



# Towards Inclusive Governance

**Promoting the Participation of  
Disadvantaged Groups in Asia-Pacific**

**UNDP Regional Centre in Bangkok**



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## Foreword

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

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

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

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

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



**Elizabeth Fong**  
**Regional Manager**  
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## Funding programmes

### **Asia Regional Governance Programme**

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

### **Regional Indigenous Peoples' Programme**

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

### **Asia Pacific Gender Mainstreaming Programme**

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



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# Introduction

## Inclusive governance for human development

Clarence Dias and R. Sudarshan<sup>1</sup>

### What is inclusive governance?

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

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

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

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

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

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

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

## Key issues in commissioned case studies

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

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

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

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

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

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

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

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

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

## **Programming for inclusive governance: reflections on the case studies**

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

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

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

## **Human rights in struggles for inclusion**

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

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

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

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

## **Exclusion of women**

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

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

### **Recommendations**

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

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

## **Exclusion of indigenous peoples**

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

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

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

### **Recommendations**

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

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

## **Exclusion of persons living with disabilities**

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

### **Recommendations**

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

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

<sup>8</sup> A/RES/61/295.

## Exclusion in law-making processes

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

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

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

### Recommendations

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

## Exclusion in judicial and dispute resolution processes

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

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

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<sup>9</sup> Family Law Act (2003).

<sup>10</sup> Republic Act No. 8371 (1997).



### **Recommendations**

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

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

### **Exclusion in conflict and post-disaster situations**

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

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

### **Recommendations**

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

### **The way forward: toward more inclusive governance**

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

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

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

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

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

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

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

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

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

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

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

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

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





# Participation of the disabled population in elections in Afghanistan

Shabnam Mallick

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# AFGHANISTAN



## ACRONYMS

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

## 1. OVERVIEW

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

In the context of the participation and representation of disabled and marginalized people in democratic elections in post-Taliban Afghanistan, this study explores these issues through extensive desk review and survey research. The study has revealed important patterns of exclusion and discrimination and has found various obvious and non-obvious obstacles to inclusive governance faced by disabled and marginalized groups in Afghanistan. These

include, among others, socially entrenched discriminatory practices that are aggravated by the impact of war; predictable and unpredictable reactions of people towards these obstacles; preference falsification; and gender-based discrimination. Better understanding of such aspects can enhance the participation, representation and empowerment of disabled people in Afghanistan. Programmatic entry points are identified for improving participation and representation. These include structural entry points (e.g. promoting institutional reform, improving physical access for all, reducing economic and communication barriers, etc.) and, among others, greater state intervention. Behavioural entry points are also considered as is the need to capitalize on human agency through sensitization, outreach, advocacy and empowerment measures.

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## 2. ANALYSIS

### Baseline

Available literature suggests that accurate statistics on rates of impairment are difficult to come by. Latest estimates place the number at about 4 percent of the population (approximately one million people). The Afghanistan Ministry of Labour and Social Affairs estimates the current number of disabled persons at about 300,000, but the actual number is likely to be significantly higher.<sup>2</sup>

Disability is a highly subjective phenomenon, and many might not have wanted to be counted as such. The World Health Organization and United Nations estimate that the actual number of disabled persons in Afghanistan is closer to 2 million, which corresponds with interim figures available from the Afghanistan Ministry of Martyrs and Disabled.<sup>3</sup>

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<sup>1</sup> See, for instance, Ann Elwan, 'Poverty and Disability', *A Survey of the Literature*, World Bank, 1999.

<sup>2</sup> Afghanistan Ministry of Labour and Social Affairs' estimates and interview with author/s.

<sup>3</sup> Qaseem Faizi, 'Statistic and Disability Planning: Afghanistan Database', Ministry of Martyrs and Disabled, Kabul, Afghanistan, 2003.



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

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

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

The ability to work and provide for your family is integral to defining the "self" in Afghanistan. It is such a strongly held social standard that to be

perceived as being dependent in any way is shameful. As reflected in a survey conducted for this paper, the most widespread feeling disabled persons felt about themselves was shame.<sup>4</sup>

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

## Background

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

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

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<sup>4</sup> Shabnam Mallick, et al, *Inclusive Governance of Marginalized Groups: Persons with Disabilities in Afghanistan*, (forthcoming).

<sup>5</sup> Afghanistan National Programme for Action on Disability's estimates and interview with the author(s).

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

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

lead role in the collection and dissemination of information, as well as research into the needs of disabled people.

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

- Linkage is envisaged through the new three-year policy framework and action plan and also the Justice programme – Justice in the Community;
- Lessons learned from this study will reinforce nationally obtained lessons already embedded in NPAD's (National Programme for Action on Disability) work to ensure that it feeds into policy and programming;
- The findings of this study will try to further the advisory capacity of the Afghanistan Independent Human Rights Commission (AIHRC), the nodal body mandated with providing suggestions and corrective measures at every level of governance for the betterment of human rights in the country based on international human rights principles and standards;

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<sup>6</sup> Ministry of Martyrs and Disabled, *The Comprehensive National Disability Policy*, Kabul, Afghanistan, 2003.

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

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

## Objectives

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

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## 3. LESSONS LEARNED

### Research method and limitations

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

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

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

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

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

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

### Inferences

Indeed, even the destructive effects of modern war, from which seemingly nothing can escape, are no match to the entrenched institutions of deteriorating social relations and mores. Socially embedded discriminatory practices and institutions continue to replicate themselves as fast as ever and, perhaps, in newer, subtler and more insidious ways as a result of constant warfare. The diminishing

stock of social capital and exacerbated effects of social dislocation due to the war, if anything, make the task of alleviating the plight of the discriminated more intractable than before.

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

#### Irrational Reactions

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

#### Rational Reactions

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

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<sup>7</sup> Shabnam Mallick, et al, *ibid.*

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

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

### **Infrastructural and institutional issues**

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

In another recent survey, conducted by the UNICEF-supported Afghan Disabled Union, most disabled respondents felt that the new constitution was unsatisfactory as it only contains a short paragraph about them. Given Afghanistan's fledgling institutions, it isn't entirely surprising that this dissatisfaction extends to the performance of line ministries. Indeed, only a minority of people appear to be satisfied with the government's performance and service delivery;

the same people believe that the government should seek outside help, including from international agencies and disabled persons' organizations, in order to improve on all those scores.<sup>8</sup>

### **The rational irrational?**

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

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

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<sup>8</sup> Afghan Disabled Union, *Survey on the Problems of Barrierfree Access for People with Disabilities in the city of Kabul, Afghanistan, 2004.*

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

### International affairs as barriers to local governance

In social science literature, little information is available to explain the embroiling effect of 'reputation' as succinctly as the above *cliché*. This is the plight of the international community in Afghanistan. The unpopularity of foreigners, including the American-led international coalition and international reconstruction efforts in Afghanistan, is reflected in repeated comments from interviewees. Many have suggested that they refuse to vote because the elections have been organized by foreigners. These sentiments are often transient and unique to Afghanistan and in

places that are heavily reliant on international assistance; however, it does not mean that this problem is any less "development-relevant".

### Gender-based discrimination

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

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

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<sup>9</sup> Steven Durlauf, *Groups, Social Influences and Inequality: A Memberships Theory Perspective on Poverty Traps*, 2002.

<sup>10</sup> Ann Elwan, *Poverty and Disability: A Survey of the Literature*, World Bank, 1999.

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

### Preference falsification or naïveté?

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

Clearly, the causes and implied solutions are not germane to the problems. But why this disparity? It seems there can be two possible answers to this. The first one is simple. The respondents, in their

*naïveté*, have misconstrued the problem and misidentified the underlying causes. But how can this be? How can so many people be so *naïve*? Doesn't such a conclusion go against the received wisdom of participatory research? After all, it is the victims who are expected to have a better insight to their plight rather than independent, outside observers.

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

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

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<sup>11</sup> Afghan Disabled Union, op. cit., 2004.

<sup>12</sup> Ibid.

<sup>13</sup> Timur Kuran, *Private Truths, Public Lies: The Social Consequences of Preference Falsification*, Harvard University Press.



## 4. RECOMMENDATIONS

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

### Structural entry points

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

- Alleviate institutional discrimination by affording gender sensitive legal protection, implementing institutional reform and capacity building, and implementing anti-discrimination laws already on the statute books to benefit persons with disabilities;
- Promote outreach to disadvantaged groups by means of effective and targeted dissemination of information and increasing awareness of their rights within the context of human rights-based approaches;
- Provide physical access for persons with disabilities to polling stations, voting material, means of transport to and from such places, including providing unhindered access to public facilities in general; introduce late opening hours for polling booths;
- Remove barriers to communication by providing signage and communication which is appropriate to people with disabilities, as well as providing access to professionals (interpreters,

psychologists) to help them engage in the civic process;

- Increase representation of persons with disabilities and women with disabilities in politics, including the government, bureaucracy, election management and legal system;
- Lift the economic barriers that prevent disabled persons to participate socially, with special focus towards disabled women.

### Behavioural entry points

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

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

- Sensitize disabled people, government and non-government officials, stakeholders and the general public through awareness campaigns of the rights of persons with disabilities;
- Advocate against the entrenched discriminatory practices and stereotypes held against persons with disabilities;



- Conduct outreach programmes that target marginalized persons with disabilities in order to instill confidence in them and allay their fears and mistrust against mainstream institutions;
  - Increase local content in all development programmes and civic/election management teams, as well as making all programmes less Kabul-centric and reach out to the remotest corners, within the possibilities afforded by security conditions, in order to enhance the legitimacy of authorities;
  - Formulate social and economic empowerment programmes that provide private incentives to constructive choices by beneficiaries, i.e. incentives that are manifestly stronger than the constraints that limit those choices (such as 'shame' and 'honour' based inhibitions, in addition to harder and more conventional constraints); utilize sociological and psychological perspectives, such as 'social multipliers', in addition to the formal logic and rigour of economics to plan and analyse such interactions and to capture a 'richer' causal picture of social change;
  - Fund research and 'network analysis' studies of associational and membership group so as to open up the multiplicity of interactions that contribute to social networks, and leads to a more complex understanding of those kinds of networks that might facilitate trust and activism and those which do not;
  - Build the capacity of disabled people's organizations active in inclusive governance programming, so that they may identify and reduce the barriers to collaboration and communicative action, thereby reducing the possibilities of value laden assumptions in communities that lead to stereotyping and unlawful decisions.
- This study shows that there are still many gaps in our knowledge. Some of the gaps which need to be addressed by researchers should consist of:
- Probing the 'gendered paths' of apparently gender-neutral discrimination, such as institutional discrimination;
  - Exploring poverty-related factors in the nexus between poverty and disability, or forming research questions that use gender, disability and poverty as dependent variables;
  - Studying variance in discrimination based on regional, ethnic/racial differences and customs, and conducting research on household-based discrimination, its impact in the public sphere and attendant micro-macro links;
  - Conducting basic research on validating measures and tools in the subject.
- More innovative programming and emancipatory goals can only be reached through finer analysis of data and a systematic collection of statistical and empirical evidence; employing appropriate anthropological and participant-observation methods; sharper analysis of gender effects/ stereotypes/social-relational dimensions of marginalized groups and poverty/discrimination traps; stronger political and donor commitment; greater awareness of the opportunity costs in neglecting the disabled; and a human rights-based inclusive governance approach.





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# Access to justice for indigenous peoples: a case study of Bangladesh

Raja Devasish Roy, Sara Hossain and Dr. Meghna Guhathakurta

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# BANGLADESH



## ACRONYMS

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

## 1. OVERVIEW

### Statement of the problem

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

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

### Objective

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

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

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

### Right to property: land and forests

Given the overwhelming dependence on land and agriculture, access to and enjoyment of land are common problems in Bangladesh, irrespective of ethnicity. Land is also of particular social and cultural significance to the Adivasis. Specific difficulties are faced by Adivasis, who have, in many cases through operation of law and by force, been

systematically dispossessed of their lands. Shifting demographics and the expansion of the Bengali cultural majority into areas traditionally inhabited by Adivasis, including some areas that have formally been designated as 'forests', have given continued impetus to forcible and violent dispossession.

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

## Land

### Chittagong Hill Tracts

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

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

The protection scheme of Adivasi land rights, as provided by the CHT Regulation, came under severe assault over subsequent years through both legal and practical measures, with many Paharis<sup>1</sup> being dispossessed of their lands, including plough lands, and being compelled to give up traditional *jum* cultivation. The most severe acts of dispossession included the appropriation of forest lands by the colonial Forest Department, the commissioning of the Kaptai hydro-electric dam in 1960, the leasing of lands to non-Adivasis for commercial and residential purposes, and the Government's policy (from 1979/1982 in particular) of systematic resettlement of Bengalis from the plains in the CHT.

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

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

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

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

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

### **Plains**

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

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

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

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

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



### Forests

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

### Chittagong Hill Tracts

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

### Plains

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

Adivasis in the plains have also faced threats from the acquisition of their lands for project developments, which threaten their habitat. For

example, the government has reclaimed lands for the purposes of developing an eco-park at Kulaura under Moulvibazar, which poses a specific threat to the livelihood and security of the Khasi community in that area.

## Right to life, liberty and personal security

### Life, liberty and security

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

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

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

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

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

**Anti-Adivasi bias within law enforcement agencies**

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

## Gender justice

### Gender issues

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

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

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

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

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

- Lack of awareness regarding women's or child rights issues within traditional justice institutions, government bodies and even NGOs, particularly with regard to questions of child custody or welfare issues in cases of divorce and separation;
- New trends of violence against women, hitherto unknown among Adivasis, though common among Bengalis, such as dowry-related violence in the plains, and in the CHT, cases of kidnapping/abduction being filed to harass couples who marry without parental approval;
- Lack of awareness of constitutional, legal and customary rights prevents many Adivasi women from seeking redress when unjustly treated;
- Limited or no representation of Adivasi women at higher levels of decision making within the formal, regional and traditional systems prevents their playing a role in development, reform or implementation of the law;

- Religion-based and other traditional personal laws continue to apply to determine rights within the family for all persons, including Adivasis in the plains and perpetuate gender-discrimination with regard to rights to marriage and dissolution;
- Lack of recognition in formal state laws of customary traditions, including of women's existing inheritance rights (e.g. among matrilineal communities such as the Garos and Khasis in the plains), results in deprivation of property rights;
- While able to do so, plains Adivasi women rarely access the Family Courts, as they are perceived as insensitive or do not understand Adivasi rights and customs, and instead seek remedies before their traditional justice institutions;
- Lack of documentation and reporting of violence against women before formal justice institutions (in cases of 'insider/outsider' violence), due to the fear of, and lack of confidence in, law enforcement agencies;
- The non-existence of a Special Tribunal on Violence against Women and Children in the CHT and the consequent need to access the distantly located Divisional Commissioner's Court in Chittagong;
- Lack of support in the form of medical, psycho-social counselling or shelter from any state or NGO-led services exacerbated in the CHT by intelligence agency surveillances, amounting to harassment of organizations providing such services;
- Adivasi women face real marginalization and exclusion from decision-making in many of the traditional justice institutions. In the process of traditional dispute resolution, women's participation is highly restricted even where they are a party in a case. In some cases concerning premarital or extramarital relations or sexual crimes, some of the physical punishments which are meted out may disproportionately impact on women: for example, sentencing the woman concerned to carry 100 buckets of water to the top of the hill to water a tree, or to stay alone in the monastery or temple (Pagoda or Kyang) for 10 to 15 days for the salvation of her soul;
- Inadequate training and orientation of traditional institutions on women's rights and gender issues;
- In some cases, women are allowed to participate in the traditional dispute resolution process, with those responsible for decision-making hearing her side of the story before any settlement is reached. But in general, gender bias is pervasive within the community justice system.

### **Right to participation and representation**

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

### Participation in the formal justice system

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

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

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

### Participation in the traditional justice system

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

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

### Social, cultural, religious and economic participation

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

#### Chittagong Hill Tracts

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

### **Plains**

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

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

In the plains, traces of anti-Adivasi racism in the majority community, possibly due to residual caste

consciousness arising from the historical influence of Hinduism dominant in the plains, results in, in some areas, the segregation of Adivasis from other students or prohibitions on their entry to restaurants and other public places.

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

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

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## **3. KEY LESSONS LEARNED FROM APPLYING PARTICIPATORY APPROACHES**

### **Research processes and tools used**

The methods used for researching the topic were the following:

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

### **Effective participatory processes**

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

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

### **Challenges to the participatory processes**

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

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

### **Principles of gathering data and ensuring sustainable participation**

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

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

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



## 4. RECOMMENDATIONS

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

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

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

### Improvement of the existing legal framework

#### Recognition of parallel legal systems

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

#### Recognition of prescriptive and customary rights to land and forests

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

#### Compilation of existing laws and customs

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

#### Implementation of existing laws

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



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

#### **Amendment/Repeal of existing laws**

- If necessary, reform of existing laws could be brought about through constitutional challenges, if the legislature appears unresponsive. For example, the question of whether the pre-constitutional Forest Act is in violation of rights to life/livelihood, property or movement, could arguably be raised by a constitutional challenge before the Supreme Court;
- In addition, dialogues on processes of law reform within the communities could be initiated, for example, on the elimination of gender discrimination in family laws and inheritance laws (as pioneered within the Bawm and Khyang peoples in the CHT) and on child rights and other relevant human rights issues.

#### **Resolving conflict of laws**

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

#### **Ratification of and incorporation into domestic law of international instruments**

- Immediate steps to incorporate into national law the provisions of treaties already ratified by Bangladesh (ICCPR, ICESCR, CERD, CEDAW, CAT

CRC and ILO Conventions No. 107 and No. 111) and to expedite ratification of other key international treaties on human rights and environment (including ILO Convention No. 169, the Rome Statute on the International Criminal Court and the Optional Protocol to the ICCPR);

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

#### **Process of law reforms**

- Existing laws applicable to Adivasi communities should be reviewed and analysed, in order to make necessary amendments and ensure their consistency to the possible extent with traditional culture and values of Adivasi communities, and also with basic human rights principles;
- As part of this process of review and analysis, action-research should be carried out on a pilot basis in several key areas to map the diversity of problems faced by Adivasis located across the country as well as their suggestions for legal changes needed. Ensure that consultations are held with a diverse cross section of persons within the community, particularly Adivasi women and children, in order to incorporate their perspectives.

#### **Formal justice system**

##### **Streamlining of functions of different institutions**

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

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

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

### **Making the CHT land Commission effective**

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

### **Setting up a land commission for the plains**

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

### **Addressing land acquisition of Adivasi lands**

- Putting in place systems for identifying such land and ensuring that it is protected from compulsory acquisition;
- Imposing restrictions on the transfer of rural lands to individuals/organizations not associated with local people or Adivasis or Hill peoples;

- Providing legal, strategic and organizational support for ensuring preservation of land and forest rights of Adivasis;
- For the concerned communities, preserving certain areas (including water bodies) as common property for community forests, grazing lands, communal grasslands and *jum* cultivation or other agricultural cultivation;
- Establishing an elected body for preservation and management of such common property (at the *mauza* level in the CHT);
- In the CHT, cancelling all leases granted to non-residents (in particular influential persons, administrative officials); establishing local committees to scrutinize such leases, and amount of land so leased; then developing legal strategies to address these problems, with collective participation in the process. The DCs could be instructed to initiate *suo moto* processes to cancel such leases;
- Following best practice from elsewhere, in applying section 28 of the Forest Act within the CHT to 'village forest communities/ forest dwellers' within Reserved Forests where tens of thousands of indigenous peoples live. Similar processes could also be initiated in the plains in greater Sylhet, greater Mymensingh, etc.;
- Cancelling declarations of reserve forest made under the Forest Act before the Accord, or otherwise under the process of reservation, and placing these lands within the jurisdiction of the HDCs, or having the disputes resolved by the Land Commission;

- False cases (including under Forests Act or Violence against Women Act) should be withdrawn to prevent further harassment;
- In tea gardens, considering leasing out to Adivasis and other workers the unused company lands where tea is not cultivable and lands where tea could be cultivated but is not being cultivated.

#### **Reduction of delays in the courts**

- In the plains, circulars or notifications to direct the cases involving the rights of Adivasis are dealt with on a priority basis (particularly on land and forest cases);
- Case management programmes to prioritize areas with high Adivasi populations to ensure speedier disposal of existing caseloads.

#### **Affirmative action**

- Following best practice from the colonial period of appointment of 'Special Officers for Aborigines' and/or 'Welfare Officers' in Adivasi areas to advise the DC. In doing so, recruiting only Adivasis from the relevant area to such posts will enable effective communication and response to Adivasis' needs in any area;
- Translation facilities should be made available in courts (including new courts to be established within the CHT) in cases involving Adivasis who are unable to communicate fully or effectively in the language of the court, as well as in police stations.

#### **Elimination of bias within the system**

- Cases involving Adivasis as victims/survivors should be investigated promptly, impartially and independently wherever possible, to allow for speedy provision of remedies. The pattern of inaction in such cases breeds resentment and distrust in the legal process, which further prevent the possibility of ensuring access to justice for Adivasis;
- Awareness-raising programmes should be undertaken among judicial officers, court officers, police, prison officials and government legal aid staff, to develop greater sensitivity regarding the issues and concerns faced by Adivasis, including those from vulnerable or marginalized communities facing intersecting discriminations;
- Similar awareness-raising programmes are required for NGOs who are working with formal legal system, for example in providing legal services.

#### **Registration of Adivasi marriages**

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

#### **Medical care in cases of violence**

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

## Traditional or informal justice systems

### Compilation of traditions and customs

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

### Recognition by the formal legal system

- Ensuring some level of recognition in the traditional dispute resolution methods by the formal legal system, especially in the plains, where indigenous chiefs and headmen are not formally recognized;
- Invoking criminal laws against those engaged in traditional dispute resolution who impose penalties or sanctions on the disputants which contravene fundamental rights.

### Affirmative action

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

### Elimination of bias within the system

- Training members of the traditional dispute resolution bodies in constitutional rights, human rights standards (including women's rights and children's rights, in particular) and

statutory laws to ensure that customary dispute resolution processes and outcomes are in conformity with the constitutional and legal framework, and respect fundamental human rights;

- Also consider how to avoid losing discretion and flexibility inherent to the customary system (consider the risks of a full formal codification);
- Also consider the risk of bringing in a more adversarial process, which would prevent effective dispute resolution that is generally more rehabilitative and participatory than processes that are oriented around incarceration and other punitive or monetary sanctions;
- Provide a platform for dialogue and discussion on various community problems and issues with government officials. There is a need to build up the capacity of individuals and representative organizations of each community to this end. The CHT Regional Council (RC) could start playing a role in this regard.

### Building linkages between formal and traditional justice systems

- Reform of Land Commission, by ensuring representation and participation of all communities in the CHT, removing provision regarding its Chairman's overriding decisions, putting limitations on its geographical jurisdiction and ensuring its effective operation, among others;
- Consider including Karbaris and Headmen in the Standing Committees of the Union Parishads, particularly on the Standing Committee on Law and Order issues.

## Enhancing capacity to provide justice

### Implementation of the Peace Accord 1997

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

### Reform and activation of the Land Commission

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

### Conduct of land survey

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

### Reorganization of MoCHTA

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

### Enhancing representation of Adivasis in the justice system and civil administration

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

### Training of government officials/NGOs

- Training programmes should be set up for government officials (judges, police, civil servants) and NGOs to increase awareness and understanding of the issues that concern Adivasi communities, including the Adivasi traditions, customs and culture. Such training should be mandatory for all those posted to areas with high density of Adivasi populations, including the CHT;
- Orientation could be provided before officers are dispatched to Adivasi settlements (e.g. for UNOs, Police, DCs, Magistrates, Judges) and, if possible, for MPs and UP chairpersons and members if they are not Adivasis;
- The curriculum for training of magistrates/judges (in JATI) and other officers could include information on Adivasi laws and practices, and on priority problems faced by Adivasi men, women and children in their access to justice.

### Public consultation with Adivasi communities

- NGOs, particularly legal services and human/women's rights organizations, should hold broad-based consultations among and within different sectors of the Adivasi communities. These consultations will help to identify more clearly their needs and concerns, in particular those of vulnerable or marginalized groups experiencing intersecting discrimination (on grounds of race and gender/age/disability, etc.), and to design interventions accordingly;
- Similarly, consultations with potentially affected Adivasi communities must be held prior to undertaking any development projects, such as eco-parks or mines, etc.

These projects should not be established without the prior, informed consent of the communities concerned.

### Monitoring and evaluation

- The Government Legal Aid Committees, as well as NGOs, should develop closer monitoring and evaluation of their own interventions, to ensure a more effective impact, and also incorporate the lessons learned into the regular review of programmes;
- The Bar Council could strengthen and coordinate the human rights cells of the various Bar Associations across the country and encourage them to work in close conjunction with key NGOs and GOs, in order to prioritise investigation, fact-finding and legal support in cases involving Adivasis (prioritizing the areas of family, land and criminal law).

## Enhancing capacity to demand justice

### Empowerment strategies

- Awareness-raising programmes should be held by and among Adivasis regarding their constitutionally guaranteed and statutory rights to life, liberty and personal security; equality and non-discrimination; property (in relation to land, family and criminal justice in particular); and available remedies before formal and non-formal institutions of justice;
- Human rights education programmes could be included at school and college level as well in institutions of higher education, preferably in Adivasi languages;

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

### **Strengthening organizational capacity**

- Skills-building – specialized skills in investigation and documentation as well as in media and communications could be developed within existing Adivasi organizations in order to enhance their capacity to identify human rights violations and to demand appropriate remedies;
- Creating paralegals and mediators – capacity building among Adivasi activists and organizations, particularly the training of Adivasis as lawyers, paralegals and shalishkars, in order to facilitate more effective access to formal legal system and non-formal legal system;
- Monitoring – Monitoring cells could be developed within Adivasi organizations and communities across the country to investigate, document and report on human rights violations, and/or to make referrals to appropriate bodies to invoke appropriate legal remedies;
- Networking – Adivasi organizations/communities could develop closer links with a wider and more broad-based set of issue-based networks and organizations (such as on violence against women, children's rights, or environmental matters), as well as human rights and legal services organizations in order to provide them with some 'coverage' in addressing sensitive matters, and also to enable them to draw on

the strengths and abilities of the latter while developing their own capacity;

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

## **Partnerships with NGOs/CSOs**

### **Networking with and among Adivasi organizations**

- NGOs (including development organizations, human rights organizations, women's rights organizations and legal services groups) need to move away from a firefighting mode – of responding only to headlines of human rights violations – and instead engage in activities directly with Adivasi communities, through their organizations on a regular basis;
- NGOs and CSOs also need to develop more effective linkages on the ground with Adivasi communities to ensure more regular communications and followups in cases that require their intervention or support;
- In developing such networks, consider whether a more formal network should be established or whether it is preferable to develop or strengthen existing working relations to enable more responsive and speedy interaction, particularly in the context of a sensitive security environment;
- In developing the networks, special emphasis should be placed on giving priorities to the most marginalized and disadvantaged Adivasi communities;



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

#### **Awareness-raising among NGOs/CSOs**

- Awareness-raising programmes should be undertaken by and among NGOs/CSOs on the key terms of the Peace Accord of 1997 in order to develop a more effective means for implementation and to otherwise help facilitate the process of implementation;
- Awareness-raising programmes and consultations need to be engaged among NGOs in order to build a wider understanding of key Adivasi issues and concerns, to strategically prepare appropriate responses, and to build these into the NGO's programme activities.

#### **Incorporating Adivasi concerns into existing access to justice initiatives**

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

#### **Developing greater diversity within NGOs**

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

## **Role of international community**

#### **UN agencies/Specialized agencies**

- The ILO Office in Bangladesh should review its obligations to address the rights of indigenous peoples, pursuant to ILO Convention No. 169, ILO Convention No. 107 and ILO Convention No. 111; disseminate information about the Conventions; and undertake appropriate strategies and programmes to help implement them;
- The UNDP Regional Centres for Asia Pacific and the ILO Regional Office for Asia and the Pacific could discuss a common framework to address such issues;
- Support initiatives to build the capacity of RC and HDCs in framing regulations for their own operations, as well as for addressing relations with the traditional justice systems;
- Strengthen and build the capacity of traditional dispute resolution bodies (such as the Karbaris and Headmen) and ensure that their activities are carried out in conformity with human rights standards;
- Support action research on the role and functions of traditional justice institutions and establish closer linkages with formal justice institutions;
- Enable provision of support services through local NGOs to enhance access to justice, including legal advice, psycho-social counselling, medical services and shelters for victims of violence;
- Support compilation of customary laws of Adivasis in the plains and in the CHT.





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

Maria Backstrom and Jeremy Ironside

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# CAMBODIA



## ACRONYMS

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

## 1. OVERVIEW

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

- To describe traditional justice systems and practices, and develop recommendations for policy-makers on amendments to legal provisions and institutional arrangements, which would ensure that indigenous peoples have improved access to justice through both their customary legal practices and the formal justice system;<sup>2</sup>
- To describe some of the difficulties that indigenous peoples face in finding just resolutions to their problems outside their village and suggest some possible solutions.

The indigenous peoples of Cambodia are a marginalized group with poor access to justice through the formal legal system.<sup>3</sup> A major factor causing this marginalization is the almost total absence of formal legal services and institutions where indigenous peoples might be able to have their cases fairly adjudicated. Social protest is often the last resort when individuals and community members have been unable to seek just redress

from the courts regarding their land disputes. 'Protesters' are often jailed for long periods, without appropriate hearings, legal procedures or legal representation.

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

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

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

<sup>2</sup> In this abstract, the words 'informal', 'traditional' and 'customary' are used interchangeably.

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

## 2. KEY FINDINGS AND MAIN POLICY ISSUES

### Key findings

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

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

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

“What is wrong is right, and what is right is wrong.”

Some problems with traditional systems raised included the at times unfair and overly heavy fines and, more recently, cases in which more powerful

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

#### **Indigenous groups are marginalized in the formal legal system**

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

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

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

### **A dysfunctional formal legal system**

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

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

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

Although the traditional legal system is still widely used in many aspects of indigenous culture, it is clear that it is facing several challenges to its continued existence. Change is taking place in indigenous communities at a more rapid pace than

at any time in the past, and this is undoubtedly a source of problems for traditional systems. However, traditional justice systems have always adapted to changing circumstances, and the adaptability of these systems is such that they still manage to maintain a strong moral code and are able to deal with many new and complex conflicts, even in the face of rapid change and in communities that have been seriously impacted by land loss, etc.

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

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

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



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

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

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

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

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

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

*to the traditional resolution. They depend on the national law and the courts.*

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

### **Policy discussion**

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

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

### **Acknowledging traditional law within the formal legal system**

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

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

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<sup>4</sup> There is, however, also a strong tradition of dealing with all types of criminal and civil offences, including serious crimes.

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

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

Policy to enhance the formal role of traditional authorities has to acknowledge and allow for the fact that, like all justice systems, the traditional system needs to evolve and adapt to changing circumstances. As has been shown, an inherent part of these systems is their ability to incorporate aspects of other justice systems from former (and present) regimes.<sup>5</sup> The Brao, Kreung and Kavet, for example, typically cite legal precedent from

different regimes when deciding on cases, indicating that their legal system is grounded in the concept of following precedent and changing with the times. One of the recommendations from communities is that there should be a codification of their laws by the indigenous communities themselves. If this were done, it would be possible to understand the diverse influences and the way this body of law has adapted and evolved. It would also reveal the variations across communities and ethnic groups, as traditional law is by nature adaptive, learned by experience and transmitted orally from generation to generation.

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

### **Reform of the formal system**

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

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<sup>5</sup> Article 31 of the Cambodian Constitution and article 26 of the International Covenant on Civil and Political Rights (ICCPR).

<sup>6</sup> See Appendix 2 of the corresponding full case study (on included CDROM).



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

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

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

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

### 3. METHODOLOGY OF THE STUDY

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

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

#### Partner organizations

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

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

#### Human resources

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

## Study sites

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

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

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

## Process and research content

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

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

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

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

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

Some of the topics of discussion included:

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

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

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

### Lessons learned

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

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

The following are guidelines for the research process:

- Develop a broad understanding of the living conditions and customary practices of marginalized groups from both primary and secondary research to allow for an indepth investigation of critical issues and the identification of policy issues to be addressed;
- Ensure participation of all groups in the community, even the most marginal, to understand important differences and variations in opinions between them;
- To achieve this broad participation from all groups in the community, the consultations should be carried out in a local language;
- Ensure capacity-building for indigenous peoples' representatives (e.g. women, youth and elders) to allow them to conduct the fieldwork.

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

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

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## **4. RECOMMENDATIONS**

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

must be emphasized that this is a process that may take several years. It is not possible to come up with a list of instant recommendations to be implemented. Some suggestions include:

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

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

2. Support an ongoing process of consultation, research and documentation with indigenous peoples communities (in a number of provinces). This should be led by indigenous organizations/networks and feed into national-level consultations (as in point 1 above). The objective would be to build agreement on how traditional systems can best be recognized by the formal system and how the interface between the two could function. The present study is a starting point for more in-depth action/reflection research and analysis;
3. In the meantime, it is strongly recommended to allow traditional authorities to continue providing the valuable social function role they are currently playing, including allowing the constructive interface already taking place between traditional and local authorities at the commune and district levels, concurrently with the dialogue mentioned in points 1 and 2 above;
4. Enhance indigenous peoples' participation (self-determination) as a basis on which the groups can share power with the state. This goes beyond simply consulting indigenous peoples and involves including them in the development decision-making process. Given the size of the indigenous population in Cambodia and the current decentralization process, this can best be accommodated under the commune councils, where the indigenous groups are in a majority. The new Organic Law

on the structure, roles and duties of the sub-national levels of government should consider the participation rights of indigenous populations and accommodate specific needs in indigenous areas;

5. Explore opportunities for the traditional authorities to play a more formal conflict-resolution role in the commune councils with delegation of power from the Ministry of Justice (MoJ) and Ministry of the Interior (Mol). The Ministries can delegate power to the commune councils under article 44 of the Law on the Administration of Communes (KhumSangkat). Opportunities should be explored by the MoJ and the Mol on which roles can be delegated to the traditional authorities and the commune councils in both criminal and civil disputes/conflicts. It is important, however, to ensure that traditional adjudicators are not overly reliant on commune council members and that the more formal role that traditional authorities would take on under the commune councils would be worked out in consultation with indigenous representatives;
6. Develop the role of the Dispute Resolution Committee (DRC) which can be set up under Article 27 of the Subdecree on the Decentralization of Powers, Roles and Duties to Commune/Sangkat Councils. The DRC in highland areas could be developed into an important instrument in the formal interface between the traditional system and the formal system with a legal mandate to facilitate and conciliate civil disputes;
7. The government should invest traditional authorities with the formal authority to deal with illicit land sales and conflicts, and to mediate boundary disputes, including ancestral

- land claims. The role of the traditional authorities to manage their communal property under the 2001 Land Law must be interpreted to include an authority to manage land conflicts on their lands, and this role should be further defined and strengthened. Guidelines also need to be formulated as a matter of urgent priority for these land dispute resolutions (following existing laws). These also need to be constructed in such a way that the traditional authorities remain accountable to the whole community. The role of the traditional institutions should also include the authority to formally recognize village boundaries that have been decided with the agreement of village elders of neighbouring villages;
8. Traditional conflict-resolution processes should also be recognized within existing government structures (e.g. Cadastral Commission, Provincial Land Allocation Committee, etc.). Where such processes already exist, as where local elder trustees function as *ad hoc* members of the District/Khan Cadastral Commissions (DKCC) under Article 5 of the Subdecree on the Organization and Functioning of the Cadastral Commission, they should be strengthened and utilized;
  9. Traditional conflict-resolution processes should further be formally recognized in the Procedures for Registration of Indigenous Immovable Property. As this legislation is currently under development, there is an excellent opening to explore opportunities for merging traditional and national laws on conflict-resolution in relation to the immovable properties of indigenous communities;
  10. Measurement and demarcation of communal land. Under Article 25 of the 2001 Land Law, the traditional authority is given a specific role in the measurement and demarcation of immovable properties of indigenous communities. This role should for the time being be further defined under existing legal procedures for registering immovable properties and later further developed in the Procedures for Registration of Indigenous Immovable Property;
  11. There needs to be some geographical or social delineation where traditional justice systems might apply. For example, in communities where indigenous peoples are in the majority, the traditional system should apply and be respected. In villages where lowland immigrants make up a significant percentage of the total population, some kind of hybrid system would need to be set up. The lowland sector of the community, for example, could develop their own representation in the traditional system (their own elders, mediators, etc);
  12. In communities where indigenous peoples have become a minority, they should still have the right to practice their traditional justice system within their own group (if they wish), as well as enjoy representation in the conflict-resolution process of the wider community;
  13. Improve the formal legal system and enhance the official role of traditional authorities. The fight against corruption in the formal legal system should be continued in order to protect and preserve the cultures of indigenous

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

14. Ultimately, it is the traditional legal system that needs recognition, not the traditional authorities. Certain individuals should not be vested with authority, but the authority should

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





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

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

## ACKNOWLEDGMENTS

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# FIJI



## ACRONYMS

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

## 1. OVERVIEW

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

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

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

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

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<sup>1</sup> United Nations Convention on the Rights of the Child (CRC) and United Nations Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).

## 2. ANALYSIS OF KEY FINDINGS

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

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

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

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

through three *coup d'états* and a hostile political climate is also a critical factor of success.

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

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

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

#### **Media skills**

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

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<sup>2</sup> P. Imrana Jalal.

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

### **The independent technical expert assisted both the government and the NGO**

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

### **Sound partnership between women's NGO and expert technical advisors**

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

techniques, and a legislative lobbying resource book is currently being written.

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

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

### **Being politically strategic**

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

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

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

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

diluted or sacrificed to traditional, religious or racist viewpoints.

### **Links and donor support**

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

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

### **Sustained campaigning and campaigning style**

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

It is also crucial in any law reform campaign to be prepared to accept that the entire process is generally a long one. If the proposed law is one that will change the fundamental nature of family

relationships and personal beliefs, then the road is even longer.

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

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

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

### **Partnerships between state and civil society support inclusive governance**

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

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<sup>5</sup> Two FWRM salaries are covered by RRRT.



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

### **Recognition of expert civil society groups representing women by the state**

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

### **Recognizing and working with the champions of change within governance institutions**

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

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

### **Women's legislators/MPs**

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

### **Ministry of Women and Culture working within government**

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

### **Consistent donor support**

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

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



## Challenges and barriers to participation of disadvantaged groups

### Lack of information at community level

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

### The need to negotiate and compromise to achieve results

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

'ex-nuptial' children. As a compromise, the AG recommended that within 10 years the family law, and especially the issues relating to *de facto* relationships, be reviewed.

### Language, educational and other barriers to accessing information

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

### Religious and cultural biases

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

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

## Entry points for women to influence decision-making

### Important strategic partnerships

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

### Individual champions of change from within governance institutions

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

### Building strategic coalitions and alliances

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

### The qualities of those identified as leading the change

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

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

### 3. KEY LESSONS LEARNED IN APPLYING A HRBA

#### Key lessons learned in a applying a HRBA to the campaign

##### 1. Participation and accountability

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

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

With its small population, news travels quickly in Fiji and can be passed informally through taxi drivers and meetings in the supermarket, in the street or at restaurants. Information is exchanged both informally (through extended family, community and church networks) and formally, through extensive media coverage. Therefore, the time and resources needed to hold formal meetings, develop solidarity on tactics and keep sister organizations advised of detailed developments is time consuming, costly and may not be necessary. In addition, frank, sensitive, potentially libelous analysis and decisions on legislative lobbying actions with a larger group, even by e-mail, would require careful thought and

time to present the situation carefully. Thus, for FWRM, political techniques included the use of a small committed group trusted by campaign affiliates. It may be that advocacy in small, developing island countries is of a different nature to techniques and tactics used in larger Asian and African countries or those more economically developed nations.

##### 2. Non-discrimination and empowerment

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

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

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<sup>8</sup> Comments made by the Attorney General during the parliamentary debate on the Family Law Bill in October 2003.

### **3. Linkages to human rights standards**

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

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

### **Key lessons learned in applying a HRBA to the research**

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

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

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

## 4. RECOMMENDATIONS

### **More training on campaigning and lobbying skills**

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

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

### **Simplifying legal terms and skills in the lobbying process**

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

### **Keeping your partners and constituents informed and involved**

Recognizing and valuing all contributions, however small, can lead to greater empowerment of those

who feel overwhelmed and confused by legislative and national parliamentary lobbying.

### **Being prepared to accept backlash from supporters and partners**

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

### **Ongoing monitoring of new law**

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

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

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

### NGO drafting of legislation

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

### Counting the cost of outdated laws

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

### Private sector involvement in lobbying for legislative change

Private enterprise (apart from law firms) is often not involved in the legislative change process. Also, NGOs do not have a history of partnership with

private enterprise; so, it is not surprising that private donors for the family law lobbying were not approached. However, NGOs promoting legislation such as domestic violence and sexual assault could encourage donations by the private sector but might need technical assistance from the donors to help sharpen their fund-raising skills.

### Passing laws is not enough

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

### Flexible donor funding

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

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

<sup>11</sup> Dhanraj, Misra and Batliwala, *The Future of Women's Rights*, Association for Women's Rights in Development (AWID), 2004.

## 5. CONCLUSION

In Fiji, women are building on their legislative lobbying experience and mounting campaigns for changes to legislation on domestic violence, sexual offences, employment relations and the charitable trust state framework. FWRM is bringing young

women into the movement to carry on the issues and provide “a human shield of activists”<sup>12</sup> who understand the issues, monitor achievements and look to new legislative issues.

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







# Adivasi rights in Jharkhand state, India

Amit Prakash

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# INDIA



## ACRONYMS

HRBA	Human rights-based approach
PESA	Panchayatis (Extension to the Scheduled Areas) Act
ST	Scheduled Tribe
UN	United Nations
UNDP	United Nations Development Programme

## INTRODUCTION\*

The discourse of rights offers a robust analytical framework to examine contemporary reality against a normative goal, which is a central issue with respect to the marginalized sections of society, amongst which the adivasi communities are at the forefront. One of the most marginalized communities in India, the adivasi communities have suffered deprivations of myriad kinds, despite special provisions for them in the Constitution,<sup>1</sup> a legal framework for the implementation of these provisions and several targeted public policy initiatives. This study therefore focuses on an adivasi state of India – Jharkhand – to assess the status of adivasi rights.

The importance of Jharkhand lies in the fact that it was created as a separate State of the Indian Union in 2000, in recognition of a century-old demand premised on the distinctiveness of adivasi heritage and culture. Simultaneously, it was inextricably linked to the question of development. Both of these premises reinforce each other and lead to a distinctive content to the concept of adivasi rights in Jharkhand.<sup>2</sup>

The Constituent Assembly of India broke new grounds when it incorporated a chapter on

Fundamental Rights<sup>3</sup> wherein “equality of status and of opportunity” and “justice, social economic and political” and “dignity of the individual” were guaranteed.<sup>4</sup> Simultaneously, it also created certain groups of rights, wherein the right of all citizens to have “a distinct language, script or culture of its own” and the “right to conserve the same” were also guaranteed.<sup>5</sup> This simultaneous privileging of both individual and group rights has been operating in a socio-economic and political context, wherein a number of historically disadvantaged communities such as tribes have continued to suffer a variety of handicaps – social, economic and political, with the result that the rights guaranteed to them by the Constitution are far from being realized. This tension lies at the root of both the problems in the assessment of rights of marginalized sections and the political contestation for the realization of these rights in a resource-deficit political economy. Both these substantive aspects of adivasi rights are under threat from the processes of development adopted by the Indian state, which lead to pressure on the space necessary for a negotiation of these rights in their correct context. Thus, a politics of development and identity is generated, which has perhaps formed the leitmotif of all contestation for adivasi rights in India.

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\* This paper is an abridged version of the full study: Amit Prakash, *Tribal Rights in Jharkhand*. Much of the arguments presented in this paper are therefore premised on the analysis presented in the full study, which will henceforth be referred to as ‘Companion Paper’.

<sup>1</sup> Particularly, Part X of the Constitution. Schedules V and VI were incorporated into the Constitution to provide for particular responsibilities of the state with respect to administration of areas inhabited by the adivasi populations, apart from a variety of enabling provisions for the betterment of individuals belonging to adivasi communities.

<sup>2</sup> See for instance the debates on the Bihar Reorganization Bill, 2000 (which created the State of Jharkhand) on its introduction in Lok Sabha on 25 July 2000 and follow up discussions in Lok Sabha on 2 August 2000. There was a general consensus amongst the members that ‘development’ was the main issue left to be realized after the State recognising the Jharkhandi identity was created. *Lok Sabha Debates*, XIII Lok Sabha, 25 July 2000 and 2 August 2000.

<sup>3</sup> See Companion Paper for a detailed discussion of the Constitutional provisions.

<sup>4</sup> ‘Preamble’ to the *Constitution of India* (as of 1 January 2001), New Delhi: Lok Sabha Secretariat, n.d., Article 366.

<sup>5</sup> *Constitution of India*, *Ibid.*, Articles 29 (1) & (2).

## THE RIGHTS FRAMEWORK

Adivasi rights can be seen as part of the larger discourse on human rights which emanates from the Universal Declaration on Human Rights of 1948, and is constantly being developed and refined through the means of political contestation, international debates, and discussion to include a wide array of rights that are fundamental to a dignified human existence.<sup>6</sup>

Rooted in the Universal Declaration on Human Rights of 1948, mediated through the ILO Conventions No. 107 and No. 169 and closely interacting with a growing literature on the right to development, adivasi rights have acquired a distinctive content and meaning. This content is also anchored in the academic debates on multi-culturalism.

### Adivasi rights and how they operate

While significant attention has been paid to the issue of the rights of the individual, particularly those of marginalized communities such as the adivasi communities, the meaning and contents of these rights has branched out as they evolves via the avenue of changing discursive structures of the international debate on Human Rights. Guided by the human rights-based approach to development promoted by UN agencies, it is now widely recognized that development processes involve “the development of the capacities of ‘duty-bearers’ to meet their obligations and/or of ‘rights-holders’ to claim their rights.” Furthermore,

the agreement lays down six principal components of human rights, all of which are central to development programming:<sup>7</sup>

- 1 Universality and inalienability;
- 2 Indivisibility;
- 3 Interdependence and inter-relatedness;
- 4 Non-discrimination and equality;
- 5 Participation and inclusion;
- 6 Accountability and the rule of law.

Therefore, the key factor in any delineation of adivasi rights is participation, without which all listed goals would have little substantive content.<sup>8</sup>

Within the human rights framework, the substantive content of adivasi rights in India may be conceptualized as follows:

- Right to preservation of their socio-cultural distinctiveness;
- Right to socio-economic development.

These two sets of rights are not exclusive of each other but are closely linked with the help of: (i) politics of development and identity; and (ii) claims for structures for participation in decision-making (e.g. local governance). Furthermore, if development benefits (e.g. livelihood, literacy, health facilities, etc.) to the adivasi communities and individuals is marginal, the right to participate in the development process is being violated, and thereby the adivasi rights are under threat.

<sup>6</sup> See Companion Paper for a more complete discussion on the international and academic processes of the discourse of adivasi rights.

<sup>7</sup> *Towards a Common Understanding Among UN Agencies* as agreed at the *Second Interagency Workshop on Implementing A Human Rights-based Approach to Development in the Context of UN Reform* held at Stamford, 5-7 May 2003, and endorsed by the UNDG Programme Group is available at [http://www.undp.org/governance/docs/HR\\_Guides\\_CommonUnderstanding.pdf](http://www.undp.org/governance/docs/HR_Guides_CommonUnderstanding.pdf), p.2.

<sup>8</sup> See Companion Paper for a detailed discussion.

## CONTEXT AND BACKGROUND

As per Census 2001, 8.2 percent of India's population (8.08 percent in the 1991 Census) are scheduled tribes (STs),<sup>9</sup> whose population continue to be at the margins of the development process: "Incidence of poverty was higher among tribals in 1999-2000, at 44 percent, while among 'others' (e.g. non-Adivasi, non-Dalit), it was 16 percent. Between 1993-1994 and 1999-2000, while the poverty ratio among Dalits fell from 49 to 36 percent, and that of 'others' (non-Dalit, non-Adivasi) fell even more from 31 to 21 percent, that of adivasis fell from 51 to just 44 percent."<sup>10</sup> Thus, the tribal population has recorded not only a higher rate of poverty but also a slower rate of decline in poverty.

### The study and its geographical focus

With the creation of Jharkhand State, the question of recognition of adivasi rights to autonomy has been recognized.<sup>11</sup> Due to intermingling of the issue of adivasi rights and a development-deficit oriented approach to the Jharkhand region, a politics of development determines the limits of the framework of tribal rights in Jharkhand. Additionally, the STs are only about 27 percent of the total population of the State, severely limiting the scope of tribal rights-oriented political contestation.

### Methodological note

The study has adopted a combination of methodological tools. Background library work and desk research were conducted to provide a context for the study, but much of the research materials for addressing the questions of adivasi rights were collected with the help of field research in the State.

An important issue in any study evaluating the status of adivasi rights is the absence of coherent and consistent data sets. Keeping this in mind, the study has tried to collate and analyze data sets derived from a variety of sources: government publication, non-governmental organizations, individual scholars, activist organizations, individuals and others.

Much of qualitative assessment of the status of tribal rights in Jharkhand was made with the help of targeted interviews, using the snowballing technique with informed and relevant individuals during the field study. Special efforts were made to interview a cross-section of tribal individuals across the State, with particular attention to the inclusion of women in the sample. The interviews were conducted in the following districts: Gulma, Latehar, West Singhbhum, Simdega, Lohardagga and Hazaribagh. In addition, individuals in adivasi groups were interviewed in Neterhaat, Latehar (hydel project), Sikni, Latehar (mining project) and Ranchi district (industrial mega-projects).

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<sup>9</sup> While a number of terms are used to refer to the tribal population, such as tribes, *Adivasi*, aborigines, or autochthones, social science has "not examined the term 'tribe' in the Indian context rigorously", Ghanshayam Shah, *Social Movements in India: A Review of Literature*, New Delhi, 2004, p. 92. Hence, the discussion about tribal population in India has largely followed the government categorization of Scheduled Tribes (STs).

<sup>10</sup> Pius Anthony, Harishwar Dayal and Anup K. Karan, *Poverty and Deprivation Among Scheduled Tribes in India*, New Delhi, Institute for Human Development, 2003 quoted in Dev Nathan, 'The Future of Indigenous Peoples' in *Seminar*, vol. 537, May 2004.

<sup>11</sup> For full details, see Amit Prakash, *Jharkhand: Politics of Development and Identity*, New Delhi: Orient Longman, 2001, especially chapters 2, 3 and 6.



## STATUS OF ADIVASI RIGHTS IN JHARKHAND

### Right to preservation of socio-cultural distinctiveness

Jharkhand adivasi population's claim to the right to preservation of their socio-cultural distinctiveness has a long, complex and fluid history. While most proponents of the Jharkhand Movement claim intellectual ancestry to the adivasi revolts of the 18th and 19th Centuries, any articulation of adivasi rights in the modern sense (however loosely interpreted) cannot be traced beyond the early part of the 20th Century. Through a complex series of processes, the region was created as a separate State of the Indian Union in 2000.<sup>12</sup> The new State of Jharkhand clearly depends on the adivasi identity for legitimizing its administrative and legal apparatus.<sup>13</sup> On the other hand, with the creation of a separate State, a new experiment in participative and deliberative democracy is underway.<sup>14</sup> Whether this new arrangement contributes to the realization of adivasi rights, particularly due to the developmental content of such rights, is another matter.

It must be pointed out that almost no respondent interviewed in Jharkhand in February 2006 stressed that there was any institutional or structural issue in the full realization of this component of adivasi rights. Most respondents underlined the fact that adivasi rights regarding the traditional utilization of local natural resources are under threat and constitute the most significant challenge to adivasi rights in Jharkhand. Clearly, the right to development was a more serious concern since the right to autonomy has been achieved.<sup>15</sup>

### Right to socio-economic development

The status of the right to socio-economic development of the adivasi population of Jharkhand is perhaps the lynchpin in the realization of adivasi rights in Jharkhand.

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<sup>12</sup> See Prakash, Op. Cit., Chapters 3, 6 & 7.

<sup>13</sup> As can be noticed in the debate involving the Jharkhand Panchayati Raj Act, whose implementation has been pending. Some actors have been arguing that the Act in its present form violates the traditional rights of the adivasi population, and the State government does not wish to be seen as ignoring the rights of the Adivasi.

<sup>14</sup> For instance, local newspapers carry these issues with a great deal of passion on a daily basis. Also noticed during the field study were public rallies of various scales and coherence on a number of such issues, ranging from implementation of the PESA to the script that must be adopted for the adivasi languages.

## DEMOGRAPHY

All rights are inherently contestable politically, and, in any democracy, demographic patterns determine the outcome. The ST population have shown a long-term pattern of decline, accounting for only a little more than a quarter of the total population of the State in the 2001 Census.<sup>16</sup> Democratic contestation for tribal rights must therefore account for the majority of the population of the region, which is not of tribal origins, severely limiting claim for adivasi rights and determining the contours of re-negotiation of adivasi rights.

STs are widely dispersed over all districts of the State but are a majority in three districts: Gumla, Lohardagga and West Singhbhum (Table 1). Given the acute poverty in Jharkhand,<sup>17</sup> the worst sufferers of a developmental deficit are the tribal populations of the State – seriously undermining the realization of their right to development and also affecting their socio-cultural rights.

One of the standard assessments on the well-being of the ST population of the State and the status of realization of their right to development is to compare the consumption levels with those of the rest of the population.<sup>18</sup> The data on consumption (Tables 2 and 3) show that the expenditure on consumption by the ST population in Bihar was the lowest amongst all social groups surveyed – consumption expenditure on non-food items in rural areas was about a fifth lower than the average for all social groups. Similarly, expenditure by ST

populations on food in urban areas was about 10 percent lower than average for all social classes, except that of Scheduled Castes.

## Literacy

Literacy again is a central component in realizing all the developmental as well as socio-cultural rights, which has also been legislated as a right for all citizens of India, STs included.<sup>19</sup> While some progress of primary education in Jharkhand can be noted, vast ground still needs to be covered as the literacy rate in primary and secondary education is abysmal. Rural impoverishment, particularly amongst STs, low levels of literacy and use of non-mother tongue (Hindi) as the medium of instruction constitute the central determining factors in perpetuating this trend.<sup>20</sup>

Overall literacy rate of the ST population in Jharkhand in 2001 was a mere 40.7 percent, compared with 53.6 percent for all the population of Jharkhand. More importantly, the literacy rate for ST women in Jharkhand was only 27 percent, compared with almost 39 percent for all Jharkhand population.

In the three districts with largest ST populations – Gumla, Lohardagga and West Singhbhum – there seems to be some correlation between numerical presence of ST in the district and higher literacy attainments.

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<sup>16</sup> See Prakash, *Jharkhand ...*, Op.Cit., especially chapters 4, 5 & 6.

<sup>17</sup> Nitya Rao, 'Jharkhand: Vision 2010: Chasing Mirages' in *Economic and Political Weekly*, 03 May 2003, p. 1756.

<sup>18</sup> Such data for the Jharkhand State is still to be computed but the available data for STs in undivided Bihar continues to be relevant as more than 90 percent of the ST population of the undivided State of Bihar resided in the erstwhile Jharkhand region. Thus, data for ST population of Bihar can safely be projected to apply to the majority of the ST population in the present State of Jharkhand.

<sup>19</sup> The Constitution (Eighty-Sixth Amendment) Act, 2002 inserted Article 21A into the Fundamental Rights chapter of the Constitution, which states that "The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."

<sup>20</sup> Kumar Rana and Samantak Das, 'Primary Education in Jharkhand' in *Economic and Political Weekly*, 13 March 2004, p. 1, 176.



In Gumla district, the gap between ST literacy rates and district averages was a little narrower, as was the case for ST women, in which the urban-rural gap in literacy followed the State averages. In Lohardagga district, the gap in literacy among general ST populations was larger with skew against ST women. The same pattern with a starker skew against STs and ST women was present in West Singhbhum (Table 4).

In such a grim picture, the availability and access to educational infrastructure, such as schools and staff, becomes central. The largest number of schools was in Ranchi district, the State capital. Gumla, with the largest ST population, was ranked 13th (out of 22 districts) with 1,458 schools. Furthermore, Gumla had only 780 education guarantee schools (EGS) – about half that of the capital, Ranchi. West Singhbhum was at the seventh place in terms of total number of schools but at 13th position in terms of EGS schools, while Lohardagga had the lowest number of all schools and was ranked 19th in terms of EGS schools. It can therefore be surmised that the prospects of realizing STs' right to education is not very bright.

Furthermore, it was noted in the field study that many of these schools are in a poor shape and are barely functional.<sup>21</sup> The poor educational infrastructure for ST population of Jharkhand is, however, not underlined by the teacher-pupil ratio in the districts of the State (Table 6). Gumla district has a substantially lower average pupil-teacher ratio in primary schools, while at the middle and secondary school levels, the ratio was in accordance with the State averages. Similar patterns can be noticed for the other two districts

with STs as the majority – West Singhbhum and Lohardagga. The pupil-teacher ratios for both these districts were either lower than or around the State averages. These averages mask certain important issues which might undermine the right to education of the ST population. The better teacher-pupil ratio averages for districts with ST as the majority population may simply be a result of lower enrolment rate or demand for primary education. It could also be that such schools are not sufficiently dense on the ground, leading to serious problems of access for the pupils.

Gulma represents a case of declining enrolment rate among ST pupils and a rising Gross Enrolment Rate (GER), which indicates that not only fewer pupils from the ST were being enrolled, but there also was a rising trend of pupils not joining schools at the right age, and/or a substantially large proportion failing to pass their respective grades.<sup>22</sup> Similar patterns can also be noticed for Lohardagga. The rising trend for GER in West Singhbhum district is much less steep than in the other two districts, indicating a better overall education profile.

Overall, the realization of the right to education by the tribal population of Jharkhand is a distant goal yet. Unless this goal is realized, the rest of the tribal rights will not bear fruit in Jharkhand.

## Socio-economic status

The discursive literature on adivasi rights and the right to development stresses the importance of achieving a higher living standard for the adivasi population.

<sup>21</sup> For instance, in Gumla district, it was noted that a number of schools have physical existence but are poorly maintained and run.

<sup>22</sup> The gross enrolment rate is the total enrolment in a specific level of education, regardless of age, expressed as a percentage of the official school-age population corresponding to the same level of education in give school-year and is widely used to show the general level of participation in a given level of education. It indicates the capacity of the education system to enrol students of a particular age-group. While a high GER generally indicates a high degree of participation, whether the pupils belong to the official age-group or not, GER can be over 100 percent due to the inclusion of over-aged and under-aged pupils/students because of early or late entrants, and grade repetition. In this case, a rigorous interpretation of GER needs additional information to assess the extent of repetition, late entrants, etc.

### **Employment**

The degree of participation of the ST community in productive economic activity is a good proxy for both socio-economic empowerment as well as central factor influencing many of the other parameters of the right to development, such as literacy, education, consumption (which is related to the issue of nutrition and well-being) and health attainments, etc.

The employment data for STs in Jharkhand did not present a rosy picture. While the State average for work participation was 37 percent in 2001, the same average for ST population in Jharkhand was 46 percent, which may not necessarily indicate more productive employment, particularly when compared with poorer literacy and consumption figures as it would indicate poorly paid work or working in the fields. The field study also indicates that higher work participation in rural areas would mean toiling in the fields with little or no infrastructural support and/or participating in lowly remunerative traditional livelihood strategies, such as foraging for food or gathering and selling non-timber forest produce. In urban areas, the ST population report a work participation rate of 34 percent, compared with a marginally lower 32 percent for the State average. The near equal work participation by STs and all communities in urban areas hide the disparities where most STs are engaged in low-paid, unskilled labour in urban areas.<sup>23</sup>

A significant gender gap in work participation is also present, albeit such gap was smaller for the ST population. While the work participation rate for ST women was almost 45 percent, the same figure for all social groups in the state was 25 percent. This data presents a fallacy that ST women were more economically empowered in Jharkhand. In fact, ST women are often recorded as 'workers' on account

of their poor economic conditions and not otherwise – engaged as they are in hard labour, including collection of minor forest produce and manual labour, to ensure daily food for the families. This pattern was also noted to be widespread during the field study and it can be confidently asserted that the higher work participation by ST women is not a reflection of greater economic independence and empowerment.

ST work participation rate in Gumla at 50.5 percent was slightly higher than the state average at about 49 percent. Lohardagga showed similar patterns while West Singhbhum's patterns were in consonance with the State's averages.

Overall, there are only small differences in work participation rates for the ST population of the State compared with the average figures. Thus, there seems to be little handicap for the ST population as far as work participation is concerned, save the already mentioned fact of low-level, non-skilled jobs coming to STs.

### **Health patterns and development**

Access to quality health facilities leads to improvements in quality of life and well-being. The health indicators, such as birth rate, infant mortality and death rates, are another important facet of the realization of adivasi rights.

Birth rate in Jharkhand closely follows the national average, although the rate of decline is lower, primarily owing to no decline in the rural birth rate. On the other hand, the death rate for Jharkhand has risen during 2002 and 2003 due to the rise in rural death rates, while there has been a small decline in the national death rate figures for the same period. Keeping in mind the fact that more than 90 percent of the ST population reside in rural areas, this rise in death rate would impact the ST population (Table 9).

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<sup>23</sup> Due care should be taken while interpreting the work participation rates owing to the constantly changing definitions of 'work' in the censuses as well as the low threshold level in classifying any individual as a 'worker'. See Companion Paper.

The same pattern is also evident in the infant mortality patterns for Jharkhand. While the national infant mortality figures have shown a decline over the two years, the same figures for Jharkhand have been constant with a marginal rise

for urban areas and a marginal decline for rural areas. Natural growth rates for Jharkhand have therefore shown a sharper decline than the national average, led by a decline in rural natural growth rates but a rise in the same figures for urban areas, indicating sub-optimal access to health facilities for

the STs.

## LAND AND FORESTS

Land has been a central question in the contestation for rights in most parts of the country, adivasi areas included. Besides, land has acquired an added dimension in adivasi Jharkhand – both economic and socio-cultural. “The long association of the adivasi with the forests and their lower levels of socio-economic development have resulted in a higher dependence of tribal communities on forests for a livelihood than other population groups.”<sup>24</sup> The importance of land in the socio-cultural conscience of the tribal society of Jharkhand is also highlighted by the issue of acquisition of land by the state ‘in public interest’, which not only threatening the adivasi’ livelihood and socio-cultural autonomy, but also creating the misery of displacement and social fracture in Jharkhand.

Alienation of adivasi land has historically been disallowed by law since the colonial times under the Santhal Parganas Tenancy Act and the Chota Nagpur Tenancy Act.<sup>25</sup> However, transfers do happen, but the informal and non-legal nature of these transfers makes it difficult to assess the scale and intensity of the issue. Transfer of adivasi land between individuals of tribal origin is allowed, which captures the changing nature of adivasi society.<sup>26</sup>

The proportion of land area under various uses in Jharkhand, which provides an overview of the utilization patterns as well as underlining the centrality of the forest in the State. At the level of the State, a mere 9.9 percent of total land area was under non-agricultural use, while forests comprised more than 29 percent of the land, and net cultivated area of the State stood at about 23 percent. These figures are in consonance with the hilly terrain of the State as well as the dependence of vast adivasi populations on forest produce (Table 10).

The dependence of adivasi communities on forest resources is also highlighted by the fact that a mere 3.27 percent of the land area was cultivated more than once. Since adivasi communities mostly reside in rural areas, this poor agricultural profile of the State cannot but have a significant impact in the realization of their rights.

In Gumla, only about 15 percent of total land area was under forests, while the net cultivated area was at about 29 percent. However, area cultivated more than once was a mere 0.83 percent of the land area. Together, these figures describe a situation in

<sup>24</sup> Suhel Firdos, ‘Forest Degradation, Changing Workforce Structures and Population Redistribution: The Case of Birhors in Jharkhand’ in *Economic and Political Weekly*, 19 February 2005, p. 773.

<sup>25</sup> See Nandini Sundar, ‘“Custom” and “Democracy” in Jharkhand’ in *Economic and Political Weekly*, 8 October 2005, p. 4,430-4.

<sup>26</sup> The latest published estimates available for such transfers are dated 1974, making it of little use for contemporary analysis. See *Bihar Statistical Handbook 1978*, Patna: Directorate of Economics and Statistics, Government of Bihar, n. d.: 192.

which the rural population, particularly tribal communities, have poor knowledge of carrying out productive agriculture, which leads to greater dependence on the forests.

Lohardagga, on the other hand, roughly follows the State averages with a slightly lower land area under forests and under more than one crop but a little higher net cultivated area. West Singhbhum shows a substantially larger area under forest cover, at 40.4 percent, and also a higher net cultivated area of about 25 percent. Area cultivated more than once was at about three percent, which was close to the State average.

The above discussion, besides highlighting the risks to the livelihood of adivasi communities in Jharkhand, underlines the central role of the forests – both, in terms of the large coverage and their impact on livelihood.

The forests, however, have also been dwindling to about half of the State average, which seriously compromises the tribal communities' ability to generate a reasonable livelihood. The changes in forest cover in Jharkhand offer a mixed picture. While on the one hand, overall forest cover in Jharkhand showed a positive change over the 2001-2003 period, the total area under dense forests showed a small decline, from 11,787 square kilometres to 11,035 square kilometres. This decline will also affect the availability of forest produce, which, as was argued earlier, is central to the preservation and realization of the socio-cultural as well as economic rights of the tribal population. The rise of areas classified as 'open forests' from 10,850 square kilometres in 2001 to 11,035 square kilometres in 2003<sup>27</sup> indicates a depletion of forest cover.

Gumla showed a small net increase in forest cover of about 0.8 percent in 2003 when compared with the figures for 2001. Dense forests recorded a decline from 1,231 square kilometres to 1,161 square kilometres, while open forests rose from 1,255 square kilometres to 1,402 square kilometres, reflecting a net decline in forest cover in the district. Lohardagga, on the other hand, recorded a decline of total forest cover by 2.75 percent in the year 2003 when compared with the 2001 figures in both dense forests as well as open forests (Table 11). West Singhbhum followed the Gumla pattern, wherein there was a depletion of area under dense forest cover but a rise in the area under open forests.

Along with commercial exploitation and increasing human activity, large developmental projects are also a major cause for the depletion of forest cover in Jharkhand, which also induces large-scale displacement of (mostly adivasi) population. Although the proportions of displaced persons are not unreasonably large (Table 12), two factors should be kept in mind when interpreting this data. Firstly, intensive exploitation of mineral wealth of the State has been active for at least 200 years, and a large number of projects (many of which involved destruction of large forest areas) were already in place by the time India gained independence. Secondly, many of the projects that saw large-scale destruction of forests and displacement of population were started before the period for which the data became available (Table 12). For instance, the Koel Karo hydel project, initiated in the 1970s, led to constant protests and activism over environmental and social costs. Such patterns of change in forest cover undermine not only the autonomy of socio-economic processes of tribal life in Jharkhand, but also seriously impact the security of livelihood of the tribal communities.

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<sup>27</sup> Classification of forest areas, with their intricate connotations of access rights for various sections of adivasi population as well as utilisation of resources from reserved, protected, and open forests is another area of serious contestation in Jharkhand. This issue is not a focus of this study and hence, the scheme of classification used here is that developed by the Forest Survey of India is as follows: Very Dense Forest: All lands with canopy density over 70 percent; Moderately Dense Forest: All lands with canopy density between 40 percent and 70 percent; Open Forest: All lands with canopy density between 10 to 40 percent; Scrub: All lands with poor tree growth mainly of small or stunted trees having canopy density less than 10 percent; Mangrove: Salt tolerant forest ecosystem found mainly in tropical and sub-tropical inter-tidal regions; and, Non-Forest: Any area not included in the above classes. *State of Forest Report 2003*, New Delhi, n.d., Box 1.1.

## DEVELOPMENTAL INFRASTRUCTURE AND SOCIO-ECONOMIC RIGHTS

Realization of socio-economic rights is crucially dependent on the availability of developmental infrastructure, such as roads, electricity and, in the case of largely rural population, irrigation facilities. Detailed data for many of these indicators for Jharkhand are not yet available, except two crucial ones: village electrification and irrigation potential. The degree of village electrification in Jharkhand continues to be dismal. Only 31.4 percent of the inhabited villages were electrified by the end of the fiscal year 2004-2005, including those whose electrification was contracted out to M/S Rites. Even this meagre figure reflects a significant improvement since the end of the fiscal year 2000-2001, when only 14 percent of the total number of inhabited villages in Jharkhand was electrified (Table 13). This is likely to have a significant impact on the developmental scenario of adivasi communities in Jharkhand.

On the contrary, in the three tribal majority districts, the growth in village electrification after the creation of Jharkhand in 2000 cannot be noticed. At the end of the fiscal year 2004-2005, only 18.4 percent of the inhabited villages had been electrified in Gumla district, of which about 11 percent were already electrified by the end of the fiscal year 2000-2001. Similarly, in Lohardagga district, only 20.5 percent of the inhabited villages had been electrified by the end of the fiscal year 2004-2005, of which more than 12 percent had been electrified before the new State of Jharkhand. Compared with the State totals, this scenario is rather bleak. On the other hand, West Singhbhum district broadly follows the patterns noticed at the State level.

The irrigation potential for Jharkhand is central to agricultural development of a largely rural ST

population, and perhaps the most important factor in economic empowerment. At the State level, 'other sources' (primarily rain-fed) remain the largest source of irrigation in Jharkhand and account for 21 percent of the total irrigated area. Government and private wells are second and account for more than a third of the total irrigated area in the State. Tanks and canals account for about 15 percent and 13 percent, respectively, of the total irrigated area. Modern devices such as tube wells (electric as well as diesel) account for only about 12 percent of the total irrigated area. Lift irrigation, which perhaps has the best application in the socio-cultural as well as geographical terrain of the State, accounts for merely two percent of the total irrigated area (Table 14).

In the district of Gumla, the dependence on rain for agricultural activities was much higher, at 47.5 percent of the irrigated area, while government wells accounted for about 29 percent of the irrigated area. When combined, government and private wells irrigated more than 48 percent of the irrigated area with no significant hectare being irrigated by modern devices such as tube wells. Lift irrigation accounted for only 0.5 percent of the irrigated area in Gumla. As far as the Lohardagga district is concerned, dependence on rain was lower, with only six percent of the area being irrigated by 'other' sources. The largest source of irrigation in Lohardagga was tanks, which accounted for 34.6 percent of the total irrigated area in Lohardagga. Wells (government and private) accounted for 43.9 percent of the total irrigated area of the district, with government wells accounting for 27.4 percent of the irrigated area. Canal irrigation in Lohardagga was also significant, at 15 percent, while tube wells and lift-irrigation

techniques had no significant share. Irrigation in West Singhbhum district was largely dependent on canals (58.7 percent of the irrigated area), and the rest of the area was rain-fed (almost 30 percent). Unlike Gumla and Lohardagga, well irrigation was marginal in West Singhbhum, while tanks accounted for about 9 percent of the total irrigated area. Significantly, electric tube wells accounted for almost 2 percent of the total irrigated area.

Overall, the irrigation potential in Gumla and Lohardagga was not very heartening while West Singhbhum seemed to be better off, as evident in many other indicators. Irrigation in Jharkhand seems to be very much dependent on the vagaries of rain, which does not augur well for economic empowerment of the adivasi population in these districts, as they are in rural areas with low consumption levels and high dependence on agricultural activities.

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## DISPLACEMENT AND REHABILITATION

The issue of displacement (and aligned issue of rehabilitation) is a crucial facet of much of the critical developmental discourse, and many of the individuals interviewed during the field study voiced this issue.<sup>28</sup>

Of the few scientific studies conducted on the issue in Jharkhand, the one by Alexius Ekka is noteworthy. His study estimates that more than 1,546 thousand acres of land were acquired for projects between 1951 and 1995, which is about 8 percent of total land area of Jharkhand and displaced at least 1,503,017 persons, of which about 41 percent were tribal population. Only a third of these lands were resettled, in many cases only nominally.<sup>29</sup> Other authors have estimated a much higher figure (Table 15), of which about three-quarters are yet to be settled. The fuzziness about size of the problem

notwithstanding, there is agreement that sufficiently large numbers of population in Jharkhand, particularly tribal population, have been displaced without sufficient attention to their rehabilitation, which seriously undermines their rights. The importance of the issue lies in the fact that “the process that begins with the announcement of the project and continues long after the people have lost their livelihood... cannot be limited to the narrow concept of physical ouster from the old habitat.”<sup>30</sup> Further, the benefits that are purported to flow to the displaced populations due to the projects are often doubtful and often accrue only to the elite in the local communities, adivasi population included.<sup>31</sup> More often than not, “the situation of women is worse than that of men. Adivasi women, for example, depend on the NTFP [non-timber forest produce] more than men do

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<sup>28</sup> Interview with Sanjay Bosu Mulick at his offices in Ranchi on 24 February 2006 and PNS Surin at his residence at Ranchi, 22 February 2006.

<sup>29</sup> Alexius Ekka and Mohammed Asif, *Development Induced Displacement and Rehabilitation in Jharkhand, 1951 to 1995: A Database on its Extent and Nature*, New Delhi, 2000, p. 134. See Companion Paper for full details.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid., pp. 135-7.

since it is their responsibility to ensure the regular supply of food, fodder, fuel and water. They are less literate than men," which means that the chances for them to find an alternate employment are quite limited and, therefore, "continue in the informal sector that is often poorly paid and without

infrastructural support mechanisms."<sup>32</sup> The net result of this process has been gross violation of the rights<sup>33</sup> of the adivasi communities, as they have often lost their land, liberty, livelihood and, sometimes, even their lives.<sup>34</sup>

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## PARTICIPATION, PANCHAYATI RAJ, PESA AND ADIVASI RIGHTS

The crucial link between the two components of adivasi rights and their realization is participation. Political acceptance of rights and their legal creation is of little value if they cannot be exercised by the individuals of the group concerned, in this case the STs.

Jharkhand has had a long tradition of customary institutions of local governance, the legitimacy of which was recognized by various enactments in the pre-independence era, such as the Chota Nagpur Tenancy Act 1908, Santhal Pargana Tenancy Act 1949, among others.<sup>35</sup> The introduction of the provisions of the Panchayatis (Extension to the Scheduled Areas) Act, 1996 (commonly known as

the PESA)<sup>36</sup> was an attempt to extend modern democratic institutions of local governance amongst the adivasi population in scheduled areas, while not totally replacing the traditional institutions. This has created a sharp divide between the votaries of traditional systems premised on customary adivasi headmen and the statutory panchayats elected democratically – a divide noticed during the field study. To make matters more complex, the constitutional validity of Jharkhand's enabling act, the Jharkhand Panchayati Raj Act 2001, has been challenged before the courts, while elections for Panchayats are yet to be held.

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<sup>32</sup> Ibid., p. 139.

<sup>33</sup> See Companion paper for full discussion of the impact.

<sup>34</sup> For instance, the tribal communities of Kalinganagar, Orissa contested the government's decision to allot 2400 acres of their land to a corporate for establishment of a steel plant. The adivasis, protesting their displacement and fearing inadequate compensation and rehabilitation measures, assembled to prevent the bull-dozer from destroying their houses and taking over their lands on 2 January 2006. Through a contested narrative of events, what is clear is that police opened fire killing 12 adivasi protesters. While this particular event occurred in the neighbouring State of Orissa, countless similar incidents of a smaller and less reported nature have occurred in Jharkhand as well.

<sup>35</sup> Sundar, "Custom" and "Democracy"...! Op. cit., p. 4,430. Also see Nandini Sundar, 'Laws, Policies and Practices In Jharkhand' in *Economic and Political Weekly*, 08 October 2005, p. 4,459-62 for a discussion of the tension between customary law on local governance and the statutory panchayats.

<sup>36</sup> For a full discussion of the provisions of the PESA, see Arbind Kumar, 'Tribal Participation' in *Seminar*, vol. 514, June 2002 and for a discussion of the relationship between various legal provisions for local governance in adivasi areas, see Nandini Sundar, 'Tradition' and 'Democracy' in Jharkhand: A Study of Laws relating to Local Self-Governance', New Delhi, n. d.



## CONCLUSIONS: CHALLENGES AND OPPORTUNITIES

The foregoing analysis highlights a mixed picture with respect to the status of adivasi rights in Jharkhand. As far as the question of autonomy of local politics and recognition of the adivasi identity are concerned, the creation of the State of Jharkhand is a positive step. The principle of adivasi political autonomy has been accepted, and along with the already extant Constitutional provisions concerning socio-cultural rights, there is little formal threat to adivasi rights.

However, the exercise of these rights by the adivasi population is another story. Formal rights are of little use in the absence of structural conditions for their enjoyment. The issues of land, water, forests and local resources, which are central to the adivasi communities for both preserving their livelihood and socio-cultural identity, are under constant threat from various quarters. There are significant threats to the realization of the adivasi population's socio-economic rights. As far as their socio-economic development and participation in economic activity are concerned, the adivasi members are considered the weakest performers in the community. In such a situation, the possibility of the adivasi population exercising their rights appears bleak. However, what is positive is the intense and vigorous public debate that has emerged on various aspects of adivasi rights. This indicates a degree of democratic contestation, which can only strengthen adivasi rights in Jharkhand.<sup>37</sup> The announcement by the Planning Commission that provision is being created for allocation of 25 percent of all plan funds to the development of scheduled caste/scheduled adivasi population<sup>38</sup> is a step in the direction of securing adivasi rights.

### Possible policy programming initiatives

The steps taken by various agencies involved in development policy at all three stages – planning, implementation and evaluation – attain centrality in realization of adivasi rights. A crucial capacity-building role can and has been envisaged for international agencies, such as the UNDP and the UN. Such an inter-twined two-fold role would include leading the discursive change as well as actual development programming in terms of augmenting capacity of both the rights-holders and duty-bearers to enable realization of adivasi rights in Jharkhand.

Capacity-building of the rights-holders and duty-bearers will succeed only if a partnership can be built with the civil society organizations working at the grassroots. Alongside, the importance of state machinery should not be under-estimated. Within the framework of programming initiatives set forth above, some specific suggestions and avenues are as follows:

#### Leading discursive change

First and foremost, international (as well as national) development agencies, such as UNDP and the Planning Commission, must play a central role in pushing forward the issue of adivasi rights in the public discourse for development planning and implementation. Many policy tools are available for the purpose, such as combining the issue of adivasi rights within the human development framework; capacity-building of both the right-holders and duty-bearers to understand the importance of focusing on adivasi rights; technical assistance in translating existing policy initiatives to address the issue of promoting adivasi rights, etc.

<sup>37</sup> Two examples of this new environment of public debate are the Scheduled Tribes (Recognition of Forest Rights) Bill, 2005 & a Draft National Policy on Tribals. While both these documents have been severely criticised for what they fail to address, the debate and battle for the realisation of tribal rights has been joined.

<sup>38</sup> 'Now, 25 percent Plan funds sought for SCs & STs' in *Indian Express*.



### **Strengthening participation**

The central link in the preservation and promotion of adivasi rights in Jharkhand is participation in both decision-making as well as in the processes of socio-economic development. Such an approach is also consistent with a HRBA, which is one of the central conceptual anchors in the realization of adivasi rights. In this respect, policy programming can play a central role in terms of:

- Offering support – technical as well as substantive – to the right-holders (the tribal population) to claim their right to participate in all aspects of public policy;
- Giving support to the duty-bearers to resolve implementation issues;
- Supporting newly elected *Panchayat* functionaries, particularly women and the marginalized communities to discharge their function of ensuring full and free participation of all sections of the local population;
- Forming initiatives, such as training programmes for local-level elected functionaries (the rights-holders) and providing technical support for development planning, implementation and infrastructural issues.

### **Building awareness about rights**

As has been noted earlier, much of the adivasi population surveyed in the field study were grossly under-informed about their rights – both as citizens of India as well as members of the tribes. Towards this end, available policy options must:

- Harness the avenues offered by civil society organizations and support their initiatives to raise awareness amongst the remotest of adivasi areas of Jharkhand;

- Take advantage of radio-based information dissemination, including community radio, which is a low-cost avenue with the potential for high policy impact.

### **Contributing to socio-economic development**

Many of these issues require small investments in local structures and civil society organizations – an issue which programming initiatives must look at closely. Some avenues which may be examined are:

- Support for traditional adivasi livelihood patterns and technical assistance to improve yields from them;
- Developing potential for commercialization of tribal produce through the avenues of co-operative tribal-owned organizations;
- Training programmes for tribal youth to empower them to make full utilization of their capability (including programmes for literacy and education);
- Supporting public-private partnerships for creation and sustenance of micro-credit structures;

Supporting civil society action in this area.

### **Advocacy for policy change**

There are some other areas which require advocacy for policy change, some of which are:

- Policies governing utilization of land and forests by adivasi communities;
- Issue of realigning the development model to ensure adivasi rights are upheld and promoted;
- Issues of displacement/rehabilitation of adivasi population, the policies for which require substantial re-working.





# The interface between formal and informal systems of justice: a study of Nari Adalats and caste Panchayats in Gujarat state, India

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# INDIA



## OVERVIEW

The concept of decentralized, local alternative dispute resolution systems in the area of social justice in India has evolved from the traditional and existing forums of village *Panchs* and caste *Panchayats* (hereafter referred to as *Gynati Panch*) to more recent platforms such as *Nari Adalats*, which are focused on 'justice for women'. The increased participation of women in the public arena and in political governance in India has been accompanied by increased entitlements to legal rights for women. It has also been accompanied by an increased rate of violence against women in both the private and the public spheres. These two phenomena have led to interesting forms of alternative courts, such as the *Nari Adalats*, which attempt to carry constitutional rights to the poor and, in particular, to victims of gender-based violence. Such forms of redress have not been constrained by legal particularities, or by rigid rules of evidence and procedure; they give priority to approaches that are both practical and gender-sensitive. In this homegrown arena of 'social justice', the propriety of the law is not really an issue, nor is the cost or venue. The most complicated cases of fact and law are resolved in a few days, and the methods of enforcement are built into settled agreements.

Increased entitlements and constitutional rights for women, and their growing abilities and acceptance into political governance, must necessarily be integrated with the increase in legislated forms of decentralized participation in judicial governance. This study, therefore, attempts to study two forms of decentralized dispute resolution systems in tandem – the traditional caste/tribe/community *Panchs* and the *Nari Adalats* of Gujarat. The study seeks to understand the functioning of these alternative legal mechanisms

at the grassroots level, largely through the lens of gender justice and the participation of women in both of the systems. In addition, while the *Nari Adalats* themselves emerged in the 1990s as a spontaneous response and reaction to domestic violence and gender-based abuse, the study also tries to track their legal and socio-political lineage through the women's movement and within the ambit of judicial reforms in India.

### **Towards social justice: Attempts to institutionalize alternative and decentralized forms of justice delivery and dispute resolution**

In the late 19th Century, the Indian Government under British rule established the *Panchayati Adalats* in rural areas to serve as decentralized judicial tribunals and to hear small cases at the local level. The formal legal and judicial system adopted the British model of adjudication, with its insistence on procedural technicalities and adherence to adversarial systems of litigation. Until India's independence, the regulation of family relationships under the British regime was devolved to religious, caste and community heads. In 1950, however, the concept of a *Nyay Panchayat* was revived once again to ensure a more decentralized and locally acceptable form of justice deliverance. Unlike the traditional *Panchayats*, *Nyay Panchayats* were designed to apply statutory laws rather than indigenous norms. Their membership was also chosen through elections from geographical constituencies rather than through the nomination of upper-caste men. In essence, they were meant to combine the formality of official law with the political malleability of caste tribunals. This combination, however, failed, and

efforts were made to set up a Legal Service Authority in 1950. However, it was the socio-political and legal turmoil during the Emergency, two and a half decades later, which marked a discernible shift from legal centrism to a recognition of the merits of legal pluralism.

Legal reform in the post-Emergency era led to relatively informal, conciliatory and alternative institutions existing alongside the formal judicial mechanism. This in turn led to the introduction of public interest litigation in the early 1980s and the establishment of the Legal Services Authority in 1987, the *Lok Adalats* in 1982 and Family Courts in 1984. Today both the *Lok Adalats* and Family Courts suffer from delays and have been reduced to dispensing low-quality arbitration and conciliation. The Family Courts, in particular, have compromised the rights of women within marriage because of their need to conciliate. In the post-Emergency era, the Public Interest Litigation Act became, to a large extent, the symbolic vehicle through which the dispossessed and oppressed began to understand the judicial system as an instrument of socio-economic change, and which has also given rise to a measure of social justice.

### The journey towards gender justice

It is interesting, but not surprising, that the move to introduce judicial reforms in the late 1970s and early 1980s was paralleled by the events that led to the contemporary women's movement in India. Even during the International Year of Women in 1975, the subversion of justice in the now-famous *Mathura* rape case provided further evidence of the need for the nascent women's movement. The failure and inadequacies of the criminal justice system triggered the first assertive anti-rape campaign in the country. The protests and demands for justice that marked the years preceding the Emergency period saw women take

to the streets and spearhead the price-rise movement, as well as participate extensively in the movement for land reforms, peasant movements, etc. By the time the Emergency ended and the anti-rape campaign began, the women's movement had begun to take on a more assertive and organized form. This participation by women in political movements led to their engaging more actively in women's and development issues through various platforms.

In 1986, the National Education Policy articulated this progressiveness through its policy of 'Education for Women's Equality'. The *Mahila Samakhya* Programme, which began in three Indian States in 1989, was a direct consequence of this policy. The concept of the *Nari Adalats* was first put into action by rural women belonging to the *Mahila Samakhya* movement in Gujarat.

By the late 1980s, the feminist agenda in India was redefined and enriched by thousands of rural women who embarked on a complex journey – questioning notions of both rural development without women and feminism without rural development. Incidents of domestic violence, marital abuse and other forms of gender-based violence were brought into the public eye, which took different forms in different Indian States. It is critical to understand here that despite the global influences of international treaties on gender-based violence, and the country's own legislative, judicial and institutional reforms, little would have been achieved had these not been accompanied by a huge grassroots movement to empower rural women. Through the 1980s and early 1990s, the women's movement's focus moved from an emphasis on shelters, counselling and social service to influencing national laws against domestic violence, enhancing the criminal justice response and raising public consciousness on the issue of violence against women.

The evolution and subsequent spread of the *Nari Adalat* concept by rural women's collectives thus carries with it a vibrant socio-political legacy, as well as a fertile socio-legal landscape within which marginalized rural women continue to contest established notions of gender justice. While '*Nari Adalat*' was the particular nomenclature given to women's courts, different versions of the same concept, with different names, were simultaneously mushrooming in different states and throughout the country. In an effort to broaden and validate the patterns in our findings in this study, we have included two other women's organizations which have similarly sponsored women-run 'courts' and legal redress mechanism.

## Nari Adalats

Run entirely in a spirit of volunteerism, the *Nari Adalats* operate as informal, conciliatory, non-adversarial courts with lay participation, which seek to extend constitutional rights to the poor and particularly to victims of gender-based violence. When assessing the extent of injustice to which the victim has been subjected, they retain their emphasis on ensuring the rights of women *within* the framework of marriage, rather than outside it. Their priority is on 'finding a solution' for the woman within the ambit of social justice, rather than applying more generic principles of judicial procedure or universal human rights. Nevertheless, it is important to question whether the *Nari Adalats*' attempt to mirror the values and attitudes of those they work for has led to the administration of justice becoming a subversion of human rights, or whether they have, in fact, 'indigenized' the formalism of official law and justice, in the process demystifying it and making it more easily accepted.

The study undertook an analysis of all of the 3,514 'cases' handled by six *Nari Adalats* in the past decade. First, it sought to understand who was and

who was not accessing the system. Direct meetings and interviews with 30 clients revealed their perceptions, expectations and experiences.

The *Nari Adalats* are clearly petitioned mostly by women who have been beaten, physically and psychologically abused and harassed in their marital homes. Eighty-nine percent of the cases brought before the *Nari Adalats* in the past decade fall into these categories. Ninety-two percent of the 'clients' are *sangh* members; nearly 35 percent of the women whose cases are heard by the *Nari Adalats* of Mahila Samakhya go there after having already knocked on the doors of the traditional *Panch*.

By and large, women and families who are economically vulnerable and not bound by the censure of the traditional *Panchayat* use the *Nari Adalat* mechanism. There seems to be a direct correlation between an increase in court use and economic development. While this aspect requires a more thorough study, we found that the higher the economic security of families/communities, the more litigious they seem to become. Inversely, in areas of extreme poverty, the hold of the *Gynati Panchs* over the community is decidedly higher. However, as the normative control of the community falls among those communities which are poor but upwardly mobile, or when community norms become diffused due to economic exigencies/opportunities, the tendency of communities and women to become litigious appears to increase, even though the cost, time and stigma attached with going to the police or courts remain. The *Nari Adalats* seem to be the most accessible option for women in these communities.

However, it is also quite clear that economic considerations alone do not determine whether a woman will go to the *Nari Adalat* or to the courts, even though they may be a critical factor. The shared gender identity of the 'client' and the 'judge',



the comfort of being in an environment which resembles your own extended family of mother, aunts, sisters, elders, and the non-intimidating spaces and culture of fearless communication all count for a lot more to a battered woman than economic considerations. It would appear that women who go to the *Nari Adalats* want resolution more than justice.

The popularity of the *Nari Adalats* also lies in the relatively high sense of control that the petitioner experiences there, compared with the familiar traditional *Panchs* and the courts. Cost, time, and venue are critical aspects in sponsoring a sense of control in the woman. The *Nari Adalats*, on average, take 3-8 months to resolve a case and do not cost the petitioner more than a thousand rupees. More important to the petitioners, though, is the fact that the *Nari Adalats* place them at the centre of the negotiations.

There are no obvious caste, class or religious hierarchies in the judicial process of the *Nari Adalats*. Women from the privileged castes do not seem to be restrained by the fact that women from the underprivileged caste will preside over their case and vice-versa. In the interest of both the client and the judges, though, the women of the *Nari Adalats* do make strategic alignments to ensure that during the proceedings of a 'higher' caste woman, 'higher' caste members are present in larger numbers; a similar alignment would apply in the cases of 'lower' caste women. However, it was consistently observed that the *Nari Adalat* members were more constrained in taking harsh or objective stands if the complainant and defendant belonged to the same caste or the same village as they do. Contesting their own community, at times, jeopardized their survival as members of that community. This goes back to the fact that in an attempt to strengthen their identity as a

women's collective across caste, religious and community lines, the *Nari Adalats* have refrained from fundamentally challenging or even questioning basic caste, religion, or class structures within their society.

Out of the 3,514 cases that were studied, 10 percent (363) were from a minority community. This brought up a number of questions. How did the *Nari Adalats* handle issues of dual minority – that of women who belong to a minority religion? How did they reconcile issues of gender justice with personal laws? What were the contradictions they faced? How did they proceed with the application of law: did they draw on the personal laws or on constitutional law – or did they draw upon both, based on circumstances? It was repeatedly found that there was an absence of studied dialogue or public discussion among the women of the larger collective, or the *Nari Adalats*, on the various merits and drawbacks for women of both the personal and the common laws. It seems that they functioned according to what came naturally to them, or would attract the maximum acceptance from society.

Meetings with some of the *Nari Adalats*' 'clients' were enlightening and provided critical feedback on the informality of the *Nari Adalats*, as practiced within the *Mahila Samakhya* programme in particular. The following issues were raised as constraints:

- The lack of formal and standard legal documentation had posed serious problems;
- The absence of a basic understanding of legal procedures and provisions meant that the client was not empowered with information about the laws, and was not fully able to take informed choices *vis-à-vis* the outcome;



- The inability of the system to comprehend and interpret revenue and legal documents – such as property documents – held by the client, and the absence of a support mechanism (such as lawyers) meant that the advice or resolutions provided by the *Nari Adalat* were vulnerable to legal disputes and procedures of law;
- The *Nari Adalat* system operates entirely through the will and courage of the volunteers and *sangh* members; this tends to give rise to a personality-oriented system. In the absence of any legitimate mandate, or structured partnership with state enforcement agencies or the formal judicial system, the ‘fear’ induced by the *Nari Adalat* is short-lived in the eyes of the violator.

### The dialectic of being ‘just’ and ‘right’

It is necessary to understand how, without the constraints and rigidity of legislated procedures and norms, the alternative ‘courts’ remain consistent with the dual need to be both ‘just’ and procedurally ‘correct’. How is ‘correctness’ defined in a gender context within both the *Nari Adalats* and the caste *Panchayats*? A further question is whether there is a gender difference in the way ‘just’ and ‘right’/‘correct’ are defined in these structures, one largely patriarchal and the other leaning towards feminism.

The formal justice system invariably adheres to the correct use of legal and judicial procedures. Similarly, in the *Gynati Panchs*, justice can only be applied if social norms, procedures and behaviour are perceived to be ‘socially correct’. However, for the *Nari Adalats*, the act of a woman seeking justice and the circumstantial evidence of her being a victim of injustice is in themselves the ‘correct’ justification to trigger a movement towards justice.

Here, the need to be just, based on the circumstances and context, precedes the confirmation of what is ‘correct’. The *Nari Adalats* do not concern themselves with providing a verdict and punitive action. Instead, they are more concerned with being ‘just’ by making men compensate women in a manner that protects women’s rights and, more importantly, facilitates a change in their situation towards a more violence-free life. In deciding how violations should be compensated, they concentrate on the circumstances, rather than on a stipulated, well-laid-out norm or law. In many ways, this is a more humanitarian way of securing rights and ensuring compliance.

In the see-saw act between ‘being just’ and ‘being correct’, however, the *Nari Adalats* do at times falter. Their relatively low levels of understanding of laws, legal provisions and procedures, coupled with unconscious slips into patriarchal ways of judging and seeing – both of which were evident during the study – occasionally lay them open to the kind of mistakes made by both the *Gynati Panchs* and the formal justice system.

### Nari Adalats – justice for women or women for gender justice?

An analysis of the 3,514 cases received and handled by six women’s courts reveals that all of the cases pertain to marital disputes and to gender-based violence – primarily domestic violence. The dominant image of the *Nari Adalats* remains that of a forum where women facing violence within marriage can seek support or justice. However, while more than 89 percent of the cases pertain to marital disputes and violence within the marital home, the *Nari Adalats* no longer deal only with women victims. In 20 percent of the cases (714 out of 3,514), men have for different reasons approached the *Nari Adalats* for justice.

Men who believe that the 'errant' ways of their wives can be 'sorted out' by the women of the *Nari Adalats* have filed complaints against their wives. The *Nari Adalats* look at the specificity of each case, often also taking into consideration the man's economic condition before deciding on a maintenance amount.

The *Nari Adalats* do not apply the legal provision for maintenance or facilitate court dispensations in a uniform manner. While maintaining and protecting the rights of women, they arrive at what most of their 'clients' perceive as a set of pragmatic, implementable solutions to the problem, often to the satisfaction of both parties. However, this could mean a 'lesser' verdict than that which the courts may offer through the more progressive legislated provisions for women. In some cases, where women are more aware of the laws, and are more determined to seek a decision expressed in a verdict rather than resolution, they do tend to approach the courts directly. In addition, and ironically, the defendant husbands approach the *Nari Adalats* which belong to their socio-economic milieu in the hope that they may give a more considerate verdict. While this has extended their 'client base' to men and gradually exploded the popular perception that *Nari Adalats* only work in the interests of women, it does raise a more fundamental question about the reasons for the *Nari Adalats'* departure from the formal legal provisions. Are the *Nari Adalats* fully aware of the legal provisions, are they primarily governed by them and do they only interpret these provisions within the overall context and specificities of the case? Or are they, like *Gynati Panchs*, governed by a set of normative rules and laws set by their socio-political contexts? The answer lies somewhere in between. The *Nari Adalats* do use the statutory principles but they interpret them according to circumstances.

While all six women's courts are embedded within a larger movement for women's empowerment, the study revealed that none of them received, or proactively took up, a single case of sexual harassment, nor did they hear sex workers' cases, or cases dealing with women's labour contracts, female foeticide, women victims of inter-caste or communal violence and disputes, etc. While acknowledging that these forms of gender-based violence and exploitation were endemic, the *Nari Adalats* had clearly developed and acquired the image of a local informal 'family court', whose predominant role is to protect the rights of the woman within the framework of marriage.

The lack of a clear institutional mandate, the absence of well-crafted links with formal structures and an inadequate understanding of the legal and judicial procedures and systems have ensured that only five percent of the cases (169 out of 3,514) that are heard are related to rape, homicide or sexual harassment. Similarly, while there is a demand for action on, and awareness on the issue of, women's rights to inheritance, only four percent of the cases pertain to this issue. Thus, while *Nari Adalats* enjoy high levels of credibility within their own collectives and in their geographical blocks or *talukas*, they have yet to make the step towards a more comprehensive form of gender justice or to become a more generic social justice mechanism governed by women. However, it would be unfair to view this lack of development within the *Nari Adalats* in isolation. A fairer approach is to place these developments within the larger context of the women's movement in Gujarat. While the rural women's movement has improved rural women's abilities to organize themselves as collectives, to form pressure groups within their regions and to express and assert their rights within the family, the movement's willingness to take up gender issues outside its ambit – be they violations of pre-natal

sex determination tests, the rights of sex workers, the violation of labour laws to the detriment of women or the trafficking of women – have been relatively low. The *Nari Adalats* merely reflect the pattern which exists within the wider grassroots rural women's movement in different parts of India, including Gujarat.

## Interface with the traditional Panch

The study team met with 11 traditional *Panch* members from as many communities in four districts of Gujarat. Interestingly, it seems that the *Nari Adalats* have emerged more as an alternative to the patriarchal caste *Panchayats* than as a decentralized alternative to the formal judicial system. While the *Panchayats* protects the patriarchal social order of the community, the *Nari Adalats* by and large protect the rights of women within that social order. In so doing, they have neatly appropriated the format and 'methods' of the *Gynati Panchs* in more ways than one – whether it is by using a public 'space' to hold 'court', using the technique of 'naming and shaming' or involving lay participation in the dispensation of justice. The *Nari Adalats* also draw their presence and power from a shared 'gender identity' – much as the *Gynati Panchs* derive theirs from a shared 'caste' or community 'identity'.

As judges, the *Nari Adalat* respond according to their emotions, with responses to male complaints/victims being fairly gendered. In fact, it was interesting to observe that the attitude of the *Nari Adalats* towards men was completely adversarial when they were defendants, but when a man was the aggrieved party, his perceived vulnerability would draw a fairly maternal response. This response is similar to that of members of traditional *Panchs*, whose attempts to be just and fair towards 'passive' and 'vulnerable'

women wronged by their husbands at times translate into patriarchal protectionism.

Any similarities end there. The costs and expenses involved with *Gynati Panchayats*, which come together if they are appealed to or 'moved' by a complainant from their caste/religion/sect, are extremely high. The mounting transaction costs of the *Gynati Panchayats*, the lack of interest or care they increasingly display when trying to find a resolution, the speed with which a separation is executed for financial gains and the existence of alternative dispute resolution systems, such as *Nari Adalats*, *Mahila Panchs* etc., have all contributed to the diminished credibility of the *Gynati Panchs* in Gujarat. Today, even men seeking justice in marital matters are more willing to approach the *Nari Adalats*, despite the perception that they are biased towards women, or the Family Counselling Centres run by the State Social Welfare Board, rather than their caste *Panchayats*.

The breakdown of the ability of *Gynati Panchs* to 'govern the community by control' is due both to their ineffectiveness and to the increasing urbanization of villages, the nuclearization of families and migration into towns. Of course, levels of control differ between communities. We found that caste or tribal communities whose livelihoods continue to be closely linked and dependant on common property resources; migrant pastoral communities which tend to live in close proximity for long periods in alien environments; communities with relatively smaller populations; or those living in remote, marginalized geographical regions, are governed and controlled by the traditional *Panchs* to a far greater extent than others.

Traditional *Panchayats* vary greatly in their normative principles and methods for protecting the rights of women. Those *Panchs* that have a better institutional framework, and that seem to have

better procedures for protecting women, have no need for or interest in the *Nari Adalats*. Despite being as regressive as most other *Panchs* on the issue of women's rights, they maintain their credibility with women and men in the community because of their strong emphasis on the welfare of both women and the poor. The Muslim community *Jamaats* fall into this category. However, where the traditional *Panch* is faced with a fragmented community, principally due to shifts in livelihoods, education and location, and are less able to overcome the diminishment of their role in community governance, we found that willingness to accept the *Nari Adalats* as a credible 'quasi-judicial' system was considerably higher. In communities such as that of the Rathwas of Chota Udaipur, where the *Panch* continues to exert a significant hold over the community, but is disorganized and localized, the decision-making process of the *Panch* is hijacked by village-level political leaders from within the community or by power-holding elites. Women in these communities are perhaps the most disadvantaged, in terms of their low levels of access to justice or resolution outside the community and the absence of well-organized caring mechanisms within their own community.

The *Nari Adalats* have evolved different strategies in different areas, and all of the *Nari Adalats* have formally invited the traditional *Panchayats* to their hearings – or at least involved some of their leaders informally. This is partly to influence and educate the *Panchayats*, and partly to keep them happy. Where the *Nari Adalats* are treated as a 'higher court' by the women of the *sanghs* – who first succumb to family and community pressure and take their issues to the *Gynati Panchayats*, and bring their cases to the *Nari Adalat* when these are unresolved or the women are harassed – the *Gynati*

*Panchayats* are faced with a visit by *Nari Adalat* members or are quite literally obliged to come to the *Nari Adalat* court to explain their verdict.

Ongoing efforts to engage and influence the *Gynati Panchs* are therefore made by the *Nari Adalats*, although these efforts are neither structured nor consistent. Interestingly, the traditional *Panchs* have reciprocated in some cases by inviting *sangh* members into their forums when handling a case. Fifteen to twenty members of the *Mahila Samakhya sangh* in all three districts, but especially Vadodara and Rajkot districts, are regularly invited to sit in on the *Panch*. However, it is also evident that the invitation to *Nari Adalat* members does not extend to all cases seen by the *Panchs* but is limited to those where a marital dispute or complex gender problem is involved. The *Nari Adalat* women seem to vacillate between pride in being invited to the traditional *Panchayats* – interpreting this as evidence of an increase in their influence within the community – and a sense of the futility of influencing the traditional *Panchayats*, which are themselves on the decline. Nevertheless, 8-10 women from the *Mahila Samakhya sangh* membership who are also on *Nari Adalat* councils are also permanent members of their caste *Panchayats*, and are silently transforming the patriarchal modes of decision-making within the *Panchs* from within.

While all of the *Nari Adalats* members were unanimous in stating that they detested the patriarchal verdicts of their traditional *Panchayat*, most felt that a traditional *Panchayat* as a community system had an inherent value for the community. They paradoxically observed that, in an increasingly homogenized world, the *Panchayat* reflected their diversity and protected different forms of governance.

The *Nari Adalats* were also clear that despite their adversarial position *vis-à-vis* the caste *Panchayats*, they have largely chosen the path of cooperation rather than confrontation. They also admitted that they often accept reconciliation as the only option because of the absence of a safe shelter for the victim. In fact, our study revealed that the outcome in 49 percent of the cases relating to marital abuse/disputes and domestic violence was reconciliation. While the lack of safe alternative domestic arrangements for a victim does seem to be a predominant consideration in finalizing the outcome of cases for all of the *Nari Adalats*, leading to more reconciliations than may be appropriate, the weight given to sustaining the family and marriage framework is equally strong.

The success and limitations of the *Nari Adalats* thus lies in the fact that they position themselves between the discriminatory norms of the traditional *Panchayats* and a formalistic and antiquated justice-dispensing system. They do not challenge the social order fundamentally, neither do they apply the statutory provisions fully. Rather, they interpret both to redefine a pro-women social order. They are more flexible in their adhesion to procedural rules than the formal system and the caste *Panchayats* – both of which have well laid out procedural protocols – and are considerably cheaper and faster than either.

### **An alternative justice dispensing mechanism?**

Is the *Nari Adalat*, then, a *supplementary* forum focusing on pre-litigation conciliation and settlements or is it a *complementary* system which has defined an equally just, and perhaps culturally more acceptable, way of dealing with the issue of women's rights? Interestingly, while *Nari Adalats*

seem to have emerged as an alternative to the traditional *Panchs*, they now judge their achievements and failures in comparison with the formal justice system, just as the self-help rural women's groups in India, which emerged in reaction to exploitation by traditional moneylenders, today make the mainstream banks their reference points.

In dealing with domestic violence, the formal legal and judicial system has relied primarily on the criminal justice system, which is itself limited when dealing with domestic violence cases. The vulnerability of victims and a law enforcement system, which is marked by complex rules of evidence and incomplete solutions (e.g. with regard to maintenance and custody issues), create the need for multiple avenues through which an abused woman can seek justice. All this has ensured that the fight against injustice is overtaken by an even more painful fight for justice. To expect a physically, emotionally and economically abused woman to seek justice through a system in which most would prefer not to litigate is a travesty of hope. The situation has also made the increasingly progressive provisions of law for women appear hollow. This question has vexed the women's movement at the macro level and voluntary movements such as the *Nari Adalats* at the local level: how can we reconcile the methods of access and application of the progressive nature of our legal reforms with the regressive nature of our judicial system?

It is now recognized and acknowledged that victims of domestic violence require a plurality of socio-legal remedies to ensure that they can live in a more secure physical, emotional, psychological, economic and social environment. They are not only victims of crime, but also primarily victims of

their family milieu. Clearly, strategies to achieve violence-free lives for women have to go beyond legal interventions to encompass confidence-building measures, the restoration of filial relationships, the mobilization of community support and the education of the victim about her rights as an individual and within the family. No one system can achieve all of these. Multiple systems of support and plural forms of resolution and justice delivery with a gender justice perspective are necessary to address the complexities of domestic violence cases. The *Nari Adalats* are in a strong position to participate fully in this process.

The *Nari Adalats* must make a more concerted effort to develop and to work towards being accepted as a complementary system to the mainstream. However, some of the above-mentioned drawbacks of the concept and its operations need

to be addressed at a broader level before the *Nari Adalats* can be incorporated into a pluralistic legal framework in India. For the *Nari Adalats* to be accepted as a parallel institution and retain their values, approach and methods, they require an authorized institutional mandate – they are presently perceived as being too informal and ‘voluntary’, which reduces the impact of their work. Clearly, they have to evolve a more standardized form of documenting records and evidence. They need a more comprehensive and systematic understanding of the formal legal and judicial system, as well as the human rights framework, so as to engage with other forms of justice delivery for women. For the *Nari Adalat* mechanism to be relevant locally and legally, members need to learn ways of introducing a public discussion about social justice based on rights, rather than merely on reconciliation or responsibility.

## GLOSSARY OF TERMS

Gynati or Jati	Caste
Gynati Panch	Caste council – its members are normally nominated and not elected
Jamaat	Community Council of Muslim communities
Lok Adalat	People’s courts
Mathura	A town in Uttar Pradesh
Mahila Samakhya	Education for Women’s Equality (a national government-sponsored programme which mobilizes grassroots rural women, raising their awareness of equity issues and women’s equality)
Mahila Samakhya Society (MSS)	The official name of the organization
Nari Adalat	Women’s court
Nyay Panchayat	Councils of Justice at the village level
Panch	Traditional council of five members
Panchayat	Jurisdiction of villages based on population and the primary level of governance
Panchayati Adalat	Village (decentralized, local) court
Sangh	Group (village-level women’s groups formed by Mahila Samakhya are known as <i>mahila (women) sanghs</i> )
Taluka	Administrative block within a district







# Access to justice: the case of women in Iran

Shahla Moazami

## ACKNOWLEDGMENTS

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# IRAN



## ACRONYMS

CEDAW	Committee on the Elimination of Discrimination against Women
NGO	Non-governmental organization
UNDP	United Nations Development Programme

## 1. OVERVIEW

Women in Iran are a marginalized group. Despite the fact that the constitution of Iran defines all individuals as equal, the established legal frameworks have not only failed to provide women with equal access to justice, but have also perpetuated a system of inequality between the female and male populations. Under the legal system of Iran, Islamic precepts govern the definition of equality, rendering it conditional, and consequently hindering the realization of the egalitarian nature of the constitution. It is within this context that the story of women in Iran and their difficulties in accessing justice unfolds.

Approximately 20 percent of Iran's population of 65 million live below the poverty line; disparities run inter-provincially (CCA, 2003). While increases in literacy rates have been achieved, high unemployment rates and a large population of young people have further pushed the population, particularly women, into the poverty trap. Given the vulnerabilities of the daily lives of women, their access to justice plays a central role in enhancing their ability to make informed choices, to contest and escape from private and public forms of violence and to feel that the justice system is accessible and empowering.

Women in Iran must have, as an inherent right, the ability to exercise choice regarding the issues that most affect their lives. As the duty-bearer, the state is responsible for ensuring that all social groups have adequate information about, and easy access to, existing legal frameworks. This entails creating an environment that fosters proper legal literacy, information sharing, access to legal aid and, most

importantly, a cooperative system that is not only aware of and responsive to the needs and interests of the most disadvantaged, but that is also willing and able to provide sound and effective remedies to these groups' concerns. This will enable people to act as full participants in their society and to find remedies to their problems and/or grievances without hindrance.

This case study aims to give precedence to the lived experiences of Iranian women as a marginalized group. Specifically, the objectives of this study are as follows:

- To examine gender discrimination in penal law and identify the intersections among the jurisprudential, legal and social reasons for the existing bias;
- To present the ideas and experiences of women implicated in the judicial system – female judges, attorneys, offenders and claimants;
- To acquire information on the activities of NGOs working to protect women's legal rights;
- Using a human rights-based approach, to identify ways to effect positive change and develop concrete approaches to programming on inclusive governance.

It is anticipated that this study will contribute to the formation of gender-sensitive legal frameworks and programmes that will provide opportunities for women to become legally empowered as active participants in their society.

## 2. ANALYSIS OF THE KEY FINDINGS

According to the findings, minimal progress has been made in terms of women's access to justice in Iran. Evidence indicates that the governing laws discriminate against women. The legal inequality of women, however, originates not only from shortcomings in rules and regulations, but also from the unwritten rules contained within social norms and customs, which are saturated with gender bias.

Article 49 of the Islamic Penal Law stipulates that juveniles be exempt from criminal liability; however, the legal age of maturity is 15 for boys and nine for girls. Islamic Penal Law also places greater value on the testimony of men. For example, cases involving lesbianism, consuming alcohol, speaking out against the government, larceny and murder require only the testimony of men. In cases requiring proof of adultery, a man's testimony is equivalent to the testimony of two women.<sup>1</sup> The penal system needs to reflect the realities and concerns of women today; if no changes are introduced, little progress could be made in terms of women's access to justice through either the formal or informal media. Laws need to reflect current social realities, or they have no meaning.

Women in general have become increasingly aware of their condition due to their exposure to higher education, especially in the humanities and social sciences, to their engagement in civil society, and to increased international discussion on the situation of women in Iran. Female claimants and offenders have become aware of their condition through their involvement with the justice system.

Of the 56 female claimants participating in the study, 47 believed that governing laws do not adequately support women, and 29 believed that they did not receive proper support because they were women. As one woman indicated:

"Of course, because I am a woman, my words went unheard. They did not even call me to court, and my husband, because he had married another at that point, simply divorced me."

The effectiveness of legislation and the success of civil and governmental institutions in protecting female claimants require legal reform, appropriate cultural transformations and awareness-raising for women about their rights, which will encourage them to take a more proactive role as social actors. Since there is a deep correspondence between penal law and dominant cultural ideologies, any legal changes require equal transformations at the level of culture in order to change normative prescriptions about what is deemed appropriate for women and men in Iranian society.

Female offenders, who make up 3.41 percent of all prisoners, expressed their dismay at the way in which women are treated in the criminal justice system – a system they identified as unethical and biased. There was a common perception that female offenders are treated differently based on their gender, offence, appearance and age. Of the 54 women interviewed, 35 believed that a double standard existed, as women are charged with greater severity than their male counterparts for similar crimes. Women in prison may also be

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<sup>1</sup> Many discriminatory laws have been addressed in detail in the case study.

sexually abused or tortured, especially if they are regarded as being licentious or “too sexual”. Of the 54 participants, 10 affirmed that prisons are unsafe, and 24 felt that the prison environment encouraged promiscuity and greater susceptibility to prostitution. Of the former prisoners, 23 confirmed experiencing violence in the prison, and 22 affirmed that they had experienced violence committed by a prison guard.

Committing acts of violence against female offenders while they are incarcerated is not only inexcusable, but also a severe violation of their human rights. What can we assume when such women are released from prison? What can we expect from their reintegration process? It is safe to assume that there is a probability that these women will reoffend. Both the courts and the prisons need to be guided by a standard code of ethics informing them of their obligations and responsibilities. A shift in attitude also needs to take place. There needs to be room to voice concerns and to encourage government and legal institutions to take a more proactive approach in ensuring that human rights standards are always upheld.

Furthermore, it is difficult for women to seek safe spaces for support – resources are lacking. The government has yet to create widespread and accessible support services for women who have been victimized. Only one governmental organization, *Behzisti*, has established several safe homes in the city; these, however, are limited in number, and knowledge of their existence is minimal. The few non-governmental bodies providing support to female victims are limited and under-funded, and while charity institutions offer temporary financial support to women,

they do not provide any intellectual or physical protection from recurring harm.

Female representation within the courts has encouraged small but meaningful changes and progress within the justice system as a whole. Female lawyers and judges advocating for legal reform within the framework of human rights have created slight changes in attitudes, particularly with regard to the involvement of women in decision-making institutions. By arguing for a more equitable and just system, women in the courts have encouraged others to ‘think outside the box’ and have energized their colleagues into improving their understanding of the paradoxes and double standards currently prevailing the system. Links have also been created between women working within the courts, providing them with mutual support within their highly male-dominated and rigid work environment.

Many of the impediments women face in attempting to gain acceptance within the judicial system are a result of dominant gender stereotypes that reinforce negative attitudes and behaviour. Female lawyers and judges have worked very hard to resist these stereotypes and barriers, and to create a reputation within the justice system as capable, trustworthy and attentive.

Women need a venue in which they can break the silence, voice their concerns and share their experiences as actors and agents of change. One of the fundamental problems in Iran is that women have little permission to organize and advocate for reform. Their authority to be proactive and influence the decisions that most affect them is contingent on their increased participation in national government.

### 3. KEY LESSONS LEARNED FROM APPLYING A HUMAN RIGHTS-BASED APPROACH

Protecting the rights of women is part of promoting, respecting and protecting the rights of all human beings. As a methodology, a human rights-based approach works not only to create an enabling framework in which people can exercise freedom of choice and expand their capabilities, but also towards developing an empowering environment in which people are involved in both the decision-making and development process. Using a human rights-based approach in the study meant that a participatory process was required: one that was empowering for the women involved and that addressed their marginality in such a way so as to provide options for the improvement of their daily lives. It was important to seek participation from the women who were most exposed to the justice system in Iran, since the research began with the supposition that those implicated in the system (in the capacity of duty-bearers and rights-holders) had the experience and information to provide details on the current challenges and needs of women accessing justice.

In this study, translating the experiences of women meant that they were acknowledged as active participants and recognized as agents of positive transformation. Although numerous legal studies on women's rights have been conducted during the last three decades, they have not provided the space to hear women's stories and make public the experiences of women involved in accessing justice.

The study applied both qualitative and quantitative research methods to collect statistical data and to gather experiential information from individual interviews and focus group discussions. Desk and literature reviews and survey assessments were

used to gather data. Individual interviews and focus group discussions were held with the groups represented in the study: female judges, attorneys, offenders and victims.

To engage the participation of women within the courts, formal letters were written to a focal person within the courts, which were then distributed to other judges and attorneys. Attorneys willing to participate in the study were met in their own offices, and judges were visited in the courts. Female claimants were also solicited in the courts. The research team approached the participants and provided them with information on the background and purpose of the research project. All interviews with female claimants, judges and attorneys were conducted behind closed doors in the court. Without prior notification, it would not have been possible to meet with representatives from the courts. More importantly, without connections it would have been impossible to meet with the women because of the sensitive nature of the study. The research group knew key people in the courts, and their familiarity with our previous work enabled us to carry out this study.

Female offenders were solicited in the Women's Prison. Women who had been recently released but lacked shelter were staying in a centre for newly released prisoners near the prison, and they were also approached to participate in this study. Non-governmental organizations (NGOs) working on women's legal issues also participated and provided information on their activities.

The study aimed to ensure the participation of both rights-holders and duty-bearers. Although



both groups provided meaningful insights, challenges did exist given the sensitive and political nature of the topic being addressed. Contesting a system takes courage, especially when that system is institutionalized and supported at a political level. The women who were addressing their concerns and sharing their experiences were engaging in a political act: one that was empowering but also, if dealt with unethically, could have invited harm. Each participant had her own concerns about engaging with the research study. Female attorneys had much at stake, as they openly shared their views on Iran's governing laws, justice system and their own experiences as women in a largely male-dominated sphere of work. In the past, women who had expressed their concerns within the legal system had faced serious repercussions; and in this instance, they worried that their jobs would be on the line. Ensuring confidentiality and anonymity was crucial in order to provide the necessary confidence to participate in the study.

Many of the female offenders questioned the study. Women in the prisons were disheartened by

the fact that this was not the first research being conducted where their lived experiences were surfacing on paper. Despite these studies, their fate had not changed nor had they ever been provided access to the final research findings. They questioned the nature of 'participatory research' and identified it as a process that ended once data was collected. In the light of this, the participants of this study were assured that they would be given a copy of the report so that they could see how they had contributed to the study and take note of the recommendations made for future programming.

Using surveys, which respondents in the prisons completed at their own convenience as interviews were prohibited, reduced the level of fear since the offenders were submitting answers in total anonymity. We found that this 'neutral' medium created space for better and more detailed data gathering. While the written questionnaires provided no room for increased engagement, the interview process was less structured and focused on being open-ended and sensitive to the condition of the respondents.

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## **4. RECOMMENDATIONS**

The purpose of this research was to provide the opportunity for marginalized women to voice their lived experience and, in doing so, to exercise greater influence over the decisions that most affect their lives. With the information gathered, we hope to create positive change and ultimately offer the space for women, as rights-holders, to feel more empowered and, while doing so, hold duty-bearers increasingly accountable.

The women in this research study were able to evaluate their condition within the existing legal, social and economic context. Their experiences and knowledge feed into our recommendations in relation to human rights based approach programming. The following recommendations are proposed:



### Human rights education

There appears to be a large gap in the justice system *vis-à-vis* knowledge about and application of human rights. In order to stop current practices that deny the need for a human rights-based approach, capacity-building initiatives targeting those implicated in the system are crucial. The issue of human rights needs to become more prominent within the courts and Iranian law. This will disrupt traditional assumptions, and possibilities for collective learning will emerge. It will be particularly useful to make linkages between human rights and Islam and to integrate them within the legal context.

Traditional leaders, judges, lawyers and students of law should engage with human rights education and understand how to apply it effectively in their work. This will enable greater consistency and adherence to human rights principles and impact on the decisions they will make. Key partners in this process are academic and research institutions, the judiciary and key human rights centres in Iran.

### Increased involvement of non-governmental organizations

There is a critical need for service programmes that provide women at risk with support and access to information. Specifically, this study identified a lack of shelters for battered women, sexual assault support agencies, legal aid and information centres where women can seek information about their rights. Enabling NGOs to provide such services would contribute to bringing taboo subjects that have been restricted to the private realm into the public domain. Developing such centres will serve to support women who have had the courage to speak out against the various forms of violence they have encountered and to seek support, legal aid and redress.

In addition to support services for women at risk, female offenders finishing their sentences would also benefit from integration services aimed at better preparing them as they re-enter the social and economic world. The purpose would be to prevent further offences while also providing therapy for any trauma they may have encountered while incarcerated.

Government backing is required for NGOs to operate on a safe and long-term basis. So far, this support is minimal. UNDP needs to play a more proactive role in building the capacity of civil society to meet the needs of the population, while also working with the government to support the creation of social institutions and networks. This would be a positive step towards strengthening the social response for women experiencing harm, while also acknowledging that victimized women who speak out provide the catalyst needed both to create support services and to encourage legislative change.

### Legal reform

It is important to acknowledge that legal reforms are necessary to bring about effective change aimed at inculcating a stronger sense of accountability to gender, equity and justice in all its true forms. Our research indicates that certain laws discriminate against women and that collective advocacy and action are required to change them. While we cannot expect to see radical changes in a short period, we can begin to inform and advocate on issues that can be changed over time. Working with legal practitioners, members of the judiciary and courts as well as with educators, we can begin to address laws that overtly discriminate between the sexes. Forums, high-level conferences and roundtables can be held to engage in dialogue and

open debate on the laws of concern. This will pave the way for collective lobbying and open discussion on the topic.

Drawing on the strengths of their experiences, women, as a disadvantaged group, can contribute to these forums and enable others to identify the need for change, since they have been subject to the laws that are deeply in need of transformation.

### **Change in cultural attitudes**

Our research has indicated that formal systems are not fully accountable to women, and the structural limitations embedded in cultural and social discrimination against women increase their vulnerabilities and impede their ability to become better integrated in the development process. Shifting cultural attitudes, and challenging socially constructed notions of the category of 'woman', is necessary to disentangle power relations and provide women with opportunities for creating social change. Many of the obstacles that women encounter in their daily lives, and many of the reasons women do not contest their situation, are largely due to the cultural repercussions they expect to face.

Education on gender equality and the deconstruction of the social categories of 'woman' and 'man' at community levels are important initial steps towards changing cultural attitudes for the betterment of all social groups – but women in particular. Sessions which target community leaders and other community members, and where gender is deconstructed and linkages are made between the improvement of the status of women and society in general, are essential for addressing the current situation and for finding a way forward. UNDP can play a lead role in conducting community

training sessions that open up debate and challenge dominant normative thinking on what it means to be a man and what it means to be a woman.

### **Increased international engagement**

There needs to be greater involvement between Iran and the international community. Specifically, existing international measures aimed at promoting and protecting the rights of women need to be ratified. This would oblige the government to improve measures to decrease women's vulnerabilities and the discrimination they encounter at institutional levels. This calls for increased advocacy and dialogue between the North and the South. Critical engagement with both Islam and feminism would contribute to arguments regarding the adoption of CEDAW and provide the building blocks for increased collaboration and effective change.

### **Reforms in the prison system**

A stronger chain of accountability needs to exist for prison workers. Prison workers need to be guided by a code of conduct and ethics. They would also benefit from receiving training to enhance their awareness of their responsibilities and the rights of female prisoners. More effective monitoring of what occurs in the prisons also needs to be conducted.

The practice of research and writing insists on exposing realities on the ground. It is our responsibility as advocates and practitioners for change to take this work and effect positive change through the framework of a human rights-based approach. The proposed changes are not revolutionary but provide possible alternatives that can have a meaningful impact on the lives of women in Iran and, ultimately, on all of society.



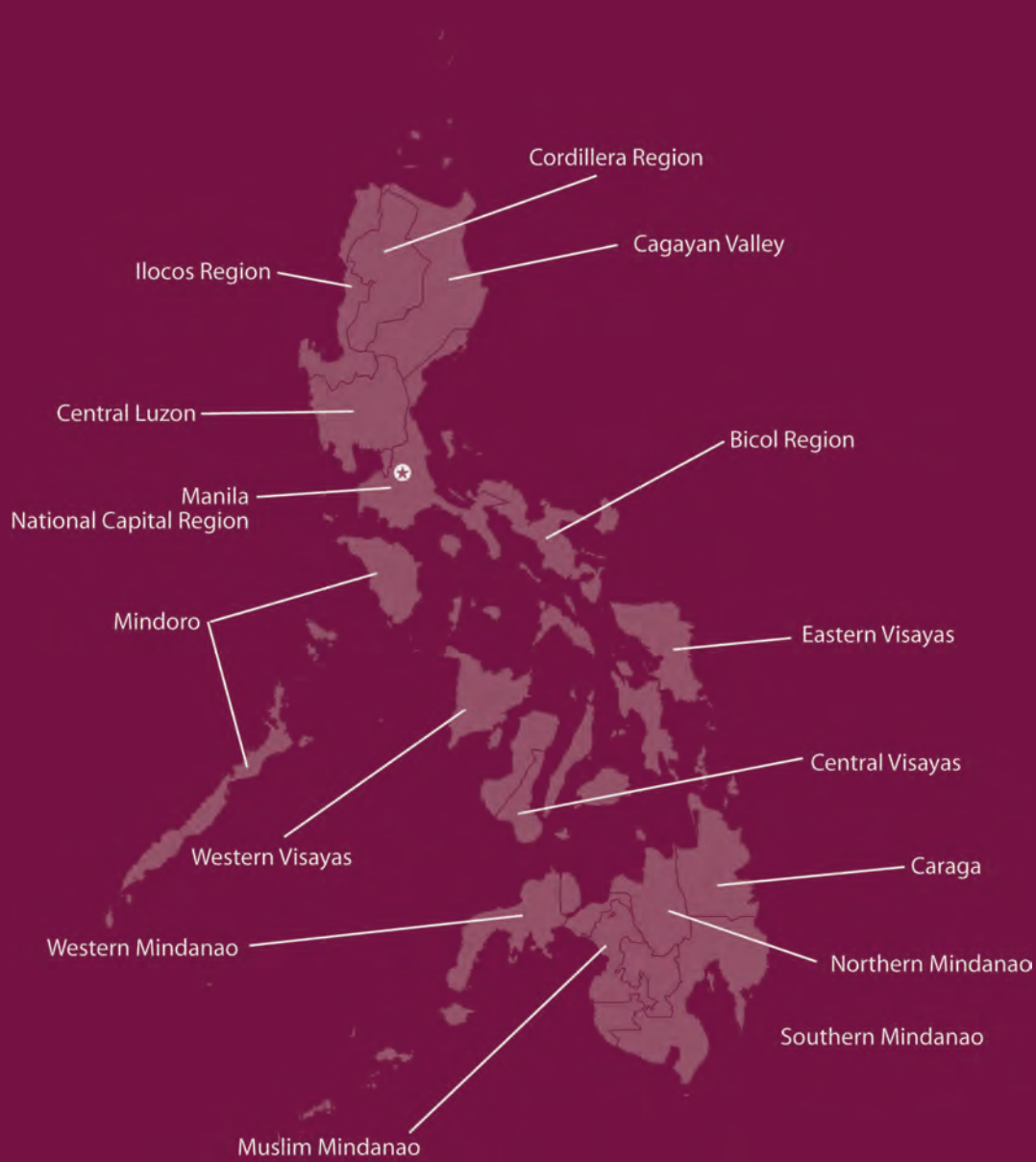
# The irony of social legislation: reflections on formal and informal justice interfaces and indigenous peoples in the Philippines

Prof. Marvic M.V.F. Leonen

## ACKNOWLEDGMENTS

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# PHILIPPINES



## ACRONYMS

AMME	Asian Ministerial Meetings for the Environment
DENR	Department of Environment and Natural Resources
ICC	Indigenous cultural communities
IFMA	Integrated forest management agreement
IP	Indigenous peoples
IPRA	Indigenous Peoples Rights Act
NCIP	National Commission on Indigenous Peoples

## INTRODUCTION: THE HEURISTIC

Cayat, an *Ibaloi*<sup>1</sup>, was fortunate to have been found languishing in the jail by a young enterprising lawyer. He was convicted of violating Philippine Act No. 1639. That law made it unlawful for any native of the Philippines who was a member of a 'non-Christian tribe' to possess or drink intoxicating liquor, other than native liquor. Cayat was inebriated and possessed A-1 gin, which was liquor produced in the Philippines but not native to the *Ibaloi*.

His lawyer challenged the discriminatory act legally by promptly filing an original petition for *habeas corpus* with the Philippine Supreme Court. The legal argument was simple. Act No. 1639 violated the equal protection clause of the Philippine Constitution.<sup>2</sup> Therefore, it was null and void *ab initio*. Thus, the continued detention of Cayat, albeit under warrant of a final judgment, was really without any legal justification.

In *People v. Cayat*<sup>3</sup> the Supreme Court, recalling established doctrine in the Philippines and in the United States, concluded:

"It is an established principle of constitutional law that the guaranty of the equal protection of the laws is not violated by a legislation based on reasonable classification. In resume, therefore, the Legislature and the Judiciary, inferentially,

and different executive officials, specifically, join in the proposition that the term 'non-Christian' refers, not to religious belief, but, in a way, to geographical area, and, more directly, to natives of the Philippine Islands of a low grade of civilization, usually living in tribal relationship apart from settled communities."<sup>4</sup> Theoretically, one may assert that all men are created free and equal. Practically, we know that the axiom is not precisely accurate. The Manguianes, for instance, are not free, as civilized men are free, and they are not the equals of their more fortunate brothers. True, indeed, they are citizens, with many but not all the rights which citizenship implies. And true, indeed, they are Filipinos. *But just as surely, the Manguianes are citizens of a low degree of intelligence, and Filipinos who are a drag upon the progress of the State*" (emphasis added).

The resulting discrimination was obvious. Even those who are uninitiated in the process of formal legal reasoning can easily unmask the decision.<sup>5</sup> Yet the legal foundation for the State's paternalistic attitude to indigenous groups persisted, affecting the allocation of rights of individuals belonging to these communities.

The irony, however, is that the very advanced principle on non-discrimination enshrined in no

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<sup>1</sup> The *Ibaloi* is an ethnolinguistic grouping composed of different communities, organized by clans and found in the lower portion of the Cordillera mountain range of Luzon, Philippines.

<sup>2</sup> "No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the law."

<sup>3</sup> 68 Phil 12, 18 (1939). Unless specified otherwise, citations of cases refer to reports of Philippine Supreme Court cases.

<sup>4</sup> *Rubi v. Provincial Board*, 39 Phil. 660.

<sup>5</sup> See for instance the statement made by noted Philippine Historian Dr. William Henry Scott, Sagada, 29 May 1986, where he says: "I have always rejected the term 'cultural minorities' because it seems to divide the Filipino people into two groups: the majority and the minority. I consider it harmful for two different reasons... In the first place, human nature being what it is, it invites exploitation of the one group by the other; and in the second place, it disguises the real division of the Filipino people into two groups: the rich and the poor, the overfed and the undernourished, those who make decisions and those who carry them out."

less than the Philippine Constitution was construed to limit the freedoms of significant populations of indigenous groups.

This paper examines the notions of interface between formal and informal justice systems in the Philippines, as well as the necessary trade-offs in working these two systems with the interfaces that have been mandated by several statutes. It ends with tentative proposals for future directions, not only for

considering interfaces between these two systems, but also future projects that would enrich this interface. For obvious purposes, the goal of this analysis is to enrich the opportunities of marginalized populations in the Philippines and invoke the coercive powers of the official national legal system in their favour. In order to focus the inquiry, this paper concentrates on the problems of indigenous peoples.

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## WHO ARE THE INDIGENOUS PEOPLES IN THE PHILIPPINES?

The best way to define who indigenous peoples are would be to ask them. But then, when this is done, the common retort, from those who consider themselves as indigenous, would be to ask why the question was asked in the first place, and why the need for an answer?

The question assumes *a priori* that there is a difference and that the difference is significant. While this may from a certain perspective be true, development organizations need to understand some of the dangers in categorization. As Iris Marion Young warns:

“Social groups who identify one another as different typically have conceived that difference as Otherness. Where the social relation of the groups is one of privilege and oppression, this attribution of Otherness is asymmetrical. While the privileged group is defined as active human

subject, inferiorized social groups are objectified, substantialized, reduced to a nature or essence. Whereas the privileged groups are neutral, exhibit free, spontaneous and weighty subjectivity, the dominated groups are marked with an essence, imprisoned in a given set of possibilities. Group differences as otherness thus usually generates dichotomies of mind and body, reason-emotion, civilized and primitive, developed and underdeveloped.”<sup>6</sup>

Most of the credible work on indigenous peoples in the Philippines starts with an admission that it is difficult to define precisely who indigenous peoples are without admitting how peoples in the Philippines have been divided by its colonizers or committing some fundamental error in identities.<sup>7</sup> Always, the question is for what purpose we are defining who indigenous peoples are.

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<sup>6</sup> Young, Iris Marion, “Together in Difference: Transforming the Logic of Group Political Conflict,” in Kymlicka, Will, *The Rights of Minority Cultures* (Oxford: 1999), p. 158.

<sup>7</sup> A good discussion is found in Gatmaytan, Augusto B., “Peoples: A View of Indigenous Peoples in the Philippines,” LRCKSK, Unpublished Policy Paper, 1999.



Development agencies should be aware that devising programmes based on continuing the categorization of Filipinos into indigenous and non-indigenous is a historically- and culturally-bound act; because it is used to address historically created disadvantages, the distinction needs to be temporary. Because it is a cultural construct, we should always be aware of other relevant categorization of a collective group of human beings. There is no universal or unambiguous definition of who indigenous peoples are.

Whoever works for indigenous peoples should therefore craft an operational definition, which will be heavily informed by their work agenda. The operational definition should not be considered as a given and should be subject to periodic evaluation.

A number of criteria, however, have been developed to recognize the identities of indigenous peoples. The National Commission on Indigenous Peoples (NCIP)<sup>8</sup> lists 110 ethno-linguistic groups as belonging to its official category of indigenous peoples, partly based on these criteria. NCIP believes that indigenous peoples constitute 17 percent of the total population and occupy about 5 million hectares from a total of 30 million hectares of land area.<sup>9</sup>

The categorization of Filipinos, based on being 'indigenous', continues to this day and only temporarily corrects the political agenda of the colonizers. Except for those who are naturalized, all Filipino citizens and their ancestors are indigenous in a sense. Officially therefore, the view of

indigenous peoples as backward and barbaric, which had been the interpretation of the Court since *Rubi v. Provincial Board of Mindoro*,<sup>10</sup> has now been changed. The specific use of the term 'indigenous cultural communities' in the Constitution was a constitutional recognition of the intricacies and complexities of culture and its continuity in defining ancestral lands and domains.<sup>11</sup> The choice of "Indigenous Peoples" in the IPRA, as well as the recognition and promotion of their rights, was a departure from the negative stereotypes instilled by our colonizers.

In a way, maintaining the distinction between indigenous and non-indigenous people allows for affirmative action to be introduced, as an attempt to correct a historical injustice by specifically defining more rights and entitlements to those who were systematically discriminated against in the past.<sup>12</sup>

Following this tradition, indigenous peoples have been identified based on their general geographic origins in the Philippines. Thus, when we speak of indigenous peoples, we usually refer to peoples who inhabit the Cordilleras, the Caraballo Mountain Ranges, the Sierra Madre Mountain Ranges, Palawan, Visayas Islands and Mindanao.

However, categorization based on ethno-linguistic affiliation fails to capture discussions and debates within communities regarding the use of customary law, the relationship of indigenous communities to the culture of outsiders and the role of local government institutions *vis-à-vis* their

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<sup>8</sup> Created by the Indigenous Peoples Rights Act (Rep. Act No. 8371).

<sup>9</sup> NCIP, National Situationer, unpublished document presented during the 2002 budget hearing.

<sup>10</sup> 39 Phil. 660 (1939). The racial slurs have been apparent in other cases such as *U.S. v. de los Reyes*, 34 Phil. 693 (1916), *People v. Cayat*, 68 Phil. 12 (1939) and *Sale de Porkan v. Yatco*, 70 Phil. 161 (1940).

<sup>11</sup> See for instance the exchange between Regalado, Davide and Bennagen, Records of the Constitutional Commission, 33-34 (28 August 1986) during the Second Reading of P.R. No. 533.

<sup>12</sup> See LRCKSK, Memorandum for Intervenors, *Cruz v. NCIP*, 2000 in LRCKSK, "A Divided Court" 2001.



own customary political units. The cultures of almost all indigenous communities in the Philippines are open to interactions with outsiders. In fact, it is possible to identify a number of customary norms which pertain to rules governing the treatment of 'aliens', as there has been a great deal of trade and other forms of contact with other indigenous groups both inside and outside the Philippines. As a result, cultures have been dynamic. They have evolved in various ways as a result of interaction with outsiders and changes in the economic, political and social system outside their communities.

Within their communities, there are a number of ways in which the dimensions of the interfaces between indigenous culture and the outside world are discussed. Again, there is significant variation among communities within ethno-linguistic groups as to how this discussion takes place or whether it takes place at all. For instance, younger *datu* (community leader) may debate with elder *datu* on how non-formal education institutions should be set up within their community.<sup>13</sup> Community reactions

as to how gender issues are discussed with communities by outsiders (which includes NGOs) may reveal their preferences as to this interface.<sup>14</sup>

Ethno-linguistic categories identify groups but do not suggest *a priori* assumptions about the dynamics of their communities and the individuals within these communities.

Finally, the definition of what an indigenous community is should not be accepted as a fixed concept. Identities are always contested. They are always conveniently relocated by loyalties to constructed groups and the reasons why these groups become distinctive. The definition of identities is above all dictated by political agendas. Their exact definition can be left to the dominant group, if we accept the categories of the status quo, or a tool for empowerment, and if these categories are properly understood, deconstructed and used.

A lot depends on the purposes for intervention, for those who would want to define the basic unit that will receive their services or resources.

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## TRADITIONAL INTER-PENETRATION OF FORMAL AND INFORMAL JUSTICE SYSTEMS

Formal and informal justice systems have never been exclusive of each other. Although they exist independently, they have always inter-penetrated each other's domain.

Thus, litigants in court normally communicate with each other through their lawyer or other informal channels to arrive at a negotiated settlement. These communication channels go beyond

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<sup>13</sup> Intervention of Datu Tony Lumadnong, Higaonon, Focus Group Discussion, Cagayan de Oro, March 2003.

<sup>14</sup> Focus Group Discussion, Davao City.

opportunities for negotiation provided under Court Rules.<sup>15</sup> In addition to *People v. Cayat*,<sup>16</sup> there have also been cases where the formal adjudicatory processes delivered results that recognized customary informal processes. We examine, as additional heuristics for this paper, the cases of *Pit-og v. People*<sup>17</sup> and *Carino v. Insular Government*.<sup>18</sup>

Erkey Pit-og, along with three other *Kankanai*,<sup>19</sup> gathered sugarcane and banana trunks in areas which were considered to be part of their *tayan*. The *tayan*, among the *Kankanai*, is an area owned by a collective grouping in their community and is used principally as a watershed. The *tayan* in this case was under the management of specific individuals. It was shown that Erkey Pit-og was a member of that group.

The municipal circuit trial court convicted Pit-og for the crime of theft. Reading the provisions of the Revised Penal Code, it saw that all the requirements for the crime to have occurred were present. The Regional Trial Court affirmed this decision, but the Supreme Court reversed it. In finding for the accused, the Court observed:

“We see this case as exemplifying a clash between a claim of ownership founded on customs and tradition and another such claim supported by written evidence but nonetheless based on the same customs and tradition. When a court is beset with this kind of case, it can never be too careful. More so in this case, where the accused, an illiterate tribeswoman who cannot be expected to resort to written evidence of ownership, stands to lose her

liberty on account of an oversight in the court’s appreciation of the evidence.

We find, that Erkey Pit-og took the sugarcane and bananas believing them to be her own. That being the case, she could not have had a criminal intent. It is therefore not surprising why her counsel believes that this case is civil and not criminal in nature. There are indeed legal issues that must be ironed out with regard to claims of ownership over the *tayan*. But those are matters which should be threshed out in an appropriate civil action”<sup>20</sup>

Custom, as fact, was used to create a reasonable doubt sufficient to acquit. However, the allocation of rights between the parties in the conflict was not clearly resolved. At the time this case was decided, there could not have been any way that the official national legal system could decide using customary law.

*Carino v. Insular Government*<sup>21</sup> provides another set of problems in the use of formal justice systems. The operative facts from which the legal issues arose were found by the court to be as follows:

“The applicant and plaintiff in error (Mateo Cariño) is an *Igorot* of the Province of Benguet, where the land lies. For more than fifty years before the Treaty of Paris, April 11, 1899, as far back as the findings go, the plaintiff and his ancestors had held the land as owners. His grandfather had lived upon it, and had maintained fences sufficient for the holding of cattle, according to the custom of the country,

<sup>15</sup> Rule 18, Revised Rules of Civil Procedure allows amicable settlement and alternative dispute resolution as part of pre-Trial proceedings.

<sup>16</sup> 68 Phil 12, 18 (1939).

<sup>17</sup> G.R. No. 76539, 11 October 1990.

<sup>18</sup> 41 Phil. 935 (1909).

<sup>19</sup> An indigenous community that lives in the Mountain Province of the Cordillera Region, Philippines.

<sup>20</sup> *supra*.

<sup>21</sup> 41 Phil. 935, 212 U.S. 449 (1909).

some of the fences, it seems, having been of much earlier date. His father had cultivated parts and had used parts for pasturing cattle, and he had used it for pasture in turn. They all had been recognized as owners by the *Igorots*, and he had inherited or received the land from his father, in accordance with *Igorot* custom. No document of title, however, had issued from the Spanish crown...In 1901 the plaintiff filed a petition, alleging ownership..."<sup>22</sup>

In a paper written by the Cordillera Studies Programme, they point out that the *Ibaloi*, to which ethno-linguistic group Mateo Cariño belonged, had no concept of exclusive or alienable ownership. They did not 'own' land as one owned a pair of shoes. Instead, they considered themselves stewards of the land from which they obtained their livelihood. During the early part of Benguet's history however, a few of the *baknang* mined gold, which was then exchanged for cattle. This resulted in the establishment of pasture lands. Later, to prevent the spread of rinder pest disease, cattle owners set up fences. It was only with the erection of these fences that new concept of rights to land arose.

The real factual circumstances, the evidence of which may have not been appreciated by the court, are significant in that the exclusive right to use the land – ownership as we understand it – was only a relatively new development and which, by custom, applied only to pasture land.

The court focused only on the issue of "whether plaintiff (Cariño) owned the land". It did not focus on the kind of property tenure Mateo had with respect to the kind of land involved. The law, which the judge

was implementing, was simply not equipped to assist him in realizing this important point.

Cariño carved out a doctrine which is advantageous in so far as it assists in the creation of an exception to the Regalian Doctrine and, perhaps, recognizes certain legal rights of these peoples. Lynch observed that "Cariño remains a landmark decision. It establishes an important precedent in Philippine jurisprudence: *Igorots*, and by logical extension other tribal Filipinos with comparable customs and long associations, have constitutionally protected native titles to their ancestral lands."<sup>23</sup>

The inter-penetration of formal and informal justice systems also takes place not only through judicial decisions, but also through enactment of legislation. Recently, Congress passed Republic Act No. 9285 or the Alternative Dispute Resolution Act of 2004. This law declared that party autonomy would be the guiding principle in determining the resolution of disputes.<sup>24</sup> The law recognized "alternative dispute resolution" methods as part of the officially recognized systems. However, not all disputes are covered by party autonomy. Thus, the law expresses its preference for adjudication for topics that it considers of the public interest, for example, labour disputes, the civil status of persons, the validity of a marriage, grounds for legal separation, the jurisdiction of courts and criminal liability.<sup>25</sup>

Being very recent, the empirical impact of these provisions in the law is very difficult to assess. For indigenous peoples, however, the provisions of the Indigenous Peoples Rights Act (IPRA) are more relevant.

<sup>22</sup> Id, at 936-937.

<sup>23</sup> Lynch, Owen J. "Native Title, Private Right and Tribal Land Law: An Introductory Survey," 57 Phil. L. J. 268, 278 (1982).

<sup>25</sup> Rep. Act No. 9285, section 6.

## THE INDIGENOUS PEOPLES RIGHTS ACT

On 29 October 1997, the President of the Republic of the Philippines finally passed the Indigenous Peoples Rights Act of 1997 (IPRA); the new law came into effect in the context of a new constitution,<sup>26</sup> after more than 10 years of legislative advocacy by indigenous and non-governmental organizations. Formally, the law is the legislature's interpretation of some key provisions of the constitution directly relating to indigenous peoples.

Article II mandates that the state "recognizes and promotes the rights of indigenous cultural communities within the framework of national unity and development." Article XII particularly commands the state to "protect the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social and cultural

well-being." It also authorizes Congress to provide for "the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain."

The Indigenous Peoples Rights Act of 1997 implements these provisions by enumerating the civil and political rights and the social and cultural rights of all members of indigenous cultural communities or indigenous peoples. It also recognizes a general concept of indigenous property right, granting title thereto, and creates a National Commission on Indigenous Peoples (NCIP) to act as a mechanism to coordinate implementation of this law as well as a final authority that has jurisdiction to issue certificates of ancestral domain/land titles.

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## CIVIL AND POLITICAL RIGHTS

Foremost in the law is its recognition of the right to non-discrimination of indigenous peoples. In an unfortunately verbose<sup>27</sup> section of the law, it states:

"Equal protection and non-discrimination of ICCs/IPs<sup>28</sup> – Consistent with the equal protection clause of the Constitution of the Republic of the Philippines, the Charter of the United Nations, the Universal Declaration of

Human Rights including the Convention on the Elimination of Discrimination Against Woman and International Human Rights Law, the State shall, with due recognition of their distinct characteristics and identity, accord to the members of the ICCs/IPs the rights, protections and privileges enjoyed by the rest of the citizenry. It shall extend to them the same employment rights, opportunities, basic

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<sup>26</sup> After the overthrow of the Marcos dictatorship, the government immediately moved to promulgate a constitution in 1987. The provisions of this constitution were inspired by the "people power" euphoria that was then sweeping the country.

<sup>27</sup> That the section is subject to the Constitution of the Republic of the Philippines is obvious, given the hierarchy of our rules and that this law is being promulgated by the same state. International law already forms part of the law of the land, so that it would have been best not to reiterate these international instruments, some of which already provide *jus cogens* rules. Finally, that "force or coercion shall be dealt with by law" is obviously redundant and considered as a technical oversight.

<sup>28</sup> ICCs/IPs is the acronym for Indigenous Cultural Communities/ Indigenous Peoples.

services, educational and other rights and privileges available to every member of the society. Accordingly, the State shall likewise ensure that the employment of any form of force or coercion against ICCs/IPs shall be dealt with by law.<sup>29</sup>

Clearly, ethnicity is now an unacceptable basis for classification, unless it is in “due recognition of the characteristics and identity” of a member or a class of indigenous peoples. Classification now should be allowed only to provide affirmative action in their favour. Cases such as *People v. Cayat*,<sup>30</sup> where the Philippine Supreme Court leaned over backwards and placed judicial imprimatur on government action discriminating against a “cultural minority”, are now things of the past. Under the Indigenous Peoples Rights Act, such notions are not only archaic but also outlawed. Indigenous peoples are entitled to the same rights and privileges as citizens,<sup>31</sup> should not be discriminated against in any form of employment<sup>32</sup> and should receive more appropriate forms of basic services.<sup>33</sup>

The IPRA, therefore, performs the traditional role of social legislation. It corrects an otherwise abominable judicial interpretation. The new law even goes further to ensure the rights of women,<sup>34</sup> children<sup>35</sup> and civilians caught in situations of

armed conflict.<sup>36</sup>

The law also recognizes the right of indigenous peoples to “self-governance”, to wit:

“Self-governance – The State recognizes the inherent right of ICCs/IPs to self-governance and self-determination and respects the integrity of their values, practices and institutions. Consequently, the State shall guarantee the right of ICCs/IPs to their economic, social and cultural development.”<sup>37</sup>

In accordance with the provisions of the Constitution,<sup>38</sup> customary law will also be the set of norms that would be used in case of conflict about the boundaries and the tenurial rights with respect to ancestral domains.<sup>39</sup> Doubt as to its application or interpretation will be resolved in favour of the ICCs/IPs.

Finally, any offended party may opt to use customary processes, rather than having the offender prosecuted in a court of law.<sup>40</sup> The penalty can be more than what the law provides for so long as it does not amount to cruel, degrading or human punishment. Also, customary norms cannot legitimately impose the death penalty or grant excessive fines.

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<sup>29</sup> Section 21, Rep. Act No. 8371 (1997).

<sup>30</sup> 68 Phil. 12 (1939).

<sup>31</sup> Section 21, Rep. Act No. 8371 (1997).

<sup>32</sup> Section 23 and 24, Rep. Act No. 8371. The later provision makes it a crime to discriminate against indigenous peoples in the workplace.

<sup>33</sup> Section 25, Rep. Act No. 8371 (1997).

<sup>34</sup> Section 21, Rep. Act No. 8371 (1997). The 2nd paragraph ensures that there be no diminution of rights for women under existing laws of general application.

<sup>35</sup> Section 27, Rep. Act No. 8371 (1997).

<sup>36</sup> Section 22, Rep. Act No. 8371 (1997).

<sup>37</sup> Section 13, Rep. Act No. 8371 (1997).

<sup>38</sup> Section 5, 2nd paragraph, Art. XII, Consti.

<sup>39</sup> Section 63, Rep. Act No. 8371.

<sup>40</sup> Section 72, Rep. Act No. 8371.

## SOCIAL AND CULTURAL RIGHTS

Section 29 of the new law lays down state policy with respect to indigenous culture. Pursuant to this policy, it requires that the education system becomes relevant to the needs of “children and young people”<sup>41</sup> and provide them with “cultural opportunities.”<sup>42</sup> Cultural diversity is recognized. Community intellectual rights<sup>43</sup> and indigenous knowledge systems<sup>44</sup> may be the subject of special measures. The rights to religious and

cultural sites and ceremonies are guaranteed. It is now unlawful to excavate archaeological sites in order to obtain materials of cultural value as well as defacing or destroying artifacts. The right to “repatriation of human remains” is even recognized.<sup>45</sup> Funds for archaeological and historical sites of indigenous peoples earmarked by the national government may now be turned over to the relevant communities.<sup>46</sup>

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## RECOGNIZING RIGHTS AND TENURE TO NATURAL RESOURCES

Tenurial and ownership rights created under the new law are always subject to those rights that have been recognized under the constitution and its various interpretations.

The legal concept underlying the government’s position with regard to full ownership and control of natural resources has been referred to as the Regalian Doctrine.<sup>47</sup> On the other hand, private vested property rights are basically protected by the due process clause<sup>48</sup> of the constitution.

The Regalian doctrine proceeds from the premise that all natural resources within the country’s territory belongs to the state.<sup>49</sup> This dates back to the arrival of the Spaniards in the Philippines when they declared all lands in the country as belonging to the King of Spain. Since then, successive governments have mistakenly taken this as the foremost principle underpinning its laws and programmes on natural resources.

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<sup>41</sup> Section 28, Rep. Act No. 8371 (1997). Possible conflicts of interpretation might ensue between the concept of “young people” as used in this section and “youth” as used in Section 27 of the same law.

<sup>42</sup> Section 30, Rep. Act No. 8371 (1997). The section, however, does not settle whether quotas or affirmative action may be given in various levels of education. It is, however, broad enough to provide the basis for such action.

<sup>43</sup> Section 32, Rep. Act No. 8371 (1997).

<sup>44</sup> Section 34, Rep. Act No. 8371 (1997). See also Section 36 on agro-technical development.

<sup>45</sup> Section 33, Rep. Act No. 8371 (1997).

<sup>46</sup> Section 37, Rep. Act No. 8371 (1997).

<sup>47</sup> Section 2, Art. XII, provides “All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated.”

<sup>48</sup> Section 1, Art. III, provides “No person shall be deprived of life, liberty or property without due process of law...”

<sup>49</sup> See *Krivenko v. Director of Lands; Gold Creek Mining v. Rodriguez*, 66 Phil. 259 (1938).

Governments have continued to assert, through legislative enactments, executive issuances, judicial decisions, as well as practice, that rights to natural resources can only be recognized by showing a grant from the state.<sup>50</sup> A recent case, *Cruz v. NCIP*,<sup>51</sup> provided the Supreme Court with an opportunity to correct this perspective. Unfortunately, a sufficient majority was not attained to create the doctrine.<sup>52</sup>

The constitution, however, also contains some basis for recognizing the rights of indigenous peoples over their lands; even without a law, as being private – that is - neither the public nor the government owned or controlled them.

The IPRA is the source of a different concept of ownership. By legislative fiat, there are now legitimate ways of acquiring ownership to ancestral domains and lands.

*Ancestral domains* are defined as all areas generally belonging to ICCs/IPs, comprising lands, inland waters, coastal areas, and natural resources therein, held under a claim of ownership, occupied or possessed by ICCs/IPs, by themselves or through their ancestors, communally or individually since time immemorial continuously to the present.<sup>53</sup>

*Ancestral lands*, on the other hand, are defined as land occupied, possessed and utilized by individuals, families and clans who are members of the ICCs/IPs since time immemorial, by themselves or through their predecessors-in-interest, under claims of individual or traditional group ownership, continuously, to the present.”<sup>54</sup>

The rights of holders of ancestral domains are found in the new law under an indigenous concept of ownership that sustains the view that ancestral domains and all resources found therein shall serve as the material basis of their cultural integrity. The indigenous concept of ownership generally holds that ancestral domains are the ICCs/IPs private but community property, which belongs to all generations, cannot be sold, disposed of or destroyed. It likewise covers sustainable traditional resource rights.<sup>55</sup>

Unlike the emphasis on individual and corporate holders in the Civil Code, the Indigenous Peoples Rights Act emphasizes the “private but community property” nature of ancestral domains. Aside from not being a proper subject of sale or any other mode of disposition, ancestral domain holders may claim ownership over the resources within the territory; develop land and natural resources; stay in the territory; have rights against involuntary displacement; can regulate the entry of migrants; have rights to safe and clean air and water; can claim parts of reservations; and can use customary laws to resolve their conflicts.<sup>56</sup>

Duties are, however, imposed on the holders of these titles.

All of these rights are subject to Section 56 of the law. This has been a difficult point of debate among advocates. The section provides that “property rights within the ancestral domains already existing and/or vested upon effectivity of this Act shall be recognized and respected.”<sup>57</sup>

<sup>50</sup> See Rep. Act No. 7942 (1995) or the Philippine Mining Act; Rep. Act No. 6940 (1993); Rep. Act No. 7076 (1993) Small Scale Mining Law; Pres. Dec. No. 705 (1974) as amended or the Revised Forestry Code; Director of Lands v. Funtilar, 142 SCRA 57 (1986), among others.

<sup>51</sup> December, 2000.

<sup>52</sup> Seven justices voted to declare the IPRA as constitutional, six declared it as unconstitutional, and only one dismissed the petition on procedural grounds. The Constitution requires a majority of justices voting to create new doctrine.

<sup>53</sup> Section 3 (a), Rep. Act No. 8371 (1997).

<sup>54</sup> Section 3 (b), Rep. Act No. 8371 (1997).

<sup>55</sup> Section 5, Rep. Act No. 8371 (1997). Sustainable traditional resource rights are defined in Section 3 (o).

<sup>56</sup> Section 7, pars. (a) to (h), Rep. Act No. 8371 (1997).

<sup>57</sup> Section 56, Rep. Act No. 8371. LRC-KSK had suggested to the bicameral committee to limit its operation to only those with torrens titles and with powers of review given to the National Commission on Indigenous Peoples.

## IRONY OF THE LAW

The weakness of the law notwithstanding, marginalized indigenous peoples' communities still need to have access or control over their ancestral domain. Insights can be gained from the consequences suffered by communities availing of these provisions of the law.

The growing consensus in the current literature is that their control over their ancestral domains provides the material bases not only for their

physical survival, but also for their cultural integrity. This recognition has been won in the Indigenous Peoples Rights Act.<sup>58</sup>

Section 5 of the IPRA is a milestone, as it provides legal arguments against the prevalent notion that all resources are still owned by the state. However, it also brings with it new issues that need to be confronted when engaged in advocacy on behalf of indigenous peoples.

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## POLITICAL VULNERABILITY AS A RESULT OF UNDERDEVELOPMENT

Almost all indigenous leaders assert that there must be some interface between their concepts of how things are done and the technologies and insights coming from other communities. Almost no indigenous leader advocates for some degree of iconoclasm. There is no debate, and nothing in their history proves otherwise. The dynamic of local cultures is influenced by dealings with outside cultures. There is also no debate that, whatever the arrangement, it needs to start with a degree of political autonomy given to the community, the peoples' organization, the family, or clans involved. There is a growing recognition that cultural processes should also be used in order to be able to find the appropriate and acceptable interfaces between indigenous and non-indigenous cultures.

However, the current economic environment is hostile to these aspirations. It also weighs heavily against the ability of indigenous communities to make truly free and autonomous choices. The relative successes that have been made in the arena of law and policy should also be made against this backdrop. Impoverished economies of indigenous peoples experience pressure from several sources. Increasing population, environmental degradation resulting from local and commercial activities coming from varied sources, expanding costs of goods and services such as medicines and other health services, gasoline and transportation, groceries, etc., weigh heavily on different households. To start with, many of these communities already live at the subsistence level, if not below the poverty line. Many are still dependent on agriculture or related activities.

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<sup>58</sup> Section 5, Rep. Act No. 8731.



The infrastructure needs of communities, e.g. water, electricity, roads, etc., require large amounts of capital which can only come from government investment. Other needs such as education and health may already be provided by the government but are lost to corruption, culturally insensitive and irrelevant programmes, or simply unexpended because of the inability of a local government unit or government agency to convince the Department of Budget and Management to release the necessary financial resources. It also needs to be said that indigenous peoples are not represented in these bodies.

The lack of education and political experience assured lack of representation which, in turn, kept these economic issues hidden. The cycle repeats itself with a deadly precision.

Indigenous communities are therefore very vulnerable to offers that are made by large commercial interests wanting to extract natural resources within their ancestral domains. They are also likewise vulnerable to government projects that may not be acceptable culturally but provide some relief.

To a certain extent, economic necessities also make many indigenous communities very vulnerable to becoming involved in NGO programmes which may not be culturally sensitive or that will simply exploit the uniqueness of their processes. If communities had been given a genuine choice, it is possible that they may have chosen a livelihood or educational project, rather than a community mapping exercise that will not result in the issuance of a title.

This is not to say, however, that community mapping has no intrinsic value in itself. It is just that

some of the choices made by NGOs also have to be discounted by the level of participation made by indigenous communities. Again, this is not to say that works on community mapping, resource planning and official recognition of ancestral lands and domains are not important. They are, but the question needs to be viewed in the context of a more expansive view of empowerment of indigenous peoples' communities, i.e. one that focuses not only on paper, legal or political victories, but on the whole ethno-linguistic groups as its base. Empowerment should be seen from the intervention's effect on everyday community life, the autonomy that results from more control of their local economies and whether there still is political vulnerability of a local community *vis-à-vis* commercial, governmental (and even NGO) interests.

Originally intended to recognize ownership of ancestral domains in 1988,<sup>59</sup> politicians took advantage of its presence to provide for a virtual *magna carta* for indigenous peoples. It is, however, too broad. Concrete mechanisms for its implementation were not adequately spelled out, except for the process of gaining paper recognition of ancestral lands and domains.<sup>60</sup> Thus, while some social, economic and cultural rights are mentioned broadly, no provisions for both budget and programmes are mentioned in the law.

This view of underdevelopment and political vulnerability shows that the Indigenous Peoples Rights Act may not be enough. Perhaps, laws that involve commercial exploration, development and utilization of natural resources must also be reviewed. Legal recognition of indigenous processes means nothing if economic security/autonomy is a mere afterthought.

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<sup>59</sup> S.B. 909 or the Estrada bill originally drafted by the Legal Rights and Natural Resources Center-Kasama sa Kalikasan (LRCKSK).

<sup>60</sup> See Leonen, Marvic, "The IPRA: Will this bring us to a new level of Political Discourse," in *Philippine Natural Resources Law Journal* (2000).

## COMMUNITY STRUGGLES

The struggles of local communities to ward off encroachments into their territory, and threaten their existence, are not new. What has become more pronounced in recent history has been the ability of peoples' organizations to act independently, or in concert with non-governmental institutions, to coordinate the use of official national and international forums with determined and creative local direct action. This has happened whether the encroachments came from public or private infrastructure projects, commercial extractive natural resource industries, or even from public or private programmes masquerading as sustainable development mechanisms.

Examples of campaigns against public or private infrastructure projects include the concerted action against the Chico River Hydroelectric Dam Project in the 1970s; the Task Force Sandawa campaign

against the Commercial Geothermal Power Plant in Mt. Apo in the early 1990s; the coalition against the Agus River Project in Mindanao; and the present day efforts to block the construction of the San Roque Multipurpose Dam in Benguet.

Examples of actions against commercial extractive natural resource industries include the campaign to declare a commercial logging ban in the 1980s; the public furor over tree plantations styled as integrated forest management agreements (IFMAs); and the present concerted efforts against the Philippine Mining Act of 1995 and its implementing rules and regulations. Projects masquerading as sustainable development projects have drawn concerted and relatively organized campaigns, including contract reforestation, the Community Forestry Programme and even the National Integrated Protected Areas Project.

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## THE INTERNATIONAL ENVIRONMENT

Pressure from international financial institutions mattered. Funding for projects had a lot to do with the changing attitude of the governments towards relinquishing control over large portions of the public domain and recognizing rights of upland migrants.

In 1988, the World Bank study on forestry, fisheries and agricultural resource management<sup>61</sup> made an assertion that:

"The natural resource management question in the Philippines is inextricably bound up with the poverty problem.... The issue is also closely related to the problem of unequal access to resources, and this study concludes that any strategies for improving natural resource management will founder if they do not simultaneously address the issues of impoverishment and unequal access."<sup>62</sup>

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<sup>61</sup> This study was done by Country Department II, Asia Region. The White Cover version was distributed for comment on 16 May 1988.

<sup>62</sup> Executive Summary, WB, Ffarm, I (1988). See also p. 58, 81 which defines the core strategy.

The influence of Asian Development Bank was even more specific. A technical assistance project carried out through Department of Environment and Natural Resources (DENR) resulted in a Master Plan for Forestry Development. Like the World Bank study, it called attention to the minimal participation and benefits that reached upland farmers.<sup>63</sup> It recognized the claims made by cultural communities to their ancestral lands and goaded the government to proceed to survey, delineate and give them privileges to manage forest resources.<sup>64</sup>

The Master Plan also proposed a policy to “recognize the right of indigenous cultural communities to their ancestral domain” and provided for a rough timetable for its accomplishment.<sup>65</sup>

International financial institutions, such as World Bank and Asian Development Bank, have been the focus of advocacy campaigns by peoples’ and non-governmental organizations.<sup>66</sup> In 1994, partly as a result of this lobby, some governments – notably the United States – refused to allow a general capital increase of Asian Development

Bank unless projects addressed social and environmental concerns.<sup>67</sup> Obvious in the policy recommendations from these agencies were linkages between conservation or natural resource management and indigenous peoples. Very little has been said about recognizing their rights simply to correct historical injustices.

As the concerns of indigenous peoples have been closely linked with well-funded ecological concerns, it is no wonder that there has been an unfortunate prevailing view that their rights should be recognized only because they would be better ecological managers. Thus, the new law provided an obligation to reforest<sup>68</sup> and to condition rights recognition to a priority for watersheds.<sup>69</sup> The obligations to ensure ecological stability do not attach to any other private owner except those that wish to hold ancestral domains. The recognition of indigenous peoples’ rights is an aspect of human rights advocacy more than simply an environmental concern. These provisions clearly reflect how much of the environmental agenda has taken over the need to correct historical and social injustices.

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<sup>63</sup> The passage read: “There is very little participation of upland farmers and community members except as labourers in the concession or processing plant. Having very minimal or no participation at all, upland farmers do not benefit or have very little benefit from the use of the resource.”

<sup>64</sup> Department of Environment and Natural Resources (DENR), Master Plan for Forestry Development, 324-325 (1990).

<sup>65</sup> DENR, Master Plan for Forestry Development, 331-332 (1990). Two years (1991-1992) were to be used to “clear the concept”; 1992-1993 for “piloting” the master plan and 1993-1995 for “implementation of the plan.”

<sup>66</sup> See for instance the NGO Working Group on the Asian Development Bank which started its lobby in 1988. This is housed by the LRC-KSK. There are about 210 NGOs from different countries that belong to this network.

<sup>67</sup> 27th Board of Governors Meeting in Nice, France (May, 1994).

<sup>68</sup> Section 9, Republic Act No. 8371 (1997).

<sup>69</sup> Section 58, Republic Act No. 8371 (1997).

## INDIGENOUS PEOPLES, COMMERCIAL ENTERPRISES, GLOBALIZATION AND THE ENVIRONMENT

It is hardly surprising that it was the DENR that took the responsibility of spearheading the government's efforts to attempt to recognize rights to ancestral domains. Many of its local offices are found in upland areas where indigenous peoples are affected by commercial natural resource extractive projects.

This department, which represents the Philippines in Asian Ministerial Meetings for the Environment (AMME) is also charged with finding ways to link environment and developmental concerns. This pressure comes not only from advocacy groups, but also, more importantly, from international concerns, especially financial institutions that promise resources for ecological projects.

The result is an administration that has been eager to project its compliance with international environmental obligations, while at the same time proceeding with privatizing its assets and utilities and deregulating in order to facilitate more private transactions and engage in liberalization initiatives so that it becomes 'competitive' on

world markets. This agenda has proven to be contradictory, especially in the natural resource management sector.

This same administration promulgated the Philippine Agenda 21 and the National Agenda for Sustainable Development in the same year.<sup>70</sup> On the other hand, the budget of the principal agency that is supposed to carry out community-based programmes, as well as its performance, reveals an altogether different record.

This contradiction between policy rhetoric and performance bodes ill for the implementation for the challenges presented by the Indigenous Peoples Rights Act. But this should be better understood if seen through the policy imperatives that caused it to be enacted. Pressure to respond to community interests and special projects of international funding institutions may have been enough for policymakers to grant these concessions, but the pressure of continued commercial exploitation provides the strongest inertia to its full implementation.

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## RECOMMENDATIONS

1. Projects and programmes involving marginalized cultures by engaging the legal system must focus on those where the imminent danger is the greatest;
2. Communities that *most* need legal intervention are those in areas where there usually is conflicting commercial or governmental interest actually occupying indigenous territory

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<sup>70</sup> See Memorandum Ord. No. 288, s. 1995 directing the formulation of the Philippine Agenda 21. Also, Memorandum Ord. No. 399, s. September, 1996 directing the Operationalization of the Philippine Agenda 21 and Monitoring its Implementation.

- or threatening to curtail use and possession. Commercial projects mostly take the form of extractive natural resource industries (logging and mining); power projects (mostly hydro-electric in nature); or real estate projects. Government interest can be in the form of already existing reservations (forest, mining, military, education), forestry projects (community forestry programmes) or even ecological initiatives (protected areas);
3. Communities that *least* need legal intervention are those where indigenous political and social institutions are still strong and where there is no threat to curtail use or possession. Legal intervention requires the use of existing law as a whole. Many of the laws that could favourably be applied to indigenous peoples (including the Indigenous Peoples Rights Act) do not entirely square with the interests of specific communities. Resorting to the law sometimes introduces a host of new issues, which are totally unnecessary for the community;
  4. The utility of informal justice systems is not only about whether there are alternative processes. It will, to a large degree, be about whether the substantive norms in the official national legal system are relevant to the needs of marginalized communities or vulnerable sectors. Hence, studies on justice systems should go beyond the procedural framework. It should perhaps just as urgently focus on the substantive clarification of norms within a legal order;
  5. A more empirical review of the impact of the alternative systems introduced in the Philippines is urgently needed. Time should be spent not only in documenting cases that have been diverted from the formal adjudicatory processes, but also on whether the expectations coming from marginalized communities are indeed addressed by the Katarungang Pambarangay system, the Alternative Dispute Resolution Act or the Indigenous Peoples Rights Act;
  6. Resources must not only be invested to allow marginalized stakeholders to engage in and test social legislation, but they must also likewise be invested to continuously examine any other legislation that may have economic or political impact. Thus, while indigenous peoples may become involved with all the processes governed by the Indigenous Peoples Rights Act, they may perhaps be more severely affected by the Mining Act or the Forestry Code. Unfortunately, they will also most certainly suffer from the misallocation of government resources.





# Participation and representation of disadvantaged groups in parliamentary processes in the Philippines

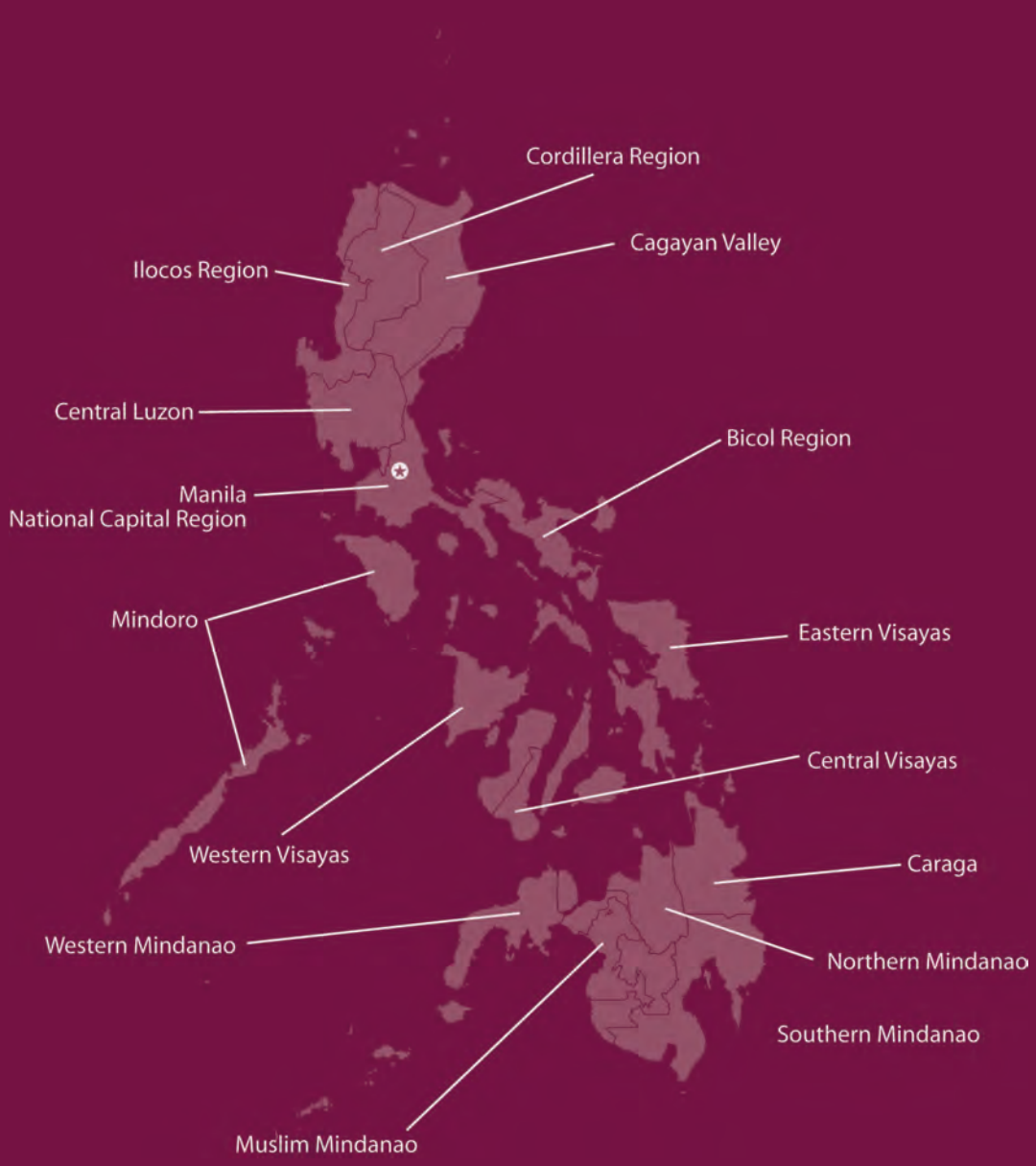
Ledivina V. Cariño

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# PHILIPPINES





## ACRONYMS

EDSA	The Philippine Revolution of 1986
ILO	International Labour Organization
NACFAR	National Coalition of Fisherfolks for Aquatic Reform
NGO	Non-governmental organization
SRA	Social Reform Agenda
UN	United Nations
UNDP	United Nations Development Programme

## 1. OVERVIEW

The Constitution of 1987 encourages all organizations “to pursue and protect, within the democratic framework, their legitimate and collective interests and aspirations through peaceful and lawful means.” This study presents how different disadvantaged groups managed to get policy issues considered in the Philippine Congress. A lot of information came from the disadvantaged groups themselves, and from five case studies written by the groups, which we supplemented with interviews and a focus group discussion of heads of Congress technical secretariats. We also combed through original documents emanating from the groups and Congress. The number of discussions and interviews with participants was reduced as the country was under a state of national emergency at the time of the study.

The cases studied are the passage of the Comprehensive Agrarian Reform Law, the Urban Development and Housing Act, the Fisheries Code, the Indigenous Peoples Rights Act, the Anti-Child Labour Law, the Anti-Rape Law of 1997, the Social Reform and Poverty Alleviation Act, and the defeat of anti-terrorism bills. The first seven affected

landless tenants, the urban poor, fisherfolks, indigenous communities, children, women, and all disadvantaged groups, respectively. These bills, all of which became law, were originated and pursued by the most affected sectors themselves. The anti-terrorism bills were initiated by the government but opposed by human rights, labour, church, corporate, professional and people’s organizations.

The cases represent most of the significant policy proposals affecting disadvantaged groups from 1987 to 2003. Two peaks in the number of social legislation may be noted: the Eighth Congress (1987-1992), the period following the People Power Revolution which opened up democratic space after the ouster of the Marcos dictatorship, and the Tenth Congress (1995-1998), which coincided with the Social Reform Agenda (SRA), a package of interventions to attack poverty and attain social justice, equity and peace. The study extracts lessons from these cases to help other disadvantaged groups, NGOs, legislators, UNDP and other development partners to improve human rights programming by legislative means.

## 2. KEY FINDINGS

The disadvantaged groups used various avenues of access and strategies for reaching parliamentarians. These are analyzed below.

### Avenues of access

The People Power Revolution made the legislature more permeable to people outside the political forces, including disadvantaged groups. The electoral process and civil society's ability to put new issues into the public agenda complement access to the legislative mill itself.

#### Entry through the electoral process

District representation of Congress, disadvantaged and marginalized groups can use the party list system, a constitutional innovation designed precisely for them. Representatives of labour, women, veterans, the disabled and mass organizations have been elected through the party list system. However, church-related, business and other groups that are not as disadvantaged have also been accredited and have won under that system.

Some of the benefits of the party list system include the ability to place issues of relevance to the disadvantaged on the public agenda, as well as the recruitment of non-traditional legislators and voting that puts a premium on causes rather than personalities and wealth. Women's elected party list representatives and their counterparts from other sectors, who were appointed rather than elected during the transition period, also helped disadvantaged groups to introduce and enact their bills.

However, the definition of "marginalized" is still unclear. That has put sectors that are not clearly

marginalized in the party list and non-poor persons as their representatives. The acceptance of broad categories, such as 'organizations' and 'political parties', without reference to disadvantaged sectors, opens the system to everyone. The general lack of information and knowledge of the populace about the party list system suggests that the causes they represent are also not known or appreciated by the voters.

Disadvantaged groups have also been able to get the support of regular legislators for their bills, especially if the latter joined the disadvantaged in their protests against the dictatorship.

Unfortunately, leaders of the disadvantaged rarely get elected through the regular system. Their lack of funding made them unable to muster the finances required by the very expensive electoral process. Thus, many of them joined any party that would accommodate them, and this affected their credibility in the eyes of their natural constituencies.

#### Entry through setting the public agenda

This refers to the idea of disadvantaged groups getting considered in legislation through their ability to incorporate themselves into the public agenda, even before the bills were themselves filed. Their respective agenda were usually forged in consultations, many involving not only a large number of people, but also a wide spectrum of groups. Their views then became the point of departure in the deliberations. The indigenous communities put ancestral domain and indigenous peoples' rights into public consciousness. The way agrarian reform child labour, and rape were discussed in Congress, was based on how the disadvantaged groups wanted

to define them. The point of departure for the discussions on fisheries development and urban housing was what the government had on its agenda. Disadvantaged groups, joined by middle-class allies, even forced the State to withdraw their draconian views on how to deal with terrorism.

**Access to the legislative mill**

Table 1 presents the possible access routes and intervention activities of groups at each step of the legislative process. In capital letters in

the first column are the formal parts of the legislative process. The second column lists the formally accepted ways outsiders may intervene in that process. The third column shows how the groups have been allowed to intervene in the cases we have discussed, suggesting many more acceptable means of access. Please note that the activities listed here are only those in the legislative track. Mass actions are not shown and may take place simultaneously with any step in the process.

**Table 1: Formal and informal access routes and activities of disadvantaged groups to Congress**

<b>Legislative process</b>	<b>Formal access routes and activities</b>	<b>Informal access routes and activities</b>
Putting issue into public agenda		Undertake consultations with constituencies; convince legislators of the need for bill
Drafting of bill	Write position papers; present ideas for bill	Draft bill; choose sponsor; prepare sponsorship speech
First reading	Attend in gallery	Prepare strategy with sponsor; get the President to certify bill
Assignment to and study by Committee in charge	Discuss bill with the Chair, members and sponsors	Suggest issues to be tackled, people to be invited to hearing, calendar convenient for constituency; learn committee priorities; befriend committee secretariat and technical people in respective House; get the Chair to invite group's representatives into technical working group
Committee on rules for calendaring		Suggest a convenient calendar for constituency
Second reading	Attend in gallery	Lobby for non-negotiables with sponsor or committee in charge; in floor deliberations, slip questions to interpellations to legislator, as needed
New Committee draft with amendments as proposed in plenary or by committee		Suggest wording of amendments and form of revised bill

**Table 1: Formal and informal access routes and activities of disadvantaged groups to Congress (continued)**

Legislative process	Formal access routes and activities	Informal access routes and activities
Third reading	Attend in gallery	If vote is to be explained, prepare legislator's statement
Legislative process in the second house		Same close-guarding as in first house
Deliberations of Conference Committee on reconciled version of Senate/House bills	May be permitted as part of technical working group or as observer, depending on bicameral agreements	If not allowed in, may prompt a person or technical working group to work out provisions to get committee out of impasse (during breaks or between committee meetings)
Approval of reconciled version	Attend in gallery	Help committee draft final version; make sure sponsors and allies are present to vote
Approval by the President		Lobby the President to sign bill

In addition to being aware of possible acceptable activities, we have learned from the cases the need to emphasize the following:

- The importance of strategic thinking and action;
- Confrontation with negotiation and compromise;
- Parallel informal interventions;
- The importance of access to the second house;
- The importance of access to the conference committee;
- Recognition of the role of the executive in the legislative process.

**1. The importance of strategic thinking and action**

Other things being equal, the groups that thought out their moves ahead of time, especially those that integrated them into the overall strategy, would come out ahead of the

game. For example, indigenous peoples and fisherfolks failed to get their proposals enacted in the Eighth Congress, but both were successful in the Tenth. It was easier for indigenous peoples to work in the later period because they would by then have a coalition and leadership to guide the impressive two-stage (regional and national) consultations and adoption into the Social Reform Agenda. The National Coalition of Fisherfolks for Aquatic Reform (NACFAR) was more mature and had more resources the second time around. In addition, its strategy included choosing the main sponsors and triangulating Congress with two "Unity" bills, as well as getting into SRA and orchestrating media coverage and mass action at strategic time periods. The government-NGO strategy, coupled with perceptible pressure from ILO and UN, was the secret behind the Anti-Child Labour Law's smooth sailing through the legislative process.

## **2. The role of negotiation and compromise**

In facing off with strong opponents, the groups armed themselves with negotiation skills, and, in turn, their list of priorities had greater chances of winning a bill they could live with. A no-compromise stand only solidifies the opposition, especially from congresspersons known to be representatives of the advantaged.

## **3. The parallel informal interventions**

Informal interventions can follow one of two tracks: legislative and mass action. In the legislative track, informal interventions can take place at all stages of the legislative process. From our cases, we saw that these could include: inclusion of representatives of disadvantaged groups in the work of the technical committees, meetings with individual legislators, and intervention by prominent civil society leaders.

The mass action track includes marches and demonstrations, which are the staple modes of civil society activities. These actions keep the issues in the streets and on the media agenda while congressional deliberations are going on, and add to their salience and urgency. The groups have also added the use of tent cities, complete with exhibits and workshops to attract the attention of legislators and their staffs who became “educated” on the demands of the groups on the spot. Another innovation is the “express” rallies, with demonstrators starting from different points in the countryside and converging in the House or the Senate. Meanwhile, to fight the anti-terrorism bills, the groups packaged terrorism with other issues which are easier for the masses to grasp and showed power through paralysing transport strikes and large demonstrations.

## **4. Access to the Second House**

The Philippine Congress is a bicameral one. Although some groups strategically choose which house to penetrate, they learn in due time that they need to show their interest in both houses and, if time and resources permit, lobby in both simultaneously. A method that has worked well is maintaining friendly relations with committee secretariats, since they could alert the lobby groups about breaking developments.

## **5. The Role of the Bicameral Conference Committee**

The conference committee (usually known as the ‘bicam’) is supposed to reconcile the bills that passed in the two Houses. Where the bills have markedly different provisions, however, the committee members, as agents of their respective chambers, hammer out compromise provisions thought to be acceptable to their principals. In several cases, this process spelled the victory or doom of a measure.

This study found that the bicam, formally regarded as a closed-door session, can be penetrated by non-legislators. Involvement in the bicameral committee shows the close-guarding that disadvantaged groups have to maintain to get their bills approved.

## **6. The role of the Executive in the legislative process**

Under the Philippine Constitution, the Executive has formal roles in the legislative process: to certify certain bills as urgent and to approve or veto a bill approved by both Houses, in whole or in part. The Executive may also draft “administration bills,” that is a bill emanating from a government agency (not just the Office of the President) and sponsored by a friendly

legislator. These bills, like the certified ones, have the force of the presidency behind them. In addition, executive agencies may participate in public hearings, respond to the question hour and be called upon to testify in investigations undertaken by Congress in aid of legislation.

Designating a bill as urgent will guarantee that it will be considered as a priority. It also implies that the President is likely to approve it, making its journey through the legislative mill rougher or smoother depending on whether or not it is an opposition congress. Presidential approval is an important step in the process, since other forces can intervene after Congress has spoken.

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## **QUALITIES FOR SUCCESSFUL POLICY ADVOCACY**

Success in legislative intervention consists of the qualities the active forces bring to the endeavour. These include, from the disadvantaged groups as well as their protagonists, their internal capacity and external linkages.

### **Internal capacity**

The first quality of disadvantaged groups is commitment to their cause. These are evident in their level of knowledge of the issue, in their pre-legislation experience and history, and in their willingness to devote time and resources to unpaid work, even staying in the heat of streets to proclaim their allegiances. Part of the passion comes from the fact that the groups were immersed in the social realities of the constituencies they were representing, or were in fact members of those constituencies. Most have experience of community movements and have also been veterans of mass actions that helped them both internalize the issues and bond them to the larger affected community. That bonding was also shown by the beneficiaries who showed up in the consultative meetings, mass actions and formal public hearings.

But passion has to be channelled, and the groups did this through strategic visioning and planning (already discussed above), organization and institutionalization, capacity-building and other management processes. All the groups involved in our cases worked in coalitions or were part of a team. Most had secretariats for the time of the campaign, including some borrowed from the parent organizations. Some had funds from an external organization, usually international.

However, some organizations faced the common problems of coalitions, such as twin loyalties to the coalition and to their parent-organizations, giving rise to suspicion and breaks of unity. Not being a separate organization, it becomes a disbanded project after passage of the law. On the other hand, separate organizations do continue to represent the sector for its other concerns.

The roles of each of the organizations put together for lobbying purposes must be delineated for smoother relations and flow of work.

## **External linkages**

Four potential partners regularly made their appearance in our cases: the Church, international organizations, the government and citizens at large. These add to the strength of a disadvantaged group but may also be the cause of other problems.

The prominence of the Roman Catholic Church in these bills underscored its pronouncement of a preferential option for the poor and was welcomed by the disadvantaged groups. However, it has not lent its voice to progressive views on women's issues.

Also, an international push is not an unmixed blessing. It may facilitate the passage of a bill, but it might also cause resentment when some legislators see their presence as the country's 'blind obedience' to international standards instead of answering our own peculiar needs.

Another role played by international organizations is the resources they give for nation-wide consultations, advocacy and training in lobbying and other capacities. This involvement by 'outsiders' needs to be better understood and investigated.

Collaboration with the government would normally strengthen a measure, since the Executive is an active constituency in legislation. Ramos' Social Reform Agenda (SRA) made the failed bills of the Eighth Congress come alive in the Tenth. Even here, however, there were problems in the details, since so many claimed the SRA banner but were conflicting in their provisions.

Last but not least is the linkage of the groups to the people at large. This may be carried out through mass action and the media. There is a perceptible decrease of reliance on the mass action track after the Eighth Congress. Perhaps this is due to the growth of knowledge about how the legislative process works and the organizations' subsequent attempts to professionalize their approach. However, as the mobilization against the anti-terrorism bills showed, it can still be impressive and effective when used.

Mass action is usually thought of as a way to unite a group's constituency and show Congress the strength of its forces. It can also be used to connect with the people at large and to convince them that their agenda is the public's interest and not only their own. As in the EDSA revolutions<sup>1</sup>, their mass actions would have remained simple demonstrations if the people outside their membership did not join in. This is also why having favourable media coverages and understanding by the people at large have strengthened the forces of the disadvantaged.

## **The opposing forces**

While the passion of the opposing forces for their cause cannot be gainsaid, they in fact used few public venues. They did not have to do much more. More than the disadvantaged groups, the opposing forces had natural allies, if not actual members, in both Houses. They could be counted on to vote against a bill or to water down a proposal considerably.

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<sup>1</sup> EDSA is also referred to as the People Power Revolution and the Philippine Revolution of 1986.



## CONCLUSIONS: DISADVANTAGED GROUPS AND THE STATE

Dominance of the elite in Congress is still marked, not only in their numbers, but also in their positions. The compromises the disadvantaged made ate into their non-negotiables. They had to accept backing so far down to grasp at that first start at reform.

Was social legislation, then, simply a show-window exercise? We cannot assume insincerity among the officials of the State, just because they did not accept the poor's demands. However, there were instances when even those who seemed to have lined up with the disadvantaged virtually abandoned them in the difficult stages. To support a disadvantaged group's demands plays well in the media and the masses; that could translate to votes. But in the less public arena of the legislative process, the poorer groups, not having legislators who are one of them, can still be left in the lurch.

So, how were these bills passed at all? Aside from the determination of disadvantaged groups, credit must go to the political environment and officials of the State who risked political capital to support their demands. The Eighth Congress began with the glow of the EDSA Revolution, when the Philippines basked in the international limelight as the leader in concretizing the power of the people. The poor had clearly voted on the side of parliamentary processes, rather than armed struggle, and had acted on their belief that a democratic space had been opened. The commission that drafted the Constitution of 1987 also acted on that premise and put provisions supporting the disadvantaged groups and civil society into it. The expectations translated into a political opportunity that could be harnessed and matched by efforts of those seeking new benefits. Many congressional leaders regarded as

'progressives' kept their alliance with the people who suffered during the dictatorship.

However, disappointments came early. President Aquino did not dissociate herself from her class and hardly lifted a finger to bolster the agrarian reform that the Coalition for a People's Agrarian Reform wanted. Later, her recognition of the staunch support of civil society in the face of coups against her brought her back to their side with an urban housing act that, however, was watered down from a proposal for urban land reform. The government bureaucracy did not help much either. Instead of giving support, the bureaucracy tended to insist on provisions that strengthened the hand of the richer constituents *vis-à-vis* the disadvantaged.

With the Ninth Congress, it seemed the euphoria of EDSA would completely dissipate. However, President Ramos had campaigned on a platform of 'people empowerment' and inaugurated the Social Reform Agenda (SRA) in the second half of his term. A strategy to fight poverty put new impetus to the struggle of difficult bills of the disadvantaged groups. Certification by the President put urgency on them and got even the congressional leadership to support them. However, no group got their demands approved outright as some details remained unresolved, including the benefits that would be dispensed. Who was going to be affected? Who was going to participate? Also, the SRA was a policy forged in the context of the embrace of globalization and economic liberalization. So, instead of leading the charge in transforming the nation, the bills of the disadvantaged became the equivalent of safety nets, given because the other policies were surely going to hurt them. With rising criminal activities

and a resurgence of communist violence, the enactment of these bills could come close to placating the poor. Not quite, because there were genuine advances won by fishers, indigenous peoples and suffering women. Besides, the government did back down from its anti-terrorism bills. But questions can also be raised as to why commercial fishers got what they wanted from the bicameral, or why mining advocates won their bids immediately after the passage of the Indigenous People's Rights Act, which had stringent requirements.

Still, a lesson to be learned from the cases is that the State is not a monolith that is programmed only for certain kinds of decisions. If nothing else, the cases show that the State is now an active

participant in the struggle and that there are officials with similar vision and values as the disadvantaged. Perhaps more than that, there are leaders who listen to technical arguments and are willing to act on new ideas.

It is incontrovertible that laws favoured by disadvantaged groups have been enacted. While these may leave much to be desired, their passage alone shows that the opposing forces are not omnipotent and can be challenged. The disadvantaged have numbers and passion on their side, enhanced by capacity, strategic thinking and alliances. Also, glimpses of problems in implementation suggest the necessity for keeping one's constant and untiring interest on the measure.

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## **RECOMMENDATIONS**

In light of the foregoing, several recommendations for action and research may be advanced.

### **Disadvantaged groups**

1. Prepare your policy agenda to promote the causes you stand for and your rights. Continuously study how your causes have been or can be translated into policy. In this and most of the measures enumerated below, undertake deliberative consultations with as many of your members as possible. The democracy you practice in your organization strengthens your advocacies;
2. Arm yourselves with the knowledge of legislative processes and the points of access and activities other disadvantaged groups have already used. This can be provided by the more experienced among your group, by support groups and by research institutions. We hope this work can provide assistance to organizations starting out on their own advocacy paths;
3. Prepare a strategy for legislative engagement, taking into account your goals for the sector, your non-negotiables, your capacities and the opponents you will face;
4. Couple your passion and commitment to a cause with deeper knowledge about its ramifications. This can help you to understand opposition to your stance, with the possibility of

- winning over some antagonists by identifying how their problems can be met by your proposal;
5. Take advantage of your nature as an organization in civil society by using a complementary set of legislative and mass actions in advocacy campaigns;
  6. Learn the art of compromise, as well as its moral hazards. Treat your antagonists with respect and assume they have the same commitment to the public interest as you. When in negotiations, recognize that you are fighting for your welfare and that of your constituents, as their opponents are fighting for theirs. Therefore, conduct negotiations with due respect for the humanity of the other. This should hold true whether the negotiations are with other civil society groups, with opposing forces or with the State;
  7. Improve your internal capacity for advocacy through:
    - Enhanced management of coalitions;
    - Focused professional staff. They may be volunteers who are willing to be identified only with the coalition or organization pushing for a bill for the duration of that struggle. This would minimize questions of loyalty and conflict of interest in the period of the campaign;
    - Specialization and division of labour, whenever appropriate. This will minimize duplications and inefficiencies, and increase the overall effectiveness of the team;
- Conduct of research on the issue itself, your group's possible allies and adherents, and ways to convince or neutralize known opponents;
  - Development of a stronger resource base, including funding. Diversified sources of funding would be preferred, since reliance on only one may lead to the possibility of being driven by the fund and the agenda of the donor, rather than by the agenda of your own disadvantaged sector;
8. In dealing with Congress, recognize the value not only of the elected officials, but also of technical secretariats that can assist you through the legislative maze;
  9. Strengthen the links with external forces, such as the Church, international organizations and the people, but be aware of the dangers of exclusive reliance on one external partner. Learn from your external allies, develop your own platform and eschew 'blind obedience' to any one particular force;
  10. Find out how the State can be an ally or partner. Many parts of the government apparatus have policies and personnel sympathetic to causes of the disadvantaged. They should be befriended, rather than alienated, and shown insights into the groups' experiences rather than ignored and left to the ministrations of opposing forces;
  11. Broaden the base of your organization by recruiting more sector members and allying with like-minded NGOs, both local and international. Never neglect the support of the people and the media in undertaking your activities.

## Recommendations for NGOs and other support groups of the disadvantaged

1. Assist in building capacity of the disadvantaged groups for advocacy, research, negotiations, strategic planning and coalition management;
2. Provide links to national and international organizations that can provide disadvantaged groups with resources for capacity-building, strategic planning and management development;
3. Help to strengthen the party list system. Disseminate information about how it works and how disadvantaged groups may participate in them. However, do not dilute its purpose by becoming a party list organization yourself, since participation of intermediary organizations of the middle class or elite would take away votes for genuine and direct representatives of the marginalized;
4. Support politicians who stand by the causes of disadvantaged groups. Engage in voter education so that more citizens will learn to connect their votes with the accountability of the elected officials to them.

## Recommendations for the State

1. Recognize that social legislation is vital to the economy and the nation, and is not charity to the poor;
2. Strengthen the party list system by reinforcing its original concept as an avenue for disadvantaged groups and ensuring that it is not a backdoor for elite interests. Study how it

can continue to function within the proposal of a constitutional change towards a parliamentary system;

3. Make the legislative process more accessible and transparent to all groups, not only to the elite, or those who are experienced in advocacy campaigns.

## Recommendations for UNDP and other development partners

1. Disseminate findings of this and similar studies to disadvantaged groups who need to advocate for legislation to protect their rights and improve their social situation;
2. Support disadvantaged groups through the legislative mill and capacity-building in the areas discussed above;
3. Encourage parliamentary bodies to learn more about the policy advocacy of disadvantaged groups and the demands for inclusive governance. This would include, but not be limited to, sponsorship of appreciation seminars on those topics; consultative dialogues between parliamentarians and disadvantaged groups, probably by sectoral themes; capacity-building for technical secretariats on understanding and promoting the policy agenda of these groups, etc.;
4. Support research in the areas listed in the next section;
5. Continue to promote inclusive governance through the promotion of human rights-based approach to all sectors.

## Recommendations for research

1. Continue to study management-related issues of advocacy groups, including coalition-building, recruitment of leaders and members, resource generation, and capacity-building;
2. Deepen this study by investigating how pro-poor laws have been implemented and how they have improved the lot of the disadvantaged. This could be fed back into the State to reinforce the national significance of the social legislation that the disadvantaged groups had already won;
3. Study how progressive legislators have managed (not) to be eaten up by the system. This would be instructive in developing the country's next generation of political leaders.





# Promoting inclusive governance in tsunami recovery in Sri Lanka

Aparna Basnyat, Dilrukshi Fonseka and Radhika Hettiarachchi

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# SRI LANKA





## ACRONYMS

CBO	Community-based organization
CHA	Consortium of Humanitarian Agencies
CIRC	International Committee of the Red Cross
CSO	Civil society organization
FAO	Food and Agriculture Organization
HIC	Humanitarian Information Centre
INGO	International non-governmental organization
JICA	Japan International Cooperation Agency
LTTE	Liberation Tigers of Tamil Eelam
MWRAF	Muslim Women Research and Action Foundation
NGO	Non-governmental organization
OCHA	Office for the Coordination of Humanitarian Affairs
OIM	International Organization for Migration
TRO	Tamil Relief Organization
UNDP	United Nations Development Programme
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children Funds
USAID	United States Agency for International Development
WFP	World Food Programme
YMCA	Young Men's Christian Association

## 1. OVERVIEW

The main objective of this case study is to look at the issue of inclusive governance in the context of the recovery efforts deployed after the tsunami in Sri Lanka. It will also look at disadvantaged groups among the tsunami-affected population in two districts, in order to highlight some of the broader issues related to inclusive governance. The study identifies and analyzes the capacity of the affected communities to participate meaningfully in local governance processes related to tsunami recovery; it also examines whether these communities were consulted, informed, involved in decisions related to the flow, allocation and management of resources, and if they had adequate capacity to claim the right to information, accountability and transparency from state and non-state actors. It also seeks to establish whether they had adequate capacity to access redress in the event of exclusion, and the degree and nature of participation in decision-making processes, particularly women within the tsunami-affected areas and those who had been affected by the conflict. Finally, the case study will look at the role and capacity of duty-bearers in service-delivery, especially with regard to identifying and acknowledging the disadvantaged and vulnerable within the affected groups.

The tsunami disaster that struck the Island of Sri Lanka on 26 December 2005 took no heed of geography, ethnicity, gender, class, caste or religion and affected all alike. Although the emotional rhetoric contained in this statement is appealing, it is also erroneous and misleading. Admittedly, the tsunami disaster left no single identity group unscathed. However, its impact was disproportionately distributed among these same identity groups. Those affected populations were not homogenous groups to begin with, but rather lay claim to deep disparities along geographic,

ethno-political, socio-economic, gender and age differences. Depending on the extent and degree of these differences, as well as the intersections between them, some identity groups were more disadvantaged or more vulnerable than others even before the tsunami. In Sri Lanka, this is true of many groups, including populations affected by war in the north and the east and populations living below the poverty line in all parts of the country, including women, children and the disabled. The first task of this case study was to identify pre-existing vulnerabilities in the Sri Lankan context and to highlight how these vulnerable categories were more susceptible to the tsunami disaster and its aftermath.

The context of disaster recovery is unique for many reasons. More often than not, countries and communities that face natural disasters are caught off-guard and are ill-equipped to cope with the sheer magnitude of the recovery process. The resultant scenario is one where those concerned, be they the national government, local authorities, donor agencies, relief efforts and development work, are under stringent timelines to deliver a package of interventions across a host of competing needs and priorities. In such contexts, little thought is given to rights-based approaches, and little attention is paid to developing systems and processes to include affected populations in their own recovery, or give them opportunities to shape the decisions being made on their behalf. While this affects their rights and their needs, it is those already disadvantaged and those that have been further 'disadvantaged' by the disaster that are the most affected. As the case studies bear out, the failure to build inclusive governance into the tsunami recovery process in Sri Lanka has had very particular and serious implications on the

conflict-affected population as well as certain ethnic groups and women, etc. It has likewise contributed to skewing the delivery of recovery in favour of certain groups over others and has even contributed to deepening divides between identity groups in the country.

The first case studies the impact of the tsunami disaster on the eastern District of Ampara. It highlights the disproportionate impact of the disaster on the different ethnic groups in Ampara as well as on other disadvantaged groups, such as the economically and politically-disadvantaged segments of society and women. The study goes on to identify how the absence of inclusive governance structures in the period following the tsunami had several serious implications, including the delivery of recovery along ethnic, ethno-

political and political lines, and the resultant erosion of faith and escalation of animosities between various groups in Ampara. The second case study examines the impact of the disaster on the southern District of Hambantota. Here, the focus is on issues of exclusion based on socio-economic cleavages and the politicization of tsunami recovery, which led to certain groups gaining benefits at the expense of others. It also looks at the dimensions of poverty and gender at the household level within the context of tsunami aid delivery mechanisms. Together, the studies are a commentary on the absence of inclusive governance structures in Sri Lanka; the systemic gaps in capacity and information; the interplay between the political and social constraints, within which the disadvantaged manoeuvre, and how this implicates and complicates disaster recovery.

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## 2. KEY FINDINGS OF THE CASE STUDIES

In the two case studies of Ampara and Hambantota districts, four groups of actors interacted simultaneously in the tsunami aid delivery mechanism: the government through the District Secretariats down to the village level *Grama Niladari*; the INGOs/NGOs where local community members were involved but the main actors usually came from outside the region; the politicians and powerful members of the political patronage hierarchy, i.e. politicians who worked directly with communities or military groups forming part of a political process; and the communities themselves.

### **Trends and practices identified in the Hambantota and Ampara case studies**

#### **Exclusion agents**

The rise of 'exclusion agents' and individuals/groups with vested interests: The interaction of the four groups of actors worked well in the relief phase, especially with the aid delivery mechanism working through formal government channels, and the working relationship established between government institutions and the Liberation Tigers of Tamil Eelam (LTTE) in the north and the east, as

well as through the influx of NGOs (and large amounts of funding) into tsunami-affected districts. However, in the long-term development phase, the aid delivery system was sustained in a tense and uneasy balance between these groups of actors and new groups/individuals that emerged as 'liaison persons' within and between these groups. These 'liaison persons' were mostly members of the communities, local civic leaders both established (e.g. religious leaders/respected persons in society) and emerging (e.g. leaders within refugee camps) who presented themselves as community leaders, speaking on behalf of the people or gained power/political leverage acquired from the specific channels of access that they had with affected communities. These 'exclusion agents' became funding gatekeepers to the community and succeeded in gaining power and control over who has access to aid from the community.

These 'interlinking' personalities became part of the larger system, speaking on behalf of the people, and thus leaving room for solutions to bottleneck as well as avenues for corruption.<sup>1</sup> Because of the lack of organized civil society and strong community-based organizations (CBOs) at the grassroots level, as well as the influx of NGOs and politicians<sup>2</sup> with vested interest, these individuals/civic leaders became the natural choice for people to see in order to mobilize/reach the affected communities.

### **Politicization of tsunami aid-delivery**

The political influence of individuals to enhance their popularity, or ignore clandestine/corrupt

practices of associates in their constituencies, was identified in both studies as a serious hindrance to an effective and fair aid-distribution system. It is also identified as a reason for the diminished capacity of the administrative systems, as politicians influence decision-making processes and/or work outside established administrative structures to manipulate aid delivery. In some cases, these gave rise to the ethnicization and political isolation of disadvantaged groups who had little access to people with influence.

### **Ethnic polarization**

The influx of NGOs, and the additional administrative burden placed on government institutions in the post-tsunami recovery process, contributed to a fragmentation of civil society groups and communities. This, in turn, led to polarization along ethnic lines, especially in the context of tsunami recovery assistance related to land and livelihoods. The intervention of 'exclusion agents' introduced an element of ethnicization in the tsunami aid-delivery process which was premised, in some cases, on affirmatively addressing inequalities while exploiting already existing ethnic divisions in others. Other interventions that indirectly led to ethnic division were for practical purposes (Muslim widows/communities prefer to be separated due to religious/cultural practices) and ease of administration.

The tense post-conflict situation in the country played out differently in the east and the south, as many actors (the government, LTTE, STF, various political parties and politicians operating on the

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<sup>1</sup> The claim often made is that the leaders identified as 'exclusion agents' had the power to identify beneficiaries, negotiate with agencies and thus had immense power to exclude those who were eligible for aid from the 'lists' if their authority was challenged or if complaints were made against them.

<sup>2</sup> The influence of politicians or their actions are not being wholly criticized. In both studies, the political climate is identified as a 'heavy' environment, penetrating into the aid-delivery process beyond the parameters allowed for political personalities or parties. There are positive and negative statements made by the focus groups on the extent of political influence on the aid-delivery process.

basis of their ethnic identities) were involved in post-tsunami aid distributions. This marginalized those affected by the tsunami, fragmenting them even further along ethnic lines. In the highly politicized post-tsunami setting, the actors involved had much higher stakes, as the entire ethno-political balance of the peace process in the north, the east and the south could be altered with land allocations and intentional polarization along ethnic lines of Muslims, Tamils and Sinhalese.<sup>3</sup>

#### **Ethnic selectivity of aid delivery mechanisms**

The exploitation of the most disadvantaged groups within the ethno-political setting of each district by those with vested interests led to the intentional selection of one group over another and specific targeting. The studies illustrate incidents where targeting, to the point of diverting aid to certain groups, served as the affirmative action to compensate the disparities suffered by the most marginalized. However, the study also highlights cases where the systematic prioritization of certain groups, especially ethnic groups, were aimed at exploiting the favour (votes) or prejudices/aspirations of a particular group for political gain.

The powerlessness and marginalization of various ethnic groups meant that they were easily manipulated by 'individuals/exclusion agents' into using their ethnicity to gain advantages in the aid-delivery mechanism. However, the ensuing conflict and tension in such short-sighted actions

were not conclusive as the ploys employed by the exclusion agents were not effective and could not be seen as a sustainable solution to the problem. They were, as in this case, simply efforts by individuals to gain power, prestige and wealth through manipulation and corruption.

#### **Diminished collective bargaining**

The studies concluded that the collective bargaining power of tsunami-affected communities had been undermined by, among others, the fragmentation of civil society and ethnic polarization. The ineffectiveness of collective action against corruption is due to the general apathy of the groups concerned, that 'collective bargaining' would not result in government intervention or solutions/redress to the problems at hand.<sup>4</sup>

However, collective bargaining was encouraged and produced results when practical problems, such as the distribution of houses constructed by NGOs, were disputed and changed according to the needs of the beneficiaries, or when a community had refused to be moved from their original location.<sup>5</sup> A notable fact here is that both studies identify the effectiveness of collective bargaining when something affects the whole community at large and does not include financial gains/loans/grants that allow space for intrusion by groups/people with vested interests or corrupt practices.

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<sup>3</sup> For example, there has always been a hegemonic struggle between the northern and eastern Tamil politicians in eastern Sri Lanka. This was reflected in the internal dynamics of the LTTE, when Colonel Karuna (commanding the Eastern forces) broke away from the LTTE in pursuit of a separate political identity for the East away from the traditional dominance of the North. However, in the East, especially in Ampara, the majority are Muslim. Thus, ethnic fragmentation and polarization based on unequal access to tsunami aid can be exploited easily for political gain by those with vested interests.

<sup>4</sup> The Human Rights Commission later set up help desks in the tsunami-affected districts and are systematically documenting/addressing claims of misconduct. However, the political climate of the districts allows very little actual progress on issues of corruption and aid mismanagement.

<sup>5</sup> Ampara case study – the Muslim Camp refused to relocate and stood firm in asking to be returned to their tsunami-affected plots of land close to the sea in the town of Kirinda. The bargaining continued for months but was successful in the end.

**Civil society organizations at the grassroots level are eroded**

The strength to speak/act and organize on behalf of communities most often rests with CBOs that have a working knowledge of the communities with which they have worked long-term. The primary point of entry/organization of aid, for larger organizations, should be through the grassroots CSOs that are part and parcel of the affected communities. The government mechanism can also benefit from using CBOs as partners and information sources at the grassroots level. However, the CSOs were largely by-passed and presented no resistance to external influences, while also opening up room for exclusion agents and corruption. Although there were clear examples of inter-ethnic and inter-party cooperation in the immediate aftermath of the disaster, unfortunately, there was no mechanism introduced at the grassroots to cement this participatory experience and to take it forth into medium and long-term recovery efforts; a strong CSO base at the grassroots would have added the communities to the aid-delivery process.

**The limited capacity of duty-bearers**

The lack of government awareness of HRBA practices, and when to hold people's consultations, participatory assessments and inclusive practices, has greatly hindered the process of people's involvement in the aid-delivery processes. The fact that most institutions are not able to engage in effective information-sharing with the communities they work with, and educating them on their rights and supporting grievance-redress mechanisms, stems from the fact that most government institutions are ill-prepared for disaster response of this nature and do not have a 'cross-sectional' view of the aid-delivery processes. The lack of a clear, coherent policy for coordination

of aid in the government and NGOs is also attributed to a lack of institutional experience and human resources. Both studies indicate that a more effective government administrative structure could have better coordinated aid-delivery within the districts and could have helped mitigate the adverse effects suffered by disadvantaged groups.

The lack of an assured justice-redress mechanism, which was wholly independent from the government authorities who were heavily patronized by political interests of various political parties/personalities, hindered the process of beneficiary participation in the aid-delivery process, or any recourse to justice in the failure of such a system.

Both studies indicate that the capacity of the administrative structures to ensure fairness and withstand efforts by outside groups with vested interests in preventing the misappropriation of aid was severely lacking. The protracted conflict, for example, had reduced the capacity of the government mechanisms in the north and the east at the time of the tsunami, making it vulnerable to outside influences, as well as severely lacking in basic resources to function effectively. The lack of independence between the government's administrative structures from political interference undermines the strength and will of the administrative structures to address issues of inclusive governance, even in relation to NGO coordination. The resistance within the government structures or on the part of government officials, in recognizing and encouraging the need for collective bargaining as a viable feature of the democratic process through the provision of space for civil society engagement in tsunami recovery, reflects negatively on aid delivery in both districts.

### Limitations in data collection

The scarcity of data and human resources and skills capacity for rapid assessments and data collection thwarts the effective delivery of aid.<sup>6</sup> The lack of good data and rapid assessment skills can leave space for corruption and for the possibility of 'exclusion agents' to hijack aid-delivery processes through their presumed 'proximity and commitment' to the affected communities.

### Gender dimensions

Although the studies do not venture deep into the

gender dimensions of poverty, and how this affected the tsunami aid-distribution, it does briefly explore the particularly vulnerable condition women face and how they are often additionally disadvantaged from accessing aid, especially when they are also part of an ethnic minority, are poor, or are part of a politically marginalized segment of society. The studies indicate that the feminization of poverty was very severe in the case of tsunami aid-delivery, as it did not allow the space for active and constructive engagement of women at the household and civic levels.

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## 3. KEY LESSONS LEARNED IN APPLYING HRBA

From a rights-based perspective, this research is an attempt to see how duty-bearers (both in the government and NGOs) delivering aid could be held accountable by the communities to ensure that they follow the principles of non-discrimination and promote the inclusion of vulnerable and marginalized groups.

In order to promote HRBA in the research process, it is important to first ensure that the research team itself is aware of rights-based approaches and is made up of both men and women. There should be at least one member of the team from the area where the research is being conducted and who is familiar with the communities. It is also necessary

to have at least one member of the team who speaks the language of the communities where the research is being undertaken.

For these case studies, each research team was consisted of a research coordinator and two research assistants.<sup>7</sup> The teams began with desk research, in which background information on the communities was gathered from published work, reports and secondary sources. Newspaper reports and reports from various aid agencies were of particular relevance to the gathering of information on the consequences of the tsunami and the impact on people directly or indirectly affected by it.

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<sup>6</sup> A data collection mechanism should be developed at the district level in order to track the needs of the affected individuals as well as the distribution and progress of aid. This innovation could serve to avoid duplication, corruption and delays associated with the *ad hoc* nature of aid delivery.

<sup>7</sup> The Hambantota research team was led by Lionel Siriwardena, with one female and one male researchers – Kelum Thaladhthadhige and Chandrika Kosgahadurage. The Ampara research team was led by Amarasiri de Silva and two male researchers – one who is Tamil and the other Muslim – Mr. S. Majeed and Mr. Weerasingham Sudehahan

In addition to the background research, it was important to hold community consultations in several locations to identify the research site. Interviews were held with key informants, including community leaders; NGOs working among the affected communities; other field level workers/activists of local NGOs; development officers of banks/microfinance institutions; government district officers, including *Grama Niladaries* and Divisional Secretaries; teachers; and traders to document their views and experience on the impact of aid-delivery mechanism on tsunami-affected marginalized groups and rank them based on vulnerability.

Based on the background and initial field research, a mapping and ranking of disadvantaged and marginalized groups and communities could be conducted, and sample could be selected for an in-depth study, where qualitative and quantitative methods of data collection were used to compile a thorough documentation.

**Hambantota study**

An assessment was carried out in Hambantota to identify the most marginalized areas. Based on the background research and interviews, the town of Kirinda was selected for the study partly because of its isolated location and its mixed Muslim-Sinhalese ethnic population.

Both Muslim and Sinhalese families are equally represented in the study. Two temporary shelter camps were selected for the focus group discussions – one which was predominantly

<b>Name of camp</b>	<b>Total families</b>	<b>Muslim families</b>	<b>Sinhalese families</b>
Shramabhimanava	99	90	9
Small-scale fisheries/ CBOs	49	2	47

Muslim and the other which was predominantly Sinhalese.

In order to be transparent about the research, the team explained to the focus groups the purpose of the discussion and how it would feed into a study on the effectiveness of the recovery process. Questions were posed to the group according to their concerns and experiences of the recovery process.

The entire group was encouraged to participate, and the forum was open to anyone to speak up. After the initial group discussions, individual in-depth interviews were conducted with all the group members. The researchers then went back to the families several times and interviewed the entire household. In this way, they were able to ensure that everyone within the household participated.

During the course of the study, the researchers visited the community several times to clarify and cross-check the interviews with other community members. They also raised the issues with relevant duty-bearers in the course of several subsequent interviews.<sup>8</sup>

Duty-bearers and rights-holders were both given equal space to participate in this study. The group discussion and the in-depth individual/family

<sup>8</sup> The researchers interviewed the following officials: the Principal of the Kirinda Muslim College, the *Grama Niladari* of Kirinda (local government officer), a Samurdhi official, *Grama Niladari* of Andaragasyaya division, a government agent in Hambantota District, NGOs staff, village leaders, members of the JVP/’Rathu Tharu’ organization, Divisional Secretaries, local traders and leaders of local institutions.



interviews provided the rights-holders with an opportunity to air their complaints, concerns and grievances. In some cases, allegations were made against certain officials. The research team held interviews with these officials to obtain their perspective on the situation and to address any complaints that had been made. During this phase of the study, the researchers served as an intermediary between the rights-holders and the duty-bearers, where they were able to channel the communities' concerns to the duty-bearers and encourage them to be more transparent and accountable directly to the community.

The next phase of the study saw the researchers conducting a second round of discussion with the focus groups. During the discussions, information obtained by the officials was discussed with the group, including responses to questions and concerns expressed by the group in the previous session. Additionally, some of the policies/measures and entitlements were also explained to them. It must be noted that in the event of contradiction, the researchers engaged in dialogue with several persons in order to assess the credibility of any claims.

The researchers also encouraged the community to act collectively in order to enhance their bargaining power with the authorities. For example, they tried to encourage the women to form a group that discusses problems and takes the concern of the whole group to the relevant authorities. The research coordinator also promised to link the communities to a bank and establish a self-help group.<sup>9</sup> By encouraging the community to mobilize themselves and to engage directly with the duty-bearers, the research team attempted not

only to gather information for the study, but also to constructively contribute to building the capacities of the community to claim their rights.

While the researchers were successful in serving as a means of communication between the duty-bearers and rights-holders for the duration of the study, it would have been beneficial and appropriate, from a rights-based perspective, to spend some time during the study to explain to the communities their rights and the various redress mechanisms available when their rights are violated. While this was done in a limited manner when some policies were explained, the researchers could have additionally referred the communities to the National Human Rights Commission or other bodies, from where they could have received additional information.

## Ampara study

In Ampara, data for the study were collected largely through interviews and focus group discussions with tsunami-affected people and families, beneficiaries of tsunami aid, agencies providing aid to affected people, key informants in the communities and political leaders, and members of the armed forces. Three focus group discussions were held with affected fishermen in the villages of Komari, Panama and in Marathamunai. One discussion was held on the beach where the fishermen mended their nets, while the other was held in a house in the fishing community of Komari where some women also participated. Interviewees were selected from the tsunami-affected population using a snowballing method, in which once a person was selected for an interview, the next person selected was an entirely

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<sup>9</sup> It is important that while encouraging the communities to assert their rights and encouraging them to form groups, the research team must be careful not to put the community at risk of abuse from more powerful authorities as the little protection they may have been offered will no longer exist once they leave. Additionally, the team needs to be careful not to make promises or raise expectations they cannot meet.

different one to the first person in social standing, employment, issues raised etc., so that diverse perspectives could be captured in the study.

Additionally, the research assistants maintained close links with two of the key informants – one from a Tamil background and the other from a Muslim community. The author also maintained close relationship with a member from the Muslim community with whom the findings were discussed. These frequent discussions with individuals from the community allowed the research team to verify and authenticate their findings.

The authors and research assistants also benefited from discussing their findings with two armed forces officers, who verified information from the community and provided additional information on specific incidents. In conflict situations, it is important to use as many different sources as possible to verify information being provided, as propaganda and misinformation is usually a concern.

A total of 35 interviews were conducted throughout the study. These interviews were more

exploratory and unstructured in the beginning of the study but took on more form and became focussed, semi-structured interviews towards the latter half of the study.<sup>10</sup>

Discussions were also held with aid agencies, INGOs and government departments to explore the various aid delivery programmes and mechanisms. Aid agencies were initially identified through a list produced by the Consortium of Humanitarian Agencies (CHA) Ampara<sup>11</sup> and in consultation with United Nations personnel in Ampara; a search was also made to find the exact whereabouts of the offices of the agencies and INGOs that were present in the district.<sup>12</sup>

Secondary information obtained through aid agencies, newspapers and media reports were helpful in understanding the context. Face-to-face informal discussions and direct observations with affected families were also very useful. Triangulations employed in the study helped to verify and establish the authenticity, validity and reproducibility of the data.

The most effective methods of data collection were discussions in the focus group, *ad hoc* meetings

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<sup>10</sup> The following is a list of people who participated in unstructured and semi-structured interviews: The president of the East Lanka social service centre; a resident of Islamabad running a small boutique next to a refugee camp; a teacher attached to the Sinhala Maha Vidyalaya; the president of a rehabilitation centre for tsunami-affected people who is also a member of Ampara NGO consortium; a Sinhala resident in Amman Kovil Road; the Managing Director of Village of Home Community and Samuel Boys Home; a representative from the Seventh Day Adventist Church situated close to Kalmunai; a landowner in Addaippallam village; a member of the Rosy refugee camp near Kannaki Amman Hindu Kovil in Addaippallam; an officer in the Nintavur Divisional Education Office; a Muslim villager in Malikaikkadu, Karaithivu; the president of Maruthamunai Baithul Tsunami; a member of the construction committee of Maruthamunai Shams Central College; a Tamil resident in the refugee cap near the Kovil at Periyaneelavanai; the Manager of the Samuel Boys and Girls Home situated in Neelavani; Grama Niladhari of Periyaneelavanai (a Tamil); a young woman in Arasady Thoddam Welfare Camp, Nintavur; someone from the Maruthamunai relief good collecting centre; a tsunami victim from Periyaneelavanai; affected fisherfolk living in Sainthamaruthu, Kalmunai; someone who works for the Muslim Women Research and Action Foundation (MWRAF); members of the armed forces and militant organizations; two politicians from the area (one a Muslim national level politician), both of whom prefer anonymity; the president of the Komari fisheries cooperative; a member of the Panama Fisheries Cooperative; and the president of the Digamadulla YMCA.

<sup>11</sup> Additional information on INGOs and agencies were collected from the Contacts Directory (Version 3.3, 2005) prepared and maintained by the United Nations Humanitarian Information Centre (HIC).

<sup>12</sup> INGOs and agencies that were interviewed and spoken to in Ampara during the study are the following: UNDP, CHA, FAO, RADA, OCHA, HIC, USAID, UNICEF, WFP, JICA, ActionAid, ICRC, Mercy Corps, Solidarites, and UNHCR. The following organizations involved in tsunami related activities were also interviewed for the study: IOM, GRC, Oxfam, Cordaid, World Vision, SOND/SWOAD, ZOA, Care, EHED, East Lanka Social Service and Digamadulla YMCA. The information provided through the District Livelihood Coordination meeting was a useful source. The various fisheries cooperative societies provided valuable information.

and face-to-face interviews. People were eager to talk to the research assistants and were willing to provide detailed information under conditions of anonymity. It was important, however, to make clear that names would not be divulged and that anonymity would be maintained so that people did not feel that their security would be jeopardized by the information they provided.

Team members came from different ethnic backgrounds, but this did not affect internal team dynamics; it was rather a bonus as it was important that the research assistant conducting the interviews in a specific community was of the same ethnic background as the community in order to build trust – this was especially important as the research touched upon several sensitive issues related to ethnicity and the conflict.

The Ampara case study, while rich in detail on the Muslim perspective, is quite limited on the Tamil perspective, since the security situation made it

difficult for the research team to obtain adequate information from tsunami-affected Tamil villages. Even though one of the research assistants was Tamil and came from Ampara, the heightened security imposed by government forces while the interviews were taking place made it difficult for him to travel to tsunami-affected areas. The interview data gathered from other accessible Tamil areas (eight interviews in all), and later from the areas where the researcher could not circulate, were used in the paper. However, it was not possible to verify the validity of some of the statements with the Tamil Relief Organization (TRO) or the LTTE because access to these organizations is very limited. Along with the security situation, which limited accessibility to the areas (e.g. road blocks, acts of civil disobedience, strikes, etc.), another obstacle was that since the communities along the coast were predominantly Muslim, access to women was limited, and it was therefore impossible to gain their perspective on the issues. The fact that the research team were all male was also a significant drawback.

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## 4. LESSONS LEARNED/RECOMMENDATIONS

### **Develop post-disaster recovery interventions that are sensitive to both existing identity-based vulnerabilities and identity-based dynamics**

As the case studies bear out, recovery interventions cannot be identity-blind; in the event that they are, they bring with them the danger of accentuating existing vulnerabilities. In Sri Lanka, this carries a

further implication where identity-blind recovery interventions can lead to perceptions of discrimination along ethno-political lines and can, *inter alia*, contribute to worsening relations among the already hostile (and warring) groups. Inclusive governance in the context of disaster recovery must take into account the existing discrepancies and ensure sensitivity to these issues.

### **Contextualize concepts such as ‘vulnerability’ and ‘inclusive governance’ in the light of realities on the ground**

There is often a tendency to make interventions armed with a list of assumed vulnerabilities and to cater inclusive governance processes to such a pre-ordained list. For example, it is quite common to assume that women, children and the disabled are ‘naturally’ vulnerable categories in most situations and to go about developing policies and programmes geared only to these groups. Vulnerability, however, is highly contextual, even within two neighbouring districts of the same country; it is clear how the interplay of factors could contribute to making certain groups more vulnerable than others. In Hambantota, for example, it is quite clear how issues of class, caste, political favouritism and party political affiliations rendered some groups more disadvantaged than others. On the other hand, in Ampara, the dynamics were more in relation to issues of ethnicity and majoritarianism. Undoubtedly in both districts, traditional factors, such as gender, age, disability, etc., were still exerting greater impact and need to be accounted for; yet, it is important to assess how individuals within these groups are differentially affected based on their intersections with other identities, such as class, caste and ethnicity. Inclusive governance in the context of disaster recovery must necessarily assess vulnerability on a case-by-case basis and develop processes and mechanisms based on realities on the ground.

### **Strengthen capacities for decentralized and localized governance processes in post-disaster recovery**

Both case studies identify the negative implications of centrally-based disaster recovery interventions. These include the discrepancies between recovery efforts and their corresponding

needs on the ground; the underutilization and waste of resources; potential for corruption; the sense of isolation and exclusion felt by the affected communities; and the ensuing erosion of faith in the democratic process. Both case studies reveal how more decentralized and localized interventions are better placed to cater to the dynamics on the ground, particularly with respect to being sensitive to the needs of disadvantaged groups in each locality. One of the means, therefore, of strengthening capacities for inclusive governance would be to strengthen capacities for decentralized and localized governance in disaster recovery contexts.

### **Develop checks and balances even within localized governance structures**

In the Sri Lankan case, it would be convenient to assume that localized delivery mechanisms would, in and of themselves, be inclusive and participatory. For example, the authority of the *Grama Niladari* as the lowest denominated representative of the village in determining community needs should, in an ideal situation, lend to disaster recovery interventions that are inclusive, participatory and sensitive to vulnerable groups. However, as the studies bear out, decentralized governance structures alone do not guarantee the rights and interests of disadvantaged groups. This is particularly the case when local government structures are not equipped with the necessary checks and balances that enable communities to hold officials accountable for their work. Inclusive governance in the context of disaster recovery must necessarily assess the viability of decentralized delivery in catering to the needs of disadvantaged groups and, where necessary, put in place checks and balances for holding the lowest levels of government accountable for their work.

**Develop capacities for sustainable processes of inclusive governance**

In post-disaster interventions, it is quite common to put in place one-off interventions for strengthening inclusive governance. For example, in Sri Lanka, UNDP supported a comprehensive programme of people's consultations which aimed at channelling the voices of the people into the official recovery process. As useful as such interventions are, it might be more advisable to use the window of opportunity provided by post-disaster situations to put in place longer-term, more sustainable mechanisms and processes for

channelling the voices of the communities into official development processes. For example, in Sri Lanka, one idea that was frequently mooted but never followed through was on the feasibility of reviving the Village Rehabilitation Committees (small representative collectives at the village level with linkages to decision makers at the provincial and district levels) as a permanent mechanism for inclusive and participatory decision-making. Wherever possible, it is important to develop sustainable inclusive governance processes that are adaptable to post-disaster situations and also outlive and outlast the crisis contexts.





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