of fact, culture, human rights and gender are critical pillars in addressing demand side issues.*” This is certainly correct, but it still views the MDGs merely in terms of service delivery. It also portrays human rights purely with regard to use of such services, falling short of adequately capturing the full and unhindered enjoyment of all human rights and the effective empowerment of people and communities.⁷⁴⁰

It may therefore not be surprising that the report on the 10 MAF pilot⁷⁴¹ countries, “**Unlocking progress: MDG acceleration on the road to 2015**”, also released in 2010, mentions rights only in the context of one project related to property titles and women’s rights. The term “human rights” is not mentioned at all. Ten pilot countries all prepared an MDG Action Plan which included identification of projects, most of which have yet to receive funding. Lessons identified from the pilot exercise included a need to increase the sense of national ownership, cross-sectoral collaborations, and civil society participation. It should be considered important to learn from these lessons and ensure these components of a successful approach are adequately reflected in any future MAF activities. The inclusion of a recommendation to “*involve civil society in the MAF process*”, through “*reputed civil society organisations especially those representing the most disadvantaged groups*” in the latest MAF Operational Note is a step in the right direction, but still falls short of an approach based on genuine participation, democratic legitimacy and genuine local ownership of “*acceleration solutions*”.

The pilot case studies concerning how the MAF has been applied at the country level demonstrates the enormous flexibility and contextuality with which the concept has

740 There is a third brief reference to human rights in the document, which recommends “ensuring that national legislation is aligned with human rights principles, including those of non-discrimination and equal educational opportunities set out in international instruments, and enforcing laws against discrimination” as part of the checklist for target 2A. The inclusion is noteworthy, but could have deserved a much more prominent place in the document, as it points to a much larger issue than what can reasonably be expected of “acceleration solutions” to address.

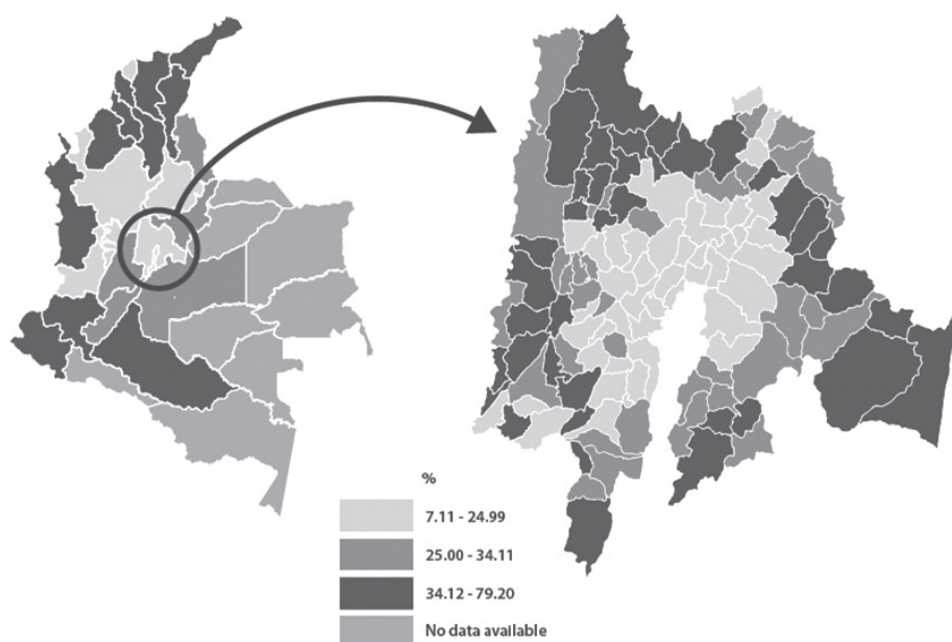
741 The ten pilot countries were: Togo, Tanzania, Ghana and Uganda in Africa, Tajikistan in the CIS, Jordan in the Middle East, Belize and Colombia in Latin America and Lao PDR and Papua New Guinea in Asia-Pacific. In Colombia the MAF was applied at the sub-national and local levels.

been applied. What is more, the creative approach taken at country level has repaired what could be taken as conceptual shortcomings of the strategy and the MAF guidelines. It is interesting that the MAF process has helped in many of the pilot countries to increase focus on existing subnational disparities by looking at the needs of the most poor and vulnerable, including women, the elderly and ethnic minorities, ensuring equitable measures and solutions are devised.⁷⁴²

It is a step in the right direction that the maps of Togo, Uganda, Laos, and Colombia in the MAF pilots report show data, as available, on MDG status on a sub-national (in the case of Colombia even the local) level. This data indicates significant regional disparities. The reports are simplistic but disparities are addressed and explained regarding how they can be overcome. As a result from these insights, the latest MAF Operational Note now includes a recommendation that the RC/UNCT and the government “*identify the MDG target(s) needing acceleration efforts, including if relevant, disparities in achievement across subnational areas or population groups*”. Needless to say, being able to present credible evidence and solid data on such disparities will greatly enhance the influence of county teams in advocating for such an inclusion in the preparation phase.

Although not explicitly highlighted in the strategy or the MAF, the MAF country analyses often identified governance problems as ‘bottlenecks’. The pilot study from Uganda found “*there are not many bottlenecks in policy and planning, bottlenecks in areas such as financing and delivery of services impede the full implementation of each of these interventions*”. This is reminiscent of the situation in many developing countries. A great number of excellent policies and plans are worked out at the central level of government, often with international assistance, but they are never fully implemented due to insufficient resources and poor service delivery on the ground despite some formal steps towards decentralization, in this case due to widespread absenteeism of health care workers. This is a typical governance problem in many poor countries throughout a variety of regions. A governance approach would suggest looking into how these plans and policies were worked out in the first place, rather than simply blaming the problem on poor delivery away from the capital. Meaningful and effective decentralization, genuine participatory planning processes, and perhaps a more modest and realistic setting of local goals could perhaps be useful new dimensions to this approach. The lack of coordination across ministries was also identified as a “*significant bottleneck*” but no clear solution to this problem was presented.

742 Unlocking Progress, 2010



“GOING BEYOND THE NATIONAL: COLOMBIA”

- presented by UNDP BDP at the APRC Bangkok MDG Acceleration Framework Workshop, 6 October 2011

Among the three priority cross-cutting bottlenecks, the removal of which would accelerate progress in Togo, the MAF pilot report lists inadequate availability (lack) of statistical information relating to various interventions (coverage, targets) making it difficult to determine the effectiveness of interventions relating to MDG 1 in the rural environment. Although a long list of priority bottleneck interventions⁷⁴³ is provided, there is unfortunately no indication of how cross-cutting bottleneck on disaggregated statistics may be overcome.

The MAF pilot project in Lao PDR also emphasized the dimension of subnational disparities and internal social inequalities. Laos, like Papua New Guinea, was a latecomer in terms of developing country-led MDG-based development plans. The government only recently began to attach any importance to applying an MDG approach within its own development policies. With the MAF, the Government expressed its intention “to accelerate progress towards the MDG achievement with a particular focus on the unreached – the people confronted with challenging outcomes due to the country’s diverse geographical and ethnic features”.⁷⁴⁴ The MAF aims to reach the most vulnerable population, especially in rural

⁷⁴³ 29 “identified solutions” with a total estimated cost of USD 250m, of which around 10 percent had been obtained.

⁷⁴⁴ Deputy Prime Minister and Minister of Foreign Affairs Sisoulith in his foreword in “Lao PDR: Reaching the Unreached” at http://www.undplao.org/newsroom/publication/MAF%20Report_Lao%20PDR_September%202010.pdf

areas through innovative options ensuring *“socially and geographically disadvantaged communities are given the opportunity and capability to enter the development agenda”*. While the focus appears to be entirely in line with a human rights based approach, possible solutions tend to focus on costly programmes such as conditional food and cash transfers, innovative employment schemes, and public private partnerships for social marketing and service delivery. The MAF restated that according to government costing estimates, an amount of USD 6.32 billion *“is required to achieve the MDGs by 2015”*. It is unlikely the MAF will have much impact on the mobilization of such funds. While this overall goal may remain elusive, the MAF established a highly promising approach to *“localizing the MDGs”*, by focusing on programmes that can be implemented by local administrations and building on experiences from the Millennium Villages Project. Work on the MAF also resulted in enhanced inter-ministry coordination and monitoring through the Round Table Process in Lao PDR. It is hard to overlook the governance dimension of these outcomes, and it is encouraging to see the pragmatic, creative and flexible use of the MAF concept can lead to modest but promising initiatives that are, at least in principle, attuned with a human rights based approach and a governance dimension.

In the end, it may not require much effort to reconnect the MAF and thinking on MDG acceleration with human rights and democratic governance. Much of the apparent disconnect is at the level of terminology and is mainly evident in global policy documents (such as the breakthrough strategy and the MAF), not so much at the operational country level, at least in reference to the analyses. It may not matter that human rights and governance dimensions are not explicitly referred to, but at least they are understood as what they are, and are approached with the appropriate set of assessment tools. Renewed efforts for progress accelerating achievement of the MDGs in a sustainable and equitable way could be enhanced by integrating country programming, and by overcoming what UNDP staffs informally often refer to as *“working in silos”*. The Breakthrough Strategy acknowledges *“UNDP rarely leverages the full breadth of its mandate at the country level. UNDP Country Office programming for the MDGs tends to focus mostly on poverty reduction (MDG1), sustainable development (MDG7) and MDG-based planning and resource mobilization (MDG8).”* However, rather than suggesting that UNDP should be engaging in interventions traditionally carried out by specialized/technical agencies, it asserts *“UNDP-specific tasks such as coordination, advocacy, governance and capacity development can be leveraged across all MDG sectors, effectively complementing and supporting the work of other specialized UN agencies and development partners.”*

If significant leadership exists by the Resident Coordinator and a common understanding among development partners on MDG priorities is developed at the country level, opportunity to address possible shortcomings at the conceptual level could be overcome by a coordinated, cross-dimensional and comprehensive approach to MDG acceleration. This fully embraces governance and human rights considerations in analysis, process and programmes, and is aimed at sustainability, inclusiveness and equality in the same way as at the accelerated attainment of aggregate statistical targets.

8. How MDG acceleration efforts could be complemented through stronger linkages to human rights and democratic governance

One of the greatest strengths of the MAF is that it can be used as a tool adapted to specific country contexts. Country Teams who have adopted the MAF demonstrate considerable flexibility in applying it, and have found practical ways of reenergizing the MDG agenda at both national and subnational levels in many countries. MDG-related work holds different meanings in different countries. Significant development assistance is still concentrated on meeting the MDGs, even though massive amounts of expected additional aid never materialized – not in 2001, not in 2005, and not in 2010. Often, pragmatic and practical approaches to rolling out the MAF at the country level were informed by what essentially constitutes a human rights based approach, namely the identification of the most vulnerable groups and those farthest away from reaching the MDG targets, which is laudable. In terms of genuine participation, another important element of a HRBA, the MAF has remained behind well-established practices and long-standing recommendations from human rights bodies. In the analysis, MAFs often identified governance challenges, in terms of capacity, the legal and regulatory environment, public finance, transparency and accountability.

UNDP and UNCTs should not interfere in the prioritization of “what should be done about the MDGs?” However, they do possess considerable leverage when presenting incontrovertible data and evidence to advocate emphasis on the underserved, the poor and the most marginalized in society. Experience has taught us that normatively lecturing countries on human rights rarely produces a conducive environment for effective remedial action. While UNDP should not be part of the decision on prioritization, it should help provide data on which the discussion and decisions should be based as well as support an inclusive and transparent process.

UNDP therefore suggests to continue “rolling out” the MAF in Asia Pacific and other regions, but to also accompany the MAF with efforts to create and maintain an enabling environment and process facilitation with a focus on inclusiveness and transparency. Increasingly, efforts by the UN and development partners need to shift from helping countries to meet the MDGs (on which development aid in any case may have only limited influence) to trying to influence *how* the goals are being met (the “ways and means”), with emphasis on reaching the most disadvantaged (which may have little visible effect on aggregate or even global statistics), and doing so in a manner that is sustainable, human rights-based, transparent and fair.

In 2006, UNDP observed the following:

In terms of the methodology by which MDG targets are pursued, human rights offer a useful guiding framework. The right to information, the right to assembly, the right to participate in political processes and the right to expression for example, provide a framework that help societies and individuals better engage in MDG processes.

*Abiding by these rights, also known as 'process rights' can help ensure that states achieve MDG targets equitably.(...) Recognizing these as rights makes them non-negotiable, consistent and legitimate.*⁷⁴⁵

Five years later, this recommendation appears to be more relevant than ever. The interdependent and mutually reinforcing process rights of meaningful participation, the right to receive and publicize information, and the rights of association and expression remain essential to making genuine progress on the principles outlined in the Millennium Declaration and the MDGs in a more sustainable and equitable manner.

Given the relative ease with which statistical parameters can be adjusted (for instance, by lowering the national poverty line, a process often marred by nontransparency and controversy), and the degree to which statistics themselves can be massaged, 'moving the goalpost' appears to be an increasingly attractive option for governments to show "progress" on some of the Goals.

Given the persistent gaps on reliable disaggregated data, it is indispensable that governments and the international development community, led by the UN, raise the game considerably on data and statistics related to the MDGs. This will ensure UNDP's commitments remain credible. Only recently has progress been made with regard to the subnational calculation of the Human Development Index. However, the advances made in Latin America appear to be significantly ahead of those in Asia-Pacific.⁷⁴⁶ For many years, the absence of data has prevented the application of this key development indicator below the national level. It is of great significance that the 20th anniversary *Human Development Report* of 2010 *introduced the Inequality-Adjusted HDI, the Gender Inequality Index, and the Multidimensional Poverty Index. Updated editions of these complementary indices will be included in the 2011 Report, published online and in print in November 2011.*⁷⁴⁷ *It is essential such tools be further developed and comprehensively integrated in the work on MDGs, in particular MDG 'acceleration' focused on inequality and regional discrepancies.*

745 UNDP, *Human Rights and the Millennium Development Goals—Making the Link* (2008)

746 See, for instance, Rodolfo de la Torre and Hector Moreno, Human Development Research Paper 2010/23, *Advances in sub national measurement of the Human Development Index: The case of Mexico*, which is available at http://hdr.undp.org/en/reports/global/hdr2010/papers/HDRP_2010_23.pdf. For a recent paper describing the situation in Asia, see Ramesh Gampat and Niranjana Sarangi, *Estimating Sub-National Human Development Indices in the Presence of Limited Information—The Case of Bhutan*, Human Development Report Unit of the UNDP Regional Centre for Asia Pacific (Colombo Office) at <http://regionalcentrebangkok.undp.or.th/practices/HDRU/documents/publications/P1119.pdf>

747 Human Development Report 2011—Sustainability and Equity: A Better Future for All

The following concrete and practical steps are proposed for consideration in order to complement the MAF by integrating a human rights and governance dimension into MDG-related efforts:⁷⁴⁸

Recommendations

- Revive and use the **Human-Rights-Based-Approach tools** elaborated in the past decade by UNDP and others (such as the hurilink webportal)
- Use **governance assessments** to identify ‘bottlenecks’ and better understand their systemic aspects, including those that focus on governance performance as well as the democratic quality of institutions and processes
- Develop a stronger emphasis on the **collection and analysis of disaggregated data**, which may involve proactive engagement of Statistical Offices, and coordination with other UN and development agencies, in order to use such data for making disparities easily understandable and evident, building on considerable advances made in this field in recent years (as through DevInfo and other GIS-based tools)
- Develop a much more nuanced and comprehensive understanding of **multi-level governance** in the context of the MDGs (decentralization, role of local governments, etc), integrated as a standard element in all MAFs
- Apply **MAFs at the sub-national level** as a rule, on the basis of better understanding the latter point, which means active engagement of subnational authorities on the MDGs and assistance to such authorities for adopting locally specific development plans and goals (building on the experiences from Colombia)
- **Widen the scope of reporting** on the MDGs from a purely numerical, statistics-based view of the MDG targets, to a more qualitative and fine-grained view of the MDGs as a whole, ideally picking up information and recommendations emanating from the human rights system (don’t let the MDGs be defined by the targets and indicators only!)
- Help and encourage countries to fully and comprehensively integrate a **human rights and governance dimension** in their future **MDG-related reports**, in particular the final assessment in 2015

There is one clear risk that the international community, the UN, and in particular UNDP should try to avoid in the coming years. That is to uncritically support efforts “to meet the goals”, such as striving for aggregate country-level statistical results that meet certain targets which can be at odds with efforts to identify and address the needs of the poorest of the poor. MDG “acceleration” risks focusing too much on the former, while under-emphasising the latter.⁷⁴⁹ Token references to a human rights approach, as they are

⁷⁴⁸ The actions proposed here do not claim to be new or particularly original. In 2004, a UN Guidance Note on Poverty Reduction Strategy Papers noted that the Country Team can “*help to establish a poverty monitoring and public expenditure tracking system, the development of country specific indicators for monitoring the impact of their strategies on poor people and regions, and strengthening national statistical capacity and to make use of such information to assist the government to use data, analysis, and evaluations effectively*”. UN Development Group, 2004.

⁷⁴⁹ OHCHR in 2010 reiterated this point recalling that one of the key criticisms of the income poverty target is that it can be attained without improving the situation of the poorest of the poor or excluded groups.

included in various recent MDG acceleration-documents may not be sufficient to ensure a genuine human rights approach to MDG-oriented development work in the coming years. The development community must be prepared to accept that certain targets may not be met, if it is the result of an emphasis on reducing the vulnerability of the most marginalized in society. Targets also may not be met if creating effective social floors for the poorest are not initiated, or building better institutions and training more qualified staff in the public service is not made a priority.

Lessons from the MDGs, in particular from the upcoming phase of “acceleration” until 2015, must be learned and acted upon as a possible agenda for human development post-2015. The fixation with the 2015 date, or any future date chosen to meet certain development goals, bears the risk of sacrificing sustainability for short term “successes”. To make investments effective on a sustainable basis, spending now to meet the 2015 Goals could enhance capital investment without much thought to longer term maintenance or operating and staff costs. Is this what the UN is advising poor countries to do?

A new push to collect and present reliable and disaggregated data will not only have benefits for the MDG process with an eye on 2015, but will also enable countries and development partners develop concrete goals post-2015. This will create a better understanding of the dynamics to poverty than what was available in 2000.

Presenting the 2010 Global MDG Report, UN SG Ban Ki Moon stated *“the world possesses the resources and knowledge to ensure that even the poorest countries, and others held back by disease, geographic isolation or civil strife, can be empowered to achieve the MDGs”*.⁷⁵⁰ More than a decade after the Millennium Declaration and first introduction of the MDGs, it is increasingly likely most countries possess the resources and knowledge to ensure even the poorest citizens, and others held back by disease, geographic isolation or civil strife, can be empowered to achieve their respective development goals. While not abandoning the commitments of the developed world in this regard, the UN family may have to pay much more attention to make countries *“more stable, more just and more secure”*⁷⁵¹ from within.

More responsive, capable and inclusive states are better equipped to meet the multiple challenges emanating from recent crises, and are more likely to attain economic progress in a way that does not leave large sections of society behind, trapped in cycles of poverty lacking opportunity.

Problems related to governance can be looked at both from a ‘supply-side’ perspective of government services such as how states are structured and organized, how policies are developed and coordinated, and how capable public servants are to implement plans. The ‘demand-side’ takes the perspective of rights and entitlements, outlining how mechanisms, such as a functioning judiciary and effective national human rights institutions, can help claim such rights. UNDP, through its democratic governance work in

750 UN Global MDG Report (2010)

751 Ibid.

the region, has gathered much experience in building, strengthening or protecting such institutions. However, where governance challenges exist should be understood as such, and where human rights are not enjoyed by parts of the population must be addressed by the UN even if it may be inconvenient for the moment. The scepticism of many developing countries about what is perceived as a “Northern” human rights agenda⁷⁵² needs to be addressed, especially if post-2015 is to be fully aligned with the values and principles of the Millennium Declaration.

It is also the understanding of the UNDP that responsive, capable and inclusive states, along with better democratic governance, helps prevent violent conflict. The freedom from conflict is not only a right recognized in the UN Charter, the MD and many other documents, but it is also a prerequisite for poverty reduction and the enjoyment of social progress.

Although it is often argued more funding is required to reach many of the MDG targets, there are also inexpensive ways and means to accelerate progress, in particular governance innovations and improved practices of delivering services. With increasing resources, various impact evaluations show the ‘quantity’ of health and education services has increased over the recent years, but not the ‘quality’. This could be one of the key reasons progress has been slower for MDGs measured by outcomes (e.g. health) than for those measured by access (e.g. education). Improving governance can therefore enhance incentives for service providers directly accountable to the poor and disadvantaged. This establishes a clear link between the governance sector, and efforts to enhance government performance per se.

752 Mac Darrow of OHCHR at the March 2010 Harvard symposium on the MDGs and human rights.

Short Biographical Summaries of the Authors

Alison Graham has worked for a number of human rights organizations, including the UN Office of the High Commissioner for Human Rights, the International Service for Human Rights and the Office of the Independent Expert (now Special Rapporteur) on human rights and extreme poverty, for 15 years in both field and headquarter locations. She is experienced in researching and drafting reports, identifying and mapping trends, conducting rights based analysis and formulating policy responses, particularly regarding economic and social rights. She currently works as an independent consultant and is also pursuing her PhD examining States' obligations in generating, mobilizing and allocating the necessary resources to realize human rights.

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Johanna Cunningham holds a Masters degree in Public and International Law from the University of Melbourne, where she specialised in human rights law. Previously she worked with the UNDP Asia Pacific Regional Centre as facilitator of the Legal Empowerment Asia Partnership and provided support to legal empowerment of the poor programs throughout the region. She has worked with the Asia Pacific Forum on National Human Rights Institutions, UNDP and UNICEF on national human rights institutions in Afghanistan, Mongolia and the Philippines. From 2004-2007, Johanna was the Program Manager for the Kartika Soekarno Foundation, an Indonesian NGO dedicated to ensuring rights based approaches to health and education services for children. Currently, she is a Child Protection Specialist with UNICEF Afghanistan.

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