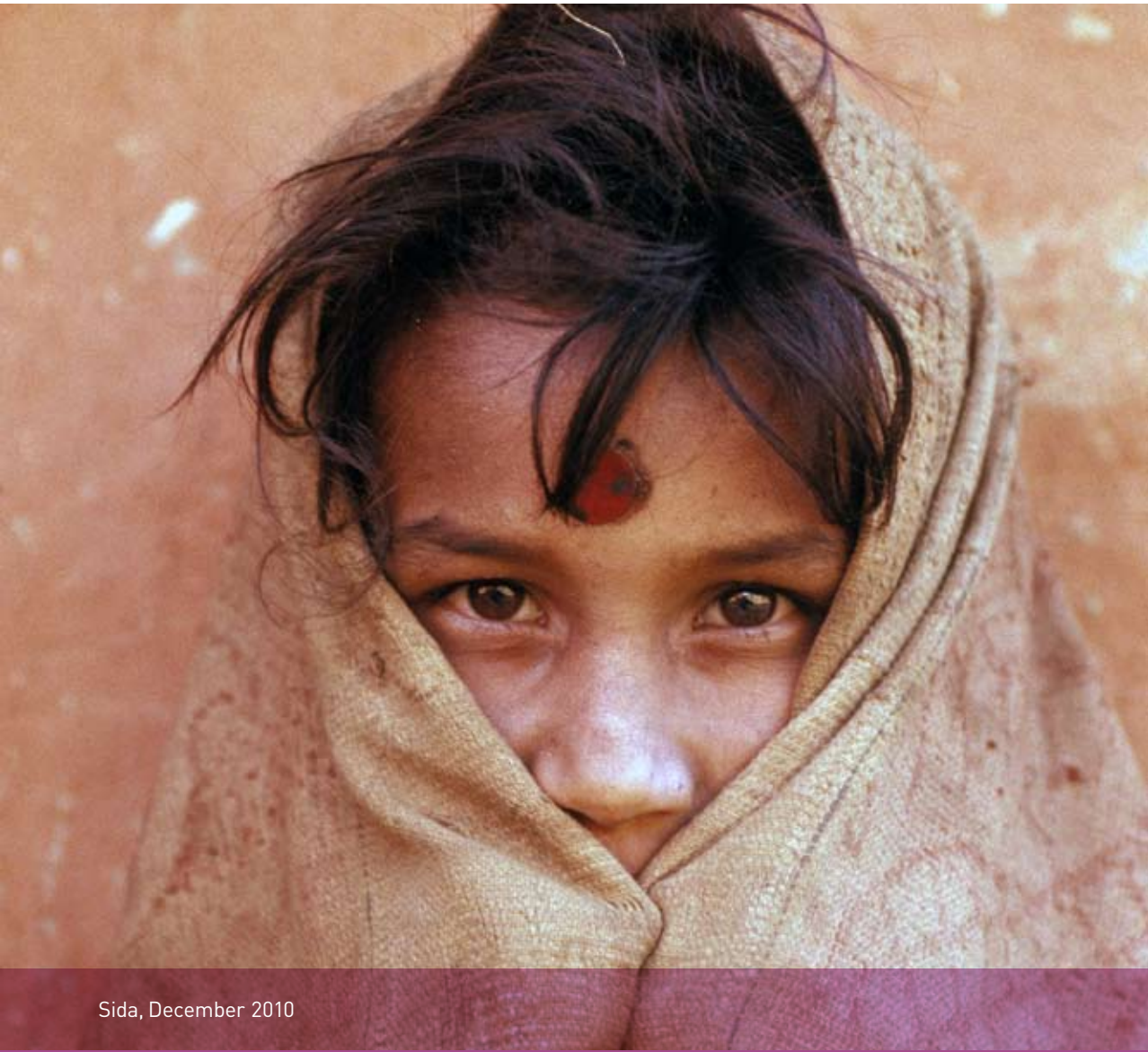

Sida, December 2010

A Guide to Equal Access to Justice Programmes

Sida

A Guide to Equal Access to Justice Programmes

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Table of Contents

1 Introduction

> "Four billion people around the world are robbed of the chance to better their lives and climb out of poverty, because they are excluded from the rule of law."
>
> *Commission on Legal Empowerment of the Poor, Making the Law Work for Everyone, vol. 1, 2008*

Sweden regards the support to enhancing rule of law as an essential part of its overall goal in development cooperation to "help create conditions that will enable poor people to improve their lives", and, alternatively[1], to "strengthen democracy, equitable and sustainable development". As a means of supporting the development of rule of law for women, men and children living in poverty, Sweden gives high priority to the concept of *equal access to justice*.

The purpose of this Guide on Equal Access to Justice (EA2J) is to serve Sida's staff (and others) with a conceptual framework and empirically based guidance on how potential EA2J interventions can be identified. The Guide *builds directly on a "mapping" of Sida's and other donors' experiences* from supporting rule of law programmes as well *as a study of relevant literature* on law, development and legal empowerment[2]. The structure of the Guide follows that Mapping document; for more detail on separate issues, therefore please refer to: Alffram, H., *Equal Access to Justice – a Mapping of Experiences*, September 2010.

The Guide's point of departure is the *Policy for Democratic Development and Human Rights in Swedish Development Cooperation, 2010–2014*. Therefore, it applies a human rights-based approach[3] and focuses on (a) civil and political rights, (b) institutions and procedures of democracy and the rule of law, and (c) actors of democratization.

Some additional points of departure are:

- The EA2J approach is relevant when preparing new country and thematic *strategies*; when designing, implementing and assessing justice sector *programmes and projects*; and when

DEFINITION OF RULE OF LAW

A principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.

Source: Guidance Note of the Secretary-General, UN Approach to Rule of Law Assistance

DEFINITION OF EQUAL ACCESS TO JUSTICE (EA2J)

A condition in which all people are able to resolve conflicts and seek and obtain remedies for grievances, through formal or informal institutions of justice, in compliance with human rights standards.

1 In regard to Sweden's objectives for reform cooperation in Eastern Europe.
2 Alffram, Henrik, "Equal Access to Justice – a Mapping of Experiences", Sept. 2010.
3 Also reiterating Sweden's focus in the Policy for Global Development (PGD, 2003) on the human rights-based approach and the perspectives of people living in poverty.

AN EA2J APPROACH

Point of departure
The primary justice needs and perspectives of the rights-holder and the obstacles they encounter in finding justice

Core features
- Empowers rights-holders to:
  a. *Access and utilize those duty-bearers that are most important for them in obtaining justice;*
  b. *Demand necessary reforms of relevant duty-bearers*
- Enhances the capacity of duty-bearers to deliver justice

identifying justice-related *entry-points in other sectors*, including health & education.

- Rule of law has over the past two decades *moved to the centre* of the international development cooperation agenda. International donors have committed considerable resources to legal reform programmes in Africa, Asia, Eastern Europe and Latin America.
- Largely, these efforts have focused on legal frameworks and justice institutions (prosecution agencies, judiciaries and police forces), and included 'importing' laws and institutional setups from other countries. A consensus is emerging that *this approach has led to few tangible results for women, men, girls and boys living in poverty.*
- The identified well-documented reasons for the weak outcomes are among others that:
  (i) *state justice-sector institutions are of limited relevance for marginalized individuals and groups*;
  (ii) *legal and institutional arrangements cannot easily be imported* from other countries and contexts, and
  (iii *powerful interests have undermined reform efforts* or managed to utilize them to further their own interests at the expense of the majority of the population.

Taking these problems into account, *alternative approaches* have emerged in recent years that have as their foundation the very question of how state and non-state legal orders can be used by women and men who live with poverty and marginalization to increase the control over their lives[4].

4 Including the principles set out in the United Nations Secretary-General's guidance note on a UN Approach to Rule of Law Assistance, see UN, United Nations Approach to Rule of Law Assistance, Guidance Note of the Secretary-General, 2008.

2 An approach to EA2J

Traditional rule of law programmes have taken as their starting point an assessment of the functioning of existing state justice sector institutions. On the basis of such an assessment, remedies for how identified institutional weaknesses can be addressed to ensure that rule of law is upheld have been put forward. An EA2J approach, as outlined in this Guide, however, *takes as a point of departure the primary justice needs and perspectives of women, men, girls and boys living in poverty* and the obstacles they encounter in finding justice. It pays particular regard to discriminated, excluded and marginalized individuals and groups.

EA2J is *a human rights-based approach*, grounded in international and regional human rights instruments. As such, assessments, implementation and follow-up should be guided by and aim to enhance the principles of *equality in dignity and rights (non-discrimination); participation; openness and transparency; and accountability*.

This means ensuring that *women and men living in poverty (rights-holders) are empowered* to utilize and demand reform of those state and non-state institutions (duty-bearers) that are most relevant for them in obtaining justice, at the same time as it pays attention to the importance of *strengthening the capacity of relevant duty-bearers* to deliver justice. In other words, it regards top-down institutional reforms as necessary, but stresses that citizens and civil society actors must be empowered to use the justice system and play a role in ensuring its proper functioning.

A *system-wide perspective* recognizes that the justice system is made up of several interlinked parts. Improvements in one part of the justice chain can otherwise be undermined by deficiencies in its other links. Sector-wide approaches can help foster this perspective, and also *facilitate cooperation* between organisations and institutions. Working groups are created and more regular dialogue is initiated for actors in the justice sector as a whole, as well as sub-sectors within it. Hereby they exchange experiences and ideas in ways that were not available or did not happen easily before, which opens up possible *synergy gains*, more cost-effective solutions and minimizes overlap.

SOME LESSONS LEARNT FROM LEGAL SECTOR SUPPORT IN KENYA

Enhancing access to justice implies in most cases a change of attitudes and behaviour, which will not happen over night anywhere. To do it, most organisations and agencies need advice and support on a close and daily basis.

In Kenya, within the legal SWAP called GJLOS (Governance, Justice, Law and Order sector programme), a lot of emphasis has been put on co-ordination, planning and reporting, managed by a central secretariat.

The key institutions have increased their capacities significantly in terms of planning and reporting, but less so in terms of the conceptual and attitude-related problems. External support, not just funding but advisory support placed directly in the relevant organisation, might be not only justifiable but even necessary. This is not so much in terms of technical skills, but because attitude change is difficult, takes time and needs constant nurturing and support.

Continued on next page

On sub-sector level, a positive example of impact has been the so-called 'Court-users Committees', where the magistrate has managed to bring together the different legal agencies; the speed of handling court cases has greatly improved. The agencies have all done their work at the time they meet in court, and the social services have prepared supportive action. Such success stories have been particularly evident where the Court-users Committee has focused primarily on family and children cases.

Source: Sida

Check-list: 6 'musts' for EA2J support

Central elements of good programming in general – some particularly relevant to EA2J

- **Recognize that there are many roads to justice**

  It should be recognized that there may be many roads to justice and that different justice needs may be addressed through different institutional setups, state and non-state.

- **Pay attention to impact assessments and learning**

  A system for monitoring and evaluation with particular focus on impact should be developed during the planning phase of an intervention and baseline studies against which progress can be measured over time should be prioritized.

- **Promote national ownership and national reform actors**

  National ownership grounded in the principles of inclusion, participation and transparency should be strived for. National reform constituencies, including human rights organisations, professional associations and media outlets, should be assisted in pushing the reform agenda forward.

- **Promote donor and programme coordination**

  Donor coordination and joint programming should be used to increase aid effectiveness in general and to avoid scattered and contradictory legal and institutional frameworks and setups in particular.

- **Combine dialogue and technical assistance**

  EA2J should be promoted through a combination of technical assistance and dialogue with governments, donors and other stakeholders.

- **Transitional justice initiatives and security sector reform**

  In many conflict and post-conflict situations EA2J is locked into a symbiotic relationship with transitional justice and security sector reform initiatives. At the same time as an EA2J approach should be an integral part of such initiatives, the long term success of an EA2J intervention will be directly dependent on them.

3 Analysis and assessment

The reasons why people living in poverty are denied access to justice will vary from one community and context to the other, but may typically be related to underdeveloped legal frameworks and discriminatory norms, poor legal awareness, insufficient legal services, problems relating to capacity and corruption within existing justice sector institutions, or a general inability of the justice system to reach beyond the interest sphere of the more affluent and influential members of society. The purpose of an EA2J intervention is to ensure these types of obstacles are removed. In the preparation for such an intervention, a system-wide assessment should be undertaken.

Interventions should be grounded in what is *needed*, but also in what is socially, culturally, politically and practically *feasible* in a particular situation. As justice interventions change the way power is exercised, overcoming resistance from *vested interests* is often a far greater challenge than to design technically sound interventions. Very often, political priorities favour some kind of reform, on a few levels or places, but ignore others. The analytical effort must focus on where such *"political will"* can be found; however, it is equally important to assess why and how *"resisters of reform"* try to undermine or block efforts to achieve EA2J, and what is possible to do even if the "will" cannot be found everywhere. This analysis is also a key step in identifying *bench-marks* for later follow-up of progress. Civil society actors are always relevant stakeholders to consult for such analyses.

TOOLS FOR ANALYZING THE JUSTICE SECTOR

DFID, "Non-state Justice and Security Systems", 2004.

OHCHR, "Rule-of-Law Tools for Post-Conflict States: Mapping the Justice Sector", 2006.

Reiling, D., Hammergren, L. & Di Giovanni, A., "Justice Sector Assessments: A Handbook", World Bank, 2008.

UNDP, "Programming for Justice: Access for All", 2005.

UNDP, "Guidelines for Participatory Consultations on Access to Justice", 2003.

UNODC, "Criminal Justice Assessment Toolkit", 2006.

USAID, "Guide to Rule of Law Country Analysis: The Rule of Law Strategic Framework", 2008.

STEP 1: IDENTIFY JUSTICE NEEDS

The first step is to identify which rights-holders are to be the primary beneficiaries of an intervention and what *their perspectives and justice needs* are. Issues of discrimination and the need to ensure the rights of marginalized individuals and groups should guide the assessment, as well as any eventual interventions.

Make use of power analyses, if available. It should be considered that legal systems have traditionally been developed by *male elites* and have largely served to protect and promote their interests. As a result, formal and informal laws often discriminate against, or pay insufficient attention to the situation, interests and protection of women, girls and boys, sexual

SAMPLE ANALYSIS OF AN ACCESS TO JUSTICE PROBLEM

- In what ways does the absence of justice remedies increase people's vulnerability to poverty?
- What factors contribute to the problem?
- What human rights claims are being ignored and what type of remedies are needed?
- Who are the actors mandated to respond through the justice process, and in what ways?
- What persons are least able to claim their rights when they need them?
- What obstacles prevent disadvantaged people from claiming their rights through the justice process?
- What obstacles prevent duty-bearers from fulfilling their obligations?
- Which of these obstacles reflect a lack of capacity, and which ones a lack of willingness?
- What opportunities are within the reach of disadvantaged people to overcome such obstacles?
- What opportunities are within the reach of duty-bearers to overcome such obstacles?

Source: UNDP

minorities, ethnic minorities, people living with disabilities and other marginalized groups. These groups also tend to be disadvantaged in mediation and adjudication processes, as well as in the enforcement of decisions handed down by courts and other conflict resolution mechanisms.

STEP 2: IDENTIFY OBSTACLES TO JUSTICE

The next step in preparing for an EA2J intervention is to identify what obstacles the rights-holders face in trying to obtain justice. These obstacles may relate to *the capacity or willingness of existing justice sector institutions* and actors to deliver justice, as well as to *the ability of the rights-holders to utilize* the existing justice system and demand reforms that serve to better protect their interests.

Again, the views and perspectives of the rights-holders should be the primary source of information. In practice it will often make sense to utilize a methodology through which information about the justice needs of the rights-holders and the obstacles they encounter in finding justice are *simultaneously* obtained.

Which methods are the most appropriate will depend on the extent to which the justice needs and obstacles have *already been documented* by others and on the resources available, but may range from a review of relevant literature, and interviews with key informants, to focus-groups discussions and surveys. Make use of power analyses, if available. A *participatory approach* in which the rights-holders are involved in developing the methodology and in conducting the study, should be strived for whenever feasible. It has to be ensured that all participants have the capacity and possibility to engage on equal terms.

However, to attain a thorough understanding of the different hurdles people face when trying to obtain justice, the views and experiences of the rights-holders should be complemented with an *analysis of the normative framework* in place and a diagnostic study of the *roles, functioning and reform needs of those duty-bearers* that are relevant for ensuring justice.

For information about the extent to which a legal system operates in accordance with international human rights standards, *reports by UN treaty bodies, UN special rapporteurs, regional human rights bodies and non-governmental organisations* can be consulted. The country pages of the Human Rights Council's Universal Periodic Review normally contain valuable reports and information.

Guidance on how to analyze the justice sector and identify obstacles to justice can be sought from the many *manuals and tools* developed for this purpose. Efforts should be made to ensure that studies conducted during the assessment phase can serve as *baselines* against which the impact of interventions can be measured.

STEP 3: IDENTIFY POTENTIAL INTERVENTIONS

Once the justice needs of the rights-holders and the obstacles they have in finding justice have been identified, an EA2J approach should aim at designing interventions for removing these obstacles by empowering rights-holders or strengthening the capacity or willingness of duty-bearers. *Power analyses* should be used to look at the extent to which long-term political will to reform exists, what the risks are that interventions will be undermined by those with vested interests in maintaining status quo, and the *possibilities of building coalitions* and devising and implementing other strategies to overcome resistance to reform.

It should be kept in mind that *an exaggerated belief in the existence of political support for reform is probably the most common reason why the objectives of justice sector interventions are not attained*. Institutional reform initiatives have small chances of success unless national stakeholders are convinced of their benefits and elite groups are prepared to accept the limits to their power that comes with adherence to the rule of law.

In order to be able to identify the set of interventions that are most relevant to overcome obstacles to justice, it is necessary to maintain a system-wide perspective. Even though resource constraints may make it impossible to try to address all relevant aspects of a justice system, *individual reform initiatives should not be considered in isolation* as improvements in one part of the justice system may be effectively undermined by existing weaknesses in other parts of the system. Maintaining a system-wide perspective is also necessary to avoid duplication of reform efforts.

In conducting a system-wide analysis, the framework set out in Figure 1 might be useful, in which EA2J is related to issues of normative protection, legal awareness, legal assistance, redress and conflict resolution, and enforcement, as well as to oversight and monitoring and to reform claim by rights-holders.[5]

5 This framework builds on what is set out in UNDP's Equal Access to Justice Guidance Note, 2003

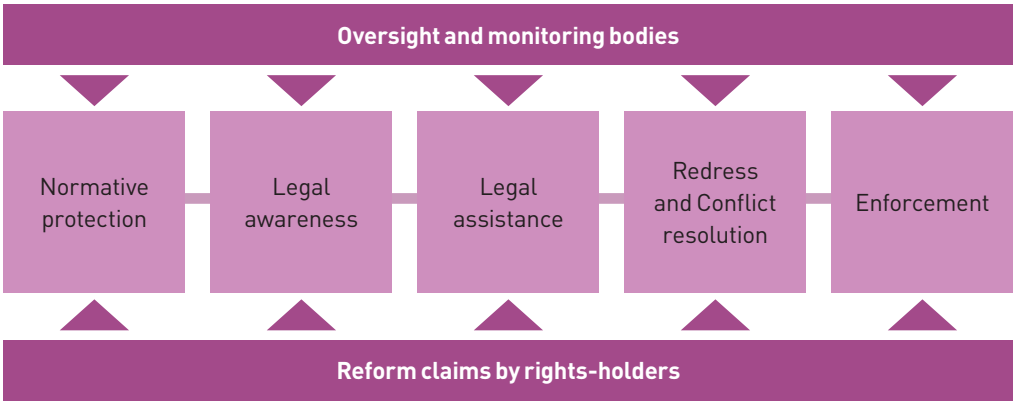

Figure 1

Even though there are no blueprints on how to sequence and what to focus on in a justice sector intervention, *a number of lessons have been learned*. This guide does not purport to present a comprehensive list, but some of the primary interventions that have been common, effective or promising will be touched upon.[6]

Normative protection

People may be denied access to justice because of a poorly developed legal framework or due to the discriminatory nature of both laws and informal norms. Support to the development of a normative framework that enhances the rights of women, men, girls and boys living in poverty may be useful in most contexts. However, the fact that *there is often a wide-gulf between laws and their actual implementation* should always be taken into account, as should the prospects for this gulf to be narrowed in the foreseeable future. Initiatives that do not aim to strengthen normative protection in a particular field, but more generally aim to strengthen the capacity of law-making institutions, *should normally be reserved for countries with a democratically elected parliament.*

To have a *legal identity*, i.e. formal and legal recognition by the state of one's existence, may be a prerequisite to be able to attend school, receive medical services, take part in elections, own and inherit property and receive the benefits of social development programmes. Efforts made to provide people with legal identity have been successfully integrated into general census, health and education programmes.

Gaps in existing legal frameworks are often filled by new laws that are heavily influenced by or copied from other coun-

CAMBODIA'S IMPUNITY LAW

In October 1994, the Cambodian National Assembly enacted a Law on Civil Servants, which in Article 51 in effect provided all civil servants, including police officers, immunity from arrest and prosecution. During several years, domestic and international human rights organisations documented the effects of Article 51 and in reports and other media drew attention to the fact that law enforcement officials were not held to account for grave violations for human rights. As these concerns came to be frequently reported in the press and several UN resolutions urged Cambodia to amend or repeal the article, the law was eventually changed by the National Assembly in March 1999.

6 For a more comprehensive description of different interventions, see Alffram, Henrik "Equal Access to Justice: A Mapping of Experiences", September 2010.

tries. Such *transplanted laws* tend to work best when borrowed from a country with a similar political and legal culture and do not concern areas of law that are deeply historically or religiously anchored, such as family law.

Public interest litigation can contribute to filling gaps in existing legal frameworks and be an effective way of strengthening legal protection for disadvantaged groups. Even when lawsuits have not succeeded in court, they have sometimes helped to bring public attention to the issue in question and contributed to shape public opinion in favour of reform.

Ratification of international human rights treaties does not necessarily mean a readiness to amend relevant laws and ensure that rights are upheld, but it gives among other things civil society actors, foreign governments and others a tool to use in their advocacy or dialogue-related activities. *Domestication* of the treaties is equally important, so that they become applicable to the country's jurisdiction[7].

Problems in finding justice for a human rights violation is often related to the existence of *impunity provisions* that shield members of the armed forces, law enforcement personnel and public servants from arrest and prosecution. The combination of monitoring and documentation by human rights groups, media attention, and the impunity issue being a prominent feature in the international community's dialogue has in some cases led to changes in existing legislation. Similar campaigns have also been successful in terms of introducing new legislation of importance from a human rights perspective, including for instance laws on domestic violence.

Legal awareness

Women and men living in poverty and with no or little formal education are in most countries likely to have particularly low awareness of laws and rights, and as a result have the biggest problems in accessing the justice system. Legal awareness can be enhanced through training initiatives, but also by making laws and regulations more accessible. Support for initiatives to increase citizens' legal awareness *should be considered if there is a normative framework in place that protects rights* and there are avenues, state or non-state, for having these rights realized.

Legal literacy programmes, implemented by state actors, civil society organisations or the media, have been particularly effective in increasing legal awareness when relevant to the day-to-day lives of the target population and connected to specific efforts at finding justice. *Integrated approaches that pair legal literacy*

7 Unless the country abides by direct applicability of international agreements and treaties signed and ratified.

ADB'S LEGAL EMPOWERMENT INITIATIVES IN BANGLADESH, INDONESIA AND PAKISTAN

Under existing sector development projects in Bangladesh, Indonesia and Pakistan, ADB developed and implemented short-term legal empowerment initiatives designed to enhance the effectiveness of the sector projects. The legal empowerment initiatives were implemented by NGOs in coordination with community members, local officials and ADB staff. Somewhat different activities were carried out in the three countries, but typically included legal awareness raising through media campaigns or distribution of information materials, training programmes, and more in-depth discussions and other measures to increase understanding of available procedures for accessing justice. An evaluation found that the pilot projects, among other things, had contributed to an improved understanding of the sector authorities' roles in delivering services, increased people's ability to approach these authorities, and enhanced people's understanding of legal rights and women's rights. In Bangladesh, as a result of the project, people created on their own initiative special committees to deal with human rights violations and to organize mediation do deal with conflict, and in Pakistan the project was found to have contributed to improved service delivery in the health sector.

Source: ADB & TAF

activities with mainstream development programmes have proven successful. Involving judges, prosecutors, police and other government actors in training for local communities can enhance public trust in state institutions at the same time as it may improve the capacity of these institutions to meet the needs of the communities.

Formal laws and regulations have generally been inaccessible to most citizens, as they have traditionally been drafted in a convoluted manner and language. This has in turn opened up for arbitrary interpretation and undermined legal protection. Experience shows that *laws can be written in plain language that makes them more accessible and easily understood*. If a country does not have a pool of competent legal drafters, support to the creation of such a pool might be valuable.

A *participatory law-making process*, providing for public hearings and allowing citizens and organisations to submit comments, can help to make laws more accessible and ensure that they reflect the needs of the people. Issuing of standard-form documents for common legal transactions has increased the ability of people to use the justice system and secure rights.

Legal assistance

As legal systems are usually complicated to navigate, most people seeking to settle a dispute or obtain a right are in need of assistance from a person with legal training and knowledge. For reasons of cost and physical access, among other things, women and men living in poverty have often limited access to such assistance. Interventions focusing on *strengthening legal assistance may be relevant in all contexts where lawyers and legal assistance providers are allowed to operate independently*, or where such assistance is likely to help strengthening their independence.

To establish effective lawyer-centered legal aid schemes is expensive. For this and other reasons they often have to be combined with other legal services models. *Paralegal programmes* in which non-lawyers assist people and communities who are poor and denied access to power with their justice needs by providing legal advice and assisting in settling disputes through mediation and negotiation have often had significant impact. They appear to have been *particularly effective when the financial stakes involved in the issues handled have been limited* and the paralegals have possessed knowledge of state law, local realities and social movement-type tools, and have had direct access to lawyers to which they have been able to refer cases when needed.

Legal aid NGOs with a clear focus on protecting the rights of women and men living in poverty have sometimes been effec-

tive providers of legal services to disadvantaged clients. Where they have been set up by, or staffed with, prominent national level lawyers, they have also been effective promoters for legal reform of relevance for marginalized groups.

Law school clinics in which law students, under some level of supervision, provide free legal services have occasionally contributed to improve access to justice, but their effectiveness has often been hampered by limited outreach. Their main value may be that they help fostering a professional understanding of the situation and legal problems of poor and marginalized communities.

Redress and conflict resolution

Access to justice is often hindered by an absence of state and non-state institutions that register rights, adjudicate disputes and ensure redress for grievances in a fair, predictable and effective manner. As *courts* can be used to enhance oppression as well as to uphold freedoms, *support to increase the capacity of the judiciary should be accompanied by genuine government commitment to reform* and go hand in hand with interventions to ensure independence, transparency, accountability and adherence to fair trial standards. If support is provided to customary, indigenous or religious conflict resolution mechanisms, the primary purpose should always be to strengthen their compliance with international human rights standards.

Judicial training programmes have been a central feature of most judicial reform efforts, but have often failed to sustain impact. Best practice suggests that legal education for practitioners should be based on active learning, participation, problem solving and real in-country problems. It also suggests that *training is most effective when personnel at all levels of an institution are targeted and when it is directly linked to ongoing reforms.* To the extent possible, local expertise should be used in order to avoid translation related problems and to ensure relevance and sustainability.

The literature puts forward a number of recommendations for reducing *justice sector corruption*, including the development of codes of conduct, simplification of legal and administrative procedures, and assured tenure of appointments. While the general effectiveness of many of these measures are yet to be proven, there is a growing body of evidence showing that anti-corruption programmes based on extensive public scrutiny of legal and judicial processes, utilizing strategies that combine such methods as citizen charts, checklists and indexes with advocacy for reform, can at least in some contexts contribute to reduce corruption.

PARALEGAL SERVICES IN MALAWI AND KENYA

The NGO-operated Paralegal Advisory Service (PAS) provides national legal services in police stations, courts and prisons in Malawi. By empowering prisoners to represent themselves and help to push cases through the criminal justice system, PAS has been able to "...visibly changing the legal landscape for both accused persons and prisoners" and at low cost dramatically decrease the number of prisoners in pre-trial detention. Similar projects in other countries have also shown significant impact. It has been found that the Kenya Prisons Paralegal Project "...significantly helped decongest the prisons...by speeding up the determination of long pending cases in courts... helped remove bottlenecks curtailing access to justice for the poor through facilitation of meetings between key criminal justice agencies and improve prison conditions."

Source: IDLO

JUDICIAL FACILITATORS IN NICARAGUA

In Nicaragua, a network of volunteers, so called judicial facilitators, who report to the local judge and are elected by the community where they live, have through a focus on mediation provided people in remote areas access to an effective dispute resolution mechanism. The judicial facilitators have also contributed to increased awareness of rights, better interaction between the formal and informal legal systems and reduced crime levels.

GENDER SENSITIZATION FOR JUDICIARIES IN ASIA

In 1997, the Indian NGO Sakshi initiated a process of dialogue and gender sensitization with the judiciary. A study carried out by the organization showed the existence of gender discrimination in judicial decision making. In cooperation with the judiciary, Sakshi developed an education programme for judges that focused on altering attitudinal barriers identified as the primary obstacle for women and children seeking access to justice in situations of violence. Visits were also organized for judges to shelter homes, juvenile justice homes, women's prison and other institutions. The programme, which among other things has been given credit for a landmark case on sexual harassment, was expanded to several countries and became the Asia Pacific Advisory Forum on Judicial Education and Equality.

Source: ILAC and UNIFEM

COMMUNITY POLICING IN SIERRA LEONE

The police force in Sierra Leone was in an abysmal state and distrusted by the public when a British Commonwealth-led police reform programme emphasizing community-based principles was put in place. Police officers were trained on local needs issues, management structures were made more transparent, a merit-based system for recruitment and promotion was put in place, a public complaints procedure was set up and efforts to reach out to communities were made.

To be continued...

For reasons of distance and poor infrastructure, disadvantaged populations often lack physical access to institutions delivering justice. One way of trying to address this problem has been the introduction of *mobile courts* and similar arrangements through which the judiciary has been brought closer to the people.

Formal and informal *alternative dispute resolution mechanisms* including small claims courts, networks of trained volunteer mediators and various other arbitration, mediation and conciliation mechanisms, have provided low-cost resolution of disputes in a manner that is satisfactory to the parties involved. They have also contributed to easing the burden on the formal legal system. However, they tend to work best when the economic stakes are not too high and the parties involved are fairly equally armed in terms of financial strength, connections and societal status. In some contexts non-governmental organisations have successfully been working in a structured manner with traditional, local government connected or sector specific conflict resolution mechanisms to improve fairness.

Non-governmental organisations have also contributed to *gender sensitization and increased knowledge of international human rights law* among judges and other actors within the formal judicial system.

Enforcement

A major problem with many formal and informal justice systems is that the decisions handed down by courts and similar institutions are not enforced due to factors such as corruption, political interference, lack of resources and poor administrative routines. Another problem is that the enforcement process is often accompanied by human rights abuses. Donors have generally focused on police reform as a means of strengthening the enforcement process and have regularly faced the challenge of trying to contribute to a shift from a policing model based on repression and social control to one that is set up to serve the population and protect their rights.

Regardless of country situation, *interventions to improve the effectiveness of the police and other enforcement agencies should always be accompanied by efforts to ensure transparency, accountability and adherence to established human rights norms*. A necessary condition for a successful reform is that the police officers themselves are convinced that the reform initiatives will contribute to a decrease in crime and disorder. Therefore, efforts to strengthen the human rights and accountability perspectives of policing

need to be combined with initiatives to increase crime control capabilities.

Community-based policing programmes striving to build positive relations between the police and the communities, focusing on the most urgent needs of the citizens, in order to ensure improved crime control and prevention, have sometimes contributed to increase public confidence in the force and to reduce crime levels. However, they have in other cases failed to overcome existing accountability problems and have occasionally been found to increase rather than decrease repression.

Efforts to create *multi-ethnic police services* and to *increase the number of female officers* have contributed to increase confidence in the police among women and minority populations. Associations of women police officers have helped the members to create a culture of support among them.

In terms of strengthening the ability of the police to deal with cases of *gender-based violence*, it appears that a "whole system approach" through which all police officers, male and female, receive training may be a more effective approach than the establishment of specialized police stations for women. Efforts to improve the capacity of law enforcement agencies to deal with gender-based violence *should be combined with initiatives aiming at sensitizing prosecutors and judges*, as well as with efforts focusing on how men can actively work against gender-based violence in their communities.

Though it may be difficult to convince decision-makers to spend scarce resources on ensuring fair treatment of children who end up in the criminal justice system, initiatives to *strengthen juvenile justice systems* rarely threaten significant vested interests and have fairly often led to positive outcomes. Efforts should be made to consult children and young people in the design and implementation of such programmes.

Regular *external monitoring* of places of detention is possibly the most effective way of *preventing torture* in prisons and police stations. Where civil society organisations have been given regular access to prisons, been allowed to conduct confidential interviews with inmates and been able to publish their findings, levels of physical abuse have sometimes been reduced significantly.

Oversight and monitoring bodies

Executive, parliamentary or independent oversight and monitoring bodies mandated to ensure that justice sector institutions and their representatives are liable for their actions and called to account for malpractice and abuse of power constitute an essential part of the justice system.

Continued :

Community policing in Sierra Leone

The communities were also given a voice in local policing through a special civil society forum established for this purpose. According to independent evaluations the reform initiatives have, among other things, led to improvements in police behavior and increased accountability. Political commitment at the national level and the existence of a strategic plan that was adhered to are regarded as crucial factors behind the success.

Source: International Peace Academy

MONITORING JUDICIAL APPOINTMENTS IN THE PHILIPPINES

Under the Philippines Constitution, a Judicial and Bar Council is mandated to nominate names to the President for appointment of judges. In 2005, after there had been numerous complaints of appointments being made on the basis of political considerations rather than merit, a consortium of civil society organizations started to review the operations of the Council and to scrutinize the appointments to the Supreme Court. Following a dialogue between the Consortium and the Council, the latter accepted a number of measures to increase transparency. The Consortium made public information about the nominating process and about the profiles of candidates, and provided opportunities for the public to make recommendations. Since the establishment of the Consortium, the backlog of judicial vacancies has been reduced and complaints about the quality of nominees have diminished.

Source: USAID

Donors have often paid considerable attention to such statutory bodies as *national human rights institutions, ombudsmen and anti-corruption commissions* to improve the performance of other state institutions, increase pressure for reform and serve as a channel for people seeking redress for a grievance. While such bodies have shown significant results in some contexts, their global *performance is at best mixed* and they tend to be working best where they are needed the least. As these institutions do not operate in a vacuum, often have limited legal and political clout, and are directly dependent on how other institutions are functioning, they *can generally not be expected to have significant impact in contexts in which other state institutions are not fulfilling their legitimate roles.*

Considerable attention has also been given to the establishment and role of internal oversight bodies, such as service commissions. However, their ability and willingness to investigate cases of misconduct has often been hampered by corruption, nepotism, undue external influences, vague mandates and limited resources. *When scrutinized by the media and civil society organisations, both internal and statutory bodies have often increased their effectiveness.*

Reform claims by rights-holders

There is often considerable resistance to reforms that make justice sector institutions accountable and responsive to the needs of women, men, girls and boys living in poverty. To overcome such resistance has proven difficult and the efforts undertaken to do so have generally been inadequate.

Since the early days of the legal and judicial reform programmes, donors have made efforts to engage bar associations in creating pressure for reform of justice institutions. However, bar associations have for a variety of reasons rarely proven to be effective vehicles for promoting change. *Genuine reform constituencies have more often been found among human rights organisations, women's groups and media outlets.* These groups often need support to develop their agendas for reform, conduct public consultations, raise public awareness and take part in public discourses about the functioning of the justice system.

In some countries non-governmental organisations specializing in *scrutinizing judicial appointments* and judgments have been established and supported, and in other contexts *investigative journalism* initiatives have played a role in monitoring the way the justice sector is operating. While there are few structured assessments of the overall impact of these types of interventions, anecdotal evidence indicate that they

can contribute to increased transparency and to overcome resistance to reform.

Social accountability strategies that strive to involve broader segments of the citizenry and civil society to monitor and promote accountability, service delivery and reform have been rare in the justice sector. There is, however, some experience suggesting that further attention should be paid to such initiatives. It has been found that *local level membership groups coordinating issues such as microcredit, health and education, can be suitable vehicles for collective action* and that *legal awareness and legal aid programmes* can be designed to play a role in fostering links between citizens and civil society organisations that can be utilized to monitor the functioning of the justice system. Social accountability strategies have, however, the potential of being particularly effective if institutionalized within the state – governments thus open up spaces for civil society participation in the design, management and monitoring of reform programmes.

4 Monitoring – results and process

WHAT THE MONITORING FRAMEWORK SHOULD CAPTURE:

OUTCOMES

- The extent to which rights-holders have been empowered to access and utilize duty-bearers essential for delivery of justice
- The extent to which rights-holders have been empowered to demand relevant reforms of duty-bearers essential for delivery of justice.
- The extent to which the willingness and capacity of relevant duty-bearers to deliver justice has been enhanced.

PROCESS

- The extent to which the rights-holders and duty-bearers have been involved in and able to influence the intervention without discrimination.
- The extent to which the rights-holders had access to information which facilitated their genuine, 'enlightened' participation.
- The extent and form of accountability that could be claimed from duty-bearers

It is widely regarded that further attention has to be paid to performance monitoring in order to ensure learning and better design and implementation of justice sector development initiatives. Once an intervention has been decided upon, the *development of a framework* for monitoring and assessment of results and process should therefore be prioritized. Such a framework should cover the full project or programme cycle and be guided by the inevitably long-term nature of objectives, and thus take into account that a substantial period of time will have to pass before results become visible.

Since EA2J interventions are normally politically sensitive, critical scrutiny and media attention to sudden negative setbacks should always be expected. As a result, the programme owners as well as donors need to be aware of – and able to demonstrate – where positive, more medium to long-term trends are to be found as well. This can only be done by *identifying key processes and benchmarks* which show the continued relevance of a particular intervention.

As an EA2J intervention must always be designed with due regard to the context in which it is to be implemented, it is neither possible nor desirable to develop a monitoring structure with universal applicability. It may be said, however, that the general purposes of the monitoring framework should be to (a) assess the extent to which the capacity of rights-holders and duty-bearers has been enhanced due to the intervention, (b) provide information for policy and managerial decision-making, and (c) enable stakeholders to monitor the performance and processes of the justice sector.

PROCESS AND OUTCOME FOCUS

As an approach that involves the stakeholders in the design, implementation and monitoring of an intervention can contribute to sustainability of results, the monitoring framework should in addition to outcomes also strive to capture the process, i.e. the extent to which stakeholders have been involved and been able to influence the different stages of the intervention. Defining clear objectives and indicators is a prerequisite to assess the success or failure of an intervention. The objectives and indicators should reflect a greater ability of rights-

holders to obtain the type of justice remedies they need to improve their well-being and the ability and preparedness of duty-bearers to ensure that justice is delivered.

BASELINE AND FOLLOW-UP STUDIES

To be able to effectively measure, as well as to ensure better design and monitoring of interventions, baseline studies carried out before the start of an EA2J intervention are essential. These baselines should contain objective and quantitative standards that provide an indication of success and can be compared over time. To measure the effects of an intervention it is usually necessary to ensure that the baseline studies and subsequent follow-up studies assess the situation of both intended beneficiaries and of individuals that are not expected to be affected by the intervention. In order to ensure "ownership" it is suggested that baseline studies before finalization are validated among key stakeholders. If several different baselines are conducted that cover different aspects of the justice sector, it may be useful to bring these studies together to obtain as a holistic picture as possible.

To promote learning of how EA2J is best supported and to increase understanding of the nature of the relationship between rule of law and poverty, baseline and follow-up studies should, if the opportunity arises, ideally be carried out as part of larger cross-country assessments or studies that look at all justice sector programmes in a country.

TOOLS AND EXAMPLES FOR MONITORING AND MEASURING OF IMPACT

ADB & TAF, "Legal Empowerment for Women and Disadvantaged Groups", 2009.

Armytage, L., "Monitoring Performance of Legal and Judicial Reform in International Development Assistance", International Bar Association, 2006.

Holland, J. & Thirkell, A., "Measuring Change and Results in Voice and Accountability Work", DFID, 2009.

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Vera Institute of Justice, "Developing Indicators to Measure the Rule of Law: Global Approach", 2008.

5 Forms of cooperation

In recognition of the need to harmonize donor efforts, ensure alignment with recipient country priorities and more effectively handle the sheer complexity of the justice systems, there has over the past decade been a worldwide move away from scattered and uncoordinated projects to more programmatic aid modalities, in particular so called *Sector-Wide Approaches (SWAps)*.

An assessment of past and ongoing SWAps provides *a mixed picture* as to their usefulness and success and shows that they have been particularly difficult to implement in post-conflict settings. Necessary conditions for an effective SWAp include genuine long-term government and donor commitment to reform, sufficient government capacity and appropriate fiscal arrangements for handling significant amounts of funding, and involvement of civil society in setting priorities and in implementation.

CIVIL SOCIETY INVOLVEMENT

It should be noted that most justice sector SWAps have primarily targeted state justice-sector institutions and that they have thus been narrower in their focus than the system-wide EA2J approach discussed in this Guide. While it may make sense to include support to civil society organisations and non-state justice sector institutions within a SWAp, it is essential to *carefully assess whether or not funding to such entities should be channeled through the government coffers*. The risks of undermining well functioning non-state conflict resolution mechanisms, of increasing civil society's dependence on the government, and of the government being tempted to restrict funding to organisations critical of its policies and actions need to be considered.

COORDINATION AND COALITION-BUILDING

Regardless of the exact nature of the cooperation, Sida should encourage and take part in efforts to strengthen donor coordination and strive to ensure national ownership grounded in the principles of inclusion, participation and transparency.

Broad coalitions involving key actors from across institutions and sectors should be promoted to ensure that reform efforts receive the support needed for success and are not undermined. If a SWAp already exists, efforts should normally be made to fit interventions within this arrangement.

Internal and external resistance to reform has in the past often hampered justice sector interventions. In the implementation of assistance projects aiming at enhancing the capacity of justice institutions, priority should be given to institutions, state or non-state, that are genuinely committed to change and unlikely to succumb to external pressures.

DIALOGUE

A development intervention should normally be made up of both funds, technical assistance and of dialogue with the national government, donor agencies and other key actors. While the particular country context will have to determine the specific issues to be raised in the dialogue, it should in general promote commitment to reform, compliance with established human rights norms, initiatives that are grounded in the needs and perspectives of women, men and children living in poverty, approaches that balance the need to empower rights-holders with the need to enhance the capacity of relevant duty-bearers, and safeguarding of space for civil society activities. Experience shows that the Head of Mission may play a critical role in the dialogue, especially when Sweden is a lead donor.

LONG-TERM PERSPECTIVE AND MAINSTREAMING

A long-term development perspective should always be applied. Efforts should be made to ensure coordination with any transitional justice initiatives of a temporary nature so that these initiatives reinforce the longer-term reform programmes. The possibility of mainstreaming justice activities into other poverty reduction programmes should be considered. Such mainstreaming can contribute to improved dispute resolution mechanisms as well as to better poverty reduction programmes.

Annex I Human rights instruments

International and regional human rights instruments that are likely to be of relevance for an EA2J intervention include the following:

A. International instruments:

- Universal Declaration of Human Rights
- International Covenant on Civil and Political Rights
- Second Optional Protocol to the International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
- International Convention for the Protection of All Persons from Enforced Disappearance
- Convention on the Rights of Persons with Disabilities
- Basic Principles on the Independence of the Judiciary
- Guidelines on the Role of Prosecutors
- Basic Principles on the Role of Lawyers
- Code of Conduct for Law Enforcement Officials
- Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice
- Principles Relating to the Status of National Institutions
- Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms

B. Regional instruments:

- African Charter on Human and Peoples' Rights
- American Convention on Human Rights
- Charter of Fundamental Rights of the European Union

- European Convention for the Protection of Human Rights and Fundamental Freedoms

C. General Comments:

- Committee against Torture, General Comment No. 2: Implementation of article 2 by States parties, 2008.
- Committee on Economic, Social and Cultural Rights, General comment no. 20: Non-discrimination in economic, social and cultural rights, 2009.
- Committee on the Elimination of Discrimination against Women, General recommendation no. 19 on violence against women, 1992.
- Committee on the Elimination of Discrimination against Women, General recommendation no. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 2010.
- Committee on the Elimination of Racial Discrimination, General recommendation no. 21 on the prevention of racial discrimination in the administration and functioning of the criminal justice system, 2005.
- Committee on the Rights of the Child, General comment No. 5: General measures of implementation of the Convention on the Rights of the Child, 2003.
- Committee on the Rights of the Child, General comment No. 7, Implementing child rights in early childhood, 2005.
- Committee on the Rights of the Child, General Comment No. 5: Children's rights in juvenile justice, 2007.
- Human Rights Committee, General Comment No. 32: Article 14, Rights to equality before courts and tribunals and to a fair trial, 2007.

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Sida works according to directives of the Swedish Parliament and Government to reduce poverty in the world, a task that requires cooperation and persistence. Through development cooperation, Sweden assists countries in Africa, Asia, Europe and Latin America. Each country is responsible for its own development. Sida provides resources and develops knowledge, skills and expertise. This increases the world's prosperity.

A Guide to Equal Access to Justice Programmes

GLOBAL ISSUES

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