Henrik Alffram, April 2011

Equal Access to Justice

A Mapping of Experiences

Sida

Table of Contents

Abbreviations 5

Executive Summary 6

1 Introduction 8

2 From Law and Development to Equal Access to Justice 9

2.1 The law and development movement 9
2.2 The demise of law and development 9
2.3 The revival of law and development 9
2.4 Defining rule of law 10
2.5 The rule of law orthodoxy 11
2.6 The new paradigms 11

3 Obstacles and Solutions to Finding Justice 13

3.1 Cross-cutting lessons 13
3.2 Legal protection 15
3.3 Legal awareness 17
3.4 Legal assistance 18
3.5 Redress and conflict resolution 20
3.6 Enforcement 23
3.7 Institutional oversight and monitoring 25
3.8 Reform claims by rights-holders 26

4 Reflections on Customary, Indigenous and Religious Law 28

5 Measuring Results 30

6 Aid Modalities 32

7 Policies 34

8 An Equal Access to Justice Approach 35

8.1 Definition 35
8.2 Point of departure and core features 35
8.3 Guiding principles and considerations 36

9 Adjusting Interventions to Country Situations 39

Annex I: Approaches by Different Donors 41

Annex II: Dialogue 47

Annex III: Results Matrix 48

Annex IV: Terms of Reference 49

Annex V: References 51

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Abbreviations

ABA	American Bar Association
ADB	Asian Development Bank
Aus AID	Australian Government's Overseas Aid Programme
CSO	Civil Society Organization
DANIDA	Danish International Development Agency
DFID	Department for International Development (United Kingdom)
DRC	Democratic Republic of Congo
EA2J	Equal Access to Justice
ELCOP	Empowerment through Law of the Common People
GSDR	Governance and Social Development Resource Centre
ICHRP	International Council on Human Rights Policy
IDLO	International Development Law Organization
ILAC	International Legal Assistance Consortium
INPROL	International Network to Promote the Rule of Law
MFS	Minor Field Study
NGO	Non-Governmental Organization
OSCE	Organization for Security and Co-operation in Europe
OSI	Open Society Institute
OSJI	Open Society Justice Initiative
RoL	Rule of Law
SDC	Swiss Agency for Development and Cooperation
Sida	Swedish International Development Cooperation Agency
SWAp	Sector-Wide Approach
TAF	Asia Foundation
UN	United Nations
UNICEF	United Nations Children's Fund
UNDP	United Nations Development Programme
USAID	United States Agency for International Development
USIP	United States Institute of Peace

Executive Summary

Rule of law (RoL) has over the past 20 years been firmly rooted at the centre of the international development agenda. The Commission on Legal Empowerment for the Poor, a constellation of high profile global leaders and thinkers focusing on the link between exclusion, poverty and law, has argued that, "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."

Most donor-supported RoL programs have primarily focused on strengthening state justice sector institutions, such as courts and prosecution agencies, and on enhancing the skills of actors within these institutions. It has also encouraged transplants of foreign legal frameworks and institutional setups. There is, however, a rapidly emerging consensus that this approach has led to few tangible results for women, men, girls and boys living in poverty, partly because state justice sector institutions are of limited relevance for them in obtaining justice, that legal and institutional arrangements cannot easily be imported, and that national elites often resist or capture reform agendas.

Recognizing the various problems associated with past efforts to promote RoL, alternative approaches that have as their foundation the very question of how state and non-state legal orders can be used to increase poor and otherwise marginalized populations' control over their lives have emerged.

The study identifies the following key recommendations:

Apply a system-wide perspective

As weaknesses in one part of the justice chain can effectively undermine improvements in others parts of the chain, a system-wide perspective should be applied, that recognizes that the justice system is made up of several interlinked parts.

Take account of context

Interventions should be tailored to the specific context in which they are to be implemented. It is essential to not only look at what is needed to ensure better access to justice, but also to carefully consider what is socially, culturally, politically and practically feasible in a particular situation.

Apply a long-term perspective

Reform of justice sector institutions takes time. A long-term development perspective must be applied and the fact that several years often have to pass before impact becomes visible should be taken into account.

Apply a human rights based approach

As implied in the concept of Equal Access to Justice (EA2J), a human rights based approach grounded in international and regional human rights instruments should be. Interventions should be guided by and aim to enhance the principles of non-discrimination, participation, openness and transparency, and accountability.

Pay regard to political commitment

Institutional reform initiatives have small chances of success unless national stakeholders are convinced of their benefits and political power holders are prepared to accept the limits to their power that comes with adherence to the RoL. Thus, due regard has to be paid to the political aspects of justice sector interventions.

Focus on amendable institutions

Linked to the political commitment to reform is the need to assess which state and non-state institutions that are likely to embrace or resist change. In comparison with traditional legal and judicial reform programs, an EA2J approach opens up to working with a much broader pool of institutions of relevance for the justice needs of people living in poverty. It may thus become easier to identify

institutions that are open to, or less likely to resist, change.

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. An EA2J intervention may be directed at customary, traditional or religious justice systems provided that the intervention's primary purpose is to increase their compliance with international human rights norms and to reaffirm through dialogue or others means that the state is ultimately responsible to ensure that they conform to such norms.

Mainstreaming

The possibility of mainstreaming justice activities into other poverty reduction programs should be considered. Such mainstreaming can contribute to improved dispute resolution mechanisms as well as better poverty reduction programs.

Transitional justice initiatives

Where applicable, interventions should be coordinated with transitional justice programs in order to ensure that such programs contribute to strengthening the permanent RoL architecture.

Pay attention to impact and learning

Structured assessments of justice sector programs have often been sorely missing. A system for monitoring and evaluation 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

National ownership grounded in the principles of inclusion, participation and transparency should be ensured and reform efforts should preferably grow out of national or local initiatives. Broad coalitions involving key actors from across institutions and sectors are important to ensure that reform efforts receive the support needed for success.

Support national actors for reform

Linked to the core feature of enhancing the capacity of rights-holders is the need to support national reform constituencies, including human rights organizations, women's groups, professional associations and media outlets, 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.

Ensure donor 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 assistance

On the basis of this review of past justice sector reform initiatives, and recent writings about legal empowerment and social accountability strategies, an *Equal Access to Justice (EA2J) approach* is proposed for the promotion of RoL and justice. This is in full compliance with the UN approach to RoL assistance, as well as the Swedish policy on democratic development and human rights, *Change for Freedom,* 2010-2014.

The EA2J approach is relevant for the preparation of new country and thematic strategies, when designing, implementing and assessing justice sector programs and projects. It is also applicable when identifying justice-related entry-points in sector programs primarily concerned with other development outcomes, including health, education and democratic governance.

The EA2J approach takes as its point of departure the primary justice needs of women, men, girls and boys living in poverty (rights-holders) and the obstacles they encounter in finding justice.

Both dialogue and technical assistance should be used to promote EA2J. The approach has three core features, or immediate objectives:

- To empower the rights-holders to access and utilize those state and non-state institutions (duty-bearers) they consider most relevant for claiming a right, obtain redress for a grievance or settle a dispute.
- To empower rights-holders to effectively demand necessary reforms of duty-bearers they consider relevant.
- To strengthen the capacity of relevant duty-bearers to deliver justice.

1 Introduction

In relation to democratic governance and human rights, the Swedish Government identifies support to Rule of Law as a prioritized area in its Policy on Democratic Development and Human Rights in Swedish Development Cooperation. Sida (the Swedish International Development Cooperation Agency) is intensifying efforts to up-date its knowledge and methods in this area, with particular focus on Equal Access to Justice.

In late 2009, Sida engaged a consultant with a view to:

- Documenting some international approaches, results and lessons learned in RoL and EA2J;
- Producing draft guidelines for Sida's work with the legal sector and EA2J support; and
- Designing training modules for Sida (and other) staff.[1]

This mapping document relates to the first of these tasks and is thus an attempt to document recent thinking and experiences with regard to donor-supported efforts and outline an approach that could guide Sida in its future work on EA2J.

The paper is based on a review of relevant academic literature, donor-supported research, project/program evaluations and handbooks, as well as on the *Policy for Democratic Development and Human Rights in Swedish Development Cooperation, 2010 – 2014*[2] (hereinafter Sweden's democracy and human rights policy) and the United Nations Secretary-General's *Guidance Note on UN Approach to Rule of Law Assistance*[3]. Input has also come from participation in conferences, discussions with Sida´s Working Group on RoL & EA2J, other staff members at Sida, and from meetings with a number of other practitioners concerned with justice sector issues.

This paper is divided into nine sections, including this introduction. Section 2 gives an overview of how law and development theory and practice have evolved over the past 50 years. In Section 3, the paper presents some of the lessons learned with regard to RoL and access to justice promotion. Challenges in working with traditional, indigenous and religious justice systems are reflected on in Section 4. The following section highlights the importance of increased efforts to measure results and discusses some of the strategies, as well as challenges, in doing so. In Section 6, aid modalities, and in particular the experiences of sector-wide approaches, are briefly dealt with. Relevant aspects of Sweden's democracy and human rights policy and the guiding principles of *the UN Approach to Rule of Law Assistance* are presented in Section 7. In Section 8, an approach to EA2J is proposed. The last section discusses how to approach EA2J in different country contexts.

1 The Terms of Reference are enclosed in Annex IV
2 Ministry of Foreign Affairs, Change for Freedom: Policy for democratic development and human rights in Swedish development cooperation, 2010 – 2014, 2010.
3 UN Approach to Rule of Law Assistance, Guidance Note of the Secretary-General

2 From Law and Development to Equal Access to Justice

In the 1950s and 1960s, in the midst of the Cold War and towards the end of the era of rapid decolonization, some actors in the international development community first took an interest – albeit limited - in trying to assist strengthening legal systems in Latin America and Africa. In accordance with the dominant development policies of the time it was assumed that law could be used as a tool for modernization and as a tool for the state to manage the economy and ensure economic growth. Democratization and respect for human rights was expected to follow once a certain level of economic development was achieved.

2.1 The law and development movement

The early law and development movement paid particular attention to legal education and to reforming legal frameworks. A guiding idea was that existing legal cultures in developing countries needed to be reformed and that this could best be achieved by targeting law schools. It was expected that students trained and accustomed to modern western legal thinking would contribute to change the prevailing legal culture once obtaining their professional positions in various sectors of society.

2.2 The demise of law and development

In the 1970s, scholars and practitioners started to question the basic assumptions on which law and development thinking and practice were based.[4] It was argued that legal development programs had not yielded the results hoped for because they were trying to transplant foreign legal models through an approach that was elite-driven and failed to take into consideration the cultural, social and political contexts of developing countries.[5]

One of the critics, John Henry Merryman, described law and development as "an effort to provide legal expertise to the developing society by persons who lacked both cultural familiarity and a respectable theory and who, as a result, could only project their own background".[6] These types of arguments contributed to a diminishing interest in law and development among donors and scholars that lasted throughout much of the 1980s.

2.3 The revival of law and development

The 1990s saw a renewed and rapidly growing interest in the relationship between law and development. Behind the growth was the convergence of a number of developments, including: (a) the breakdown of communism in Eastern Europe and the need to reshape legal and institutional frameworks created for an altogether different economic and political system; (b) new

4 Elliot M. Burg, Law and Development: A Review of the Literature & a Critique of the "Scholars in Self-Estrangement", The Journal of Comparative Law, vol. 25, no. 3, 1977

5 David M. Trubek and Marc Galanter, Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States, Wisconsin Law Review, 1974

6 John Henry Merryman, Comparative Law and Social Change: On the Origins, Style &Revival of the Law and Development Movement, The American Journals of Comparative Law, vol. 25, no. 3, 1977

economic research stressing the importance of legal norms, well functioning institutions and independent judiciaries for achieving economic growth and poverty reduction; (c) globalization and the focus on international economic law features, in particular the World Trade Organization, requiring national laws to comply with international standards; (d) wholesale UN interventions in conflict and post-conflict contexts in which the breakdown of the previous legal order had often been complete; (e) establishment of international tribunals and hybrid courts to try crimes against humanity, genocide and war crimes; and (f) the search for a tool to ensure domestic implementation of international human rights norms.

Today, law has become firmly rooted at the very centre of the international development cooperation agenda. Practitioners and policy makers regard governance problems as the root cause of failures to address pressing issues in such disparate areas as economic development, poverty reduction, security and human rights, and see the RoL as an effective shortcut to tackle them.[7] The Commission on Legal Empowerment for the Poor, a constellation of high profile global leaders and thinkers focusing on the link between exclusion, poverty and law, has argued that, "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."[8]

While many academic scholars have traditionally maintained a much more skeptical attitude regarding the existence of a direct link between law and development, recent years have seen a growing consensus that such a link exists, albeit not as strong as sometimes hoped for, and that the RoL is of importance for economic as well as political development.[9]

At the same time, there is a strong consensus that donor supported legal and judicial reform efforts have led to few tangible results and that legal and judicial system reforms are far more complex than has generally been assumed.[10]

2.4 Defining rule of law

There are basically two main schools of thought on how to define RoL. Those who propose a so-called, "thin definition" is of the view that RoL is not a value-laden concept. According to this line of thinking, RoL simply means that there are laws and that these laws are equally applied to everyone. Thus, legal systems that do not protect human rights, such as those in effect during the apartheid years in South Africa and during the Third Reich in Germany, can qualify as RoL systems as long as the laws are applied in a consistent manner.

The other school of thought proposes a so-called "thick definition" that also takes the content of laws into account and argues that RoL implies respect for human rights. Such a definition has been put forward by the UN Secretary-General, who has stated that the RoL is:

"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. It requires as well measures to

7 Balakrishnan Rajagopal, Invoking the Rule of Law in Post-Conflict Rebuilding: A Critical Examination, in William and Mary Law Review, vol. 49, 2008; Erik Jensen, The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformer's Responses; in Erik G. Jensen and Thomas C. Heller (eds.), Beyond Common Knowledge: Empirical Approaches to the Rule of Law, Stanford University Press 2003

8 Commission on Legal Empowerment of the Poor, Making the Law Work for Everyone, vol. 1, 2008

9 See for example Kevin E. Davis and Michael J. Trebilcock, The Relationship Between Law and Development: Optimists versus Skeptics, Public Law & Legal Theory Research Paper Series, Working Paper No. 08-14, May 2008; Randy Peerenboom, The Future of Rule of Law: Challenges and Prospects for the Field, Hague Journal on the Rule of Law, January 2009; and Thomas Carothers, Rule of Law Temptations, Preliminary Draft, Prepared for the World Justice Forum, 2008

10 See for example Kevin E. Davis and Michael J. Trebilcock (2008); Stephen Golub, Making Justice the Organizing Principle of the Rule of Law Field, Hague Journal on the Rule of Law, vol. 1, 2009; Caroline Sage and Michael Woolcock, Breaking the Legal Inequality Traps: A New Approach to Building Legal Systems for the Poor in Developing Countries, conference paper, 2005; Julius Court, Goran Hyden and Ken Mease, The Judiciary and Development in 16 Developing Countries, United Nations University, World Governance Survey Discussion Paper 9, May 2003; Randy Peerenboom (2009); ADB, Independent Evaluation Department, Special Evaluation Study on ADB Technical Assistance for Justice Reform in Developing Member Countries, August 2009; and Eric Jensen (2003)

ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency."[11]

2.5 The rule of law orthodoxy

The dominant methodology used to promote RoL, however defined, is sometimes referred to as the RoL orthodoxy. It is characterized by a focus on strengthening state justice sector institutions, such as courts and prosecution agencies, and on enhancing the skills of the actors within this system. It has also encouraged transplants of foreign legal frameworks and institutional setups.

There is, as mentioned, a broadly shared view that this approach has led to few tangible results. The identified reasons for its weak performance are many, but largely relate to the well documented facts that state justice sector institutions are of limited relevance for people living in poverty, that legal and institutional arrangements cannot easily be imported, and that national elites have resisted reforms because they regard them as a threat to their political and economic interests. In others contexts, people in positions of power have managed to take control over and utilize reform initiatives to dramatically further their own interests at the expense of the majority of the population.[12]

There is also, as stated in a recent report from the Asian Development Bank's Independent Evaluation Department, an emerging consensus that the whole law and justice sector reform movement has been characterized by "a systematic lack of knowledge and rigor in the assessment, design and evaluation of projects and in particular, underinvestment in impact evaluation" and "inadequate and/or ineffective change management strategies centering excessively on the supply side, particularly the judiciary which, at best, are imbalanced by lacking any corresponding focus on the demand side, notably civil society".[13]

2.6 The new paradigms

Recognizing the various problems associated with past efforts to promote RoL, and the fact that these efforts have not always had a direct focus on the situation of women, men, boys and girls living in poverty, alternative approaches that have as their foundation the very question of how state and non-state legal orders can be used to increase poor and otherwise marginalized populations' control over their lives have emerged. These alternative approaches are not automatically placing the formal legal system at the core of their activities, but give attention to a broader range of state and non-state institutions and dispute resolution mechanisms. By improving poor people's legal awareness and ability to use existing legal orders they strive to contribute to ensuring that the justice needs of people living in poverty are met. Commonly, these alternative approaches are referred to as legal empowerment or EA2J strategies.[14]

As with the RoL, there is no broadly agreed definition that clarifies exactly what the term EA2J entails. Part of the problem in defining the concept is the rather vague nature of the term justice. Golub, who argues for making justice the organizing principle of the RoL field, simply states that "justice is about fair treatment and fair results regarding a whole host of matters".[15] The UN Secretary-General has stated that justice is:

"an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Its administration involves both formal judicial and informal/customary/traditional mechanisms."[16]

As for access to justice, Yash Ghai and Jill Cottrell have suggested that it means "the ability to approach and influence decisions of those organs which exercise the authority of the state to

11 UN Approach to Rule of Law Assistance, Guidance Note of the Secretary-General (2008)

12 See for example Kirsti Samuels, Rule of Law Reforms in Post-Conflict Countries: Operational Initiatives and Lessons Learnt, Social Development Papers: Conflict Prevention and Reconstruction, Paper No. 37, October 2006; Thomas Carothers (2008); Klaus Decker, Caroline Sage and Milena Stefanova, Law or Justice: Building Equitable Legal Institutions, World Bank, 2005; Caroline Sage and Michael Woolcock (2005); Helen Hershkoff and Aubrey McCutcheon, Public Interest Litigation: An International Perspective, in: Many Roads to Justice, The Law Related Work of Ford Foundation Grantees Around the World, The Ford Foundation, 2000; and Kathryn Hendley, Rewriting the Rules of the Game in Russia: The Neglected Issue of the Demand for Law, East European Constitutional Review, vol. 8, no. 4, 1999

13 ADB, Independent Evaluation Department (2009)

14 See Stephen Golub, Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative, Carnegie Endowment Working Papers, No. 41, October 2003

15 Stephen Golub (2009)

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

make laws and to adjudicate on rights and obligations."[17] United Nations Development Programme (UNDP) has stated that access to justice "must be defined in terms of ensuring that legal and judicial outcomes are just and equitable."[18] It defines the concept equal access to justice as "the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards."[19]

This definition has also inspired other organizations. United States Institute of Peace (USIP) has for instance defined access to justice as "the ability of people to seek and obtain a remedy through formal or informal institutions of justice for grievances in compliance with human rights standards."[20]

17 Yash Ghai and Jill Cottrell, Rule of Law and Access to Justice: Findings of an ABA Project on Access to Justice, Prepared for the ABA World Forum on Justice, Vienna 2-5 July, 2008

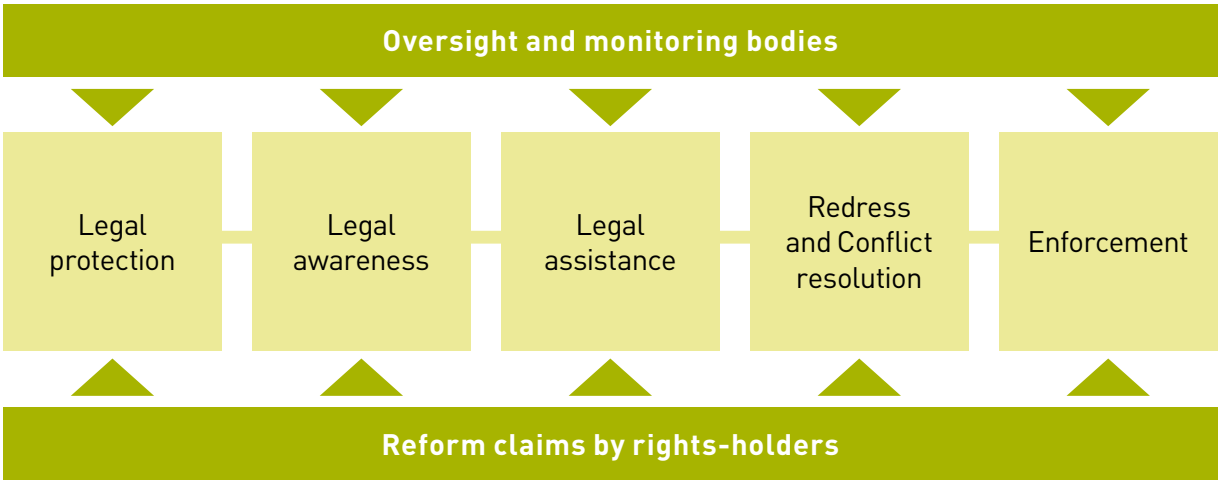
18 UNDP, Access to Justice: Practice Note, 2004

19 UNDP Asia-Pacific Rights and Justice Initiative, Programming for Justice: Access for All, A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice, 2005

20 United States Institute of Peace and United States Army Peacekeeping and Stability Operations Institute, Guiding Principles for Stabilization and Reconstruction, 2009

3 Obstacles and Solutions to Finding Justice

This section gives an overview of some of the obstacles people may have in finding justice. It also presents some of the more common, promising or effective measures used to address them. While there are a number of guidebooks and other tools outlining potential interventions, the literature contains limited evidence of what type of interventions that have proven effective in terms of bringing about broader societal impact.



To structure the presentation an analytical framework has been used that assumes that the delivery of justice for people living in poverty is related to issues of normative protection, legal awareness, legal assistance, redress and conflict resolution, and enforcement of decisions, as well as to two mechanisms to promote transparency and accountability through institutional oversight and reform claims by groups and individuals ("rights-holders").

3.1 Cross-cutting lessons

The literature provides a number of cross-cutting lessons that apply to several or all aspects of a justice sector intervention. While many of these lessons are of a rather general nature, experience shows that they are often ignored.

System-wide perspective

Even though resource constraints may make it impossible to address all relevant aspects of a legal order, there is broad agreement that individual reform initiatives should not be considered in isolation. In order to identify what combination of interventions that will most effectively promote equal access to justice, a system-wide perspective is necessary.[21]

21 Vivek Maru, Access to Justice and Legal Empowerment: A Review of World Bank Practice, Justice & Development Working Paper Series, 9/2009; ICHRP, Local perspectives: Foreign aid to the justice sector, 2000; International Crisis Group, Central Asia: The Politics of Police Reform, December 2002; and William G. O'Neill, Police Reform and Human Rights, A HURIST Document, July 2004

No blue-prints

Reform strategies will always have to be context specific. There are no blue-prints for implementation.[22]

Issue of politics

Justice sector reform changes the way power is exercised and is thus inherently threatening to the economic and political interests of existing elites. It should be approached as a political rather than technical issue as legal actors alone cannot establish RoL.[23]

Even though it is well recognized that political will is a prerequisite for reform of state justice institutions, donors have in practice often failed to ensure the existence of genuine commitment among power holders.

Feasibility

Reform programs have often been designed on the basis of what is needed rather than on what is possible. It is essential to carefully consider what is socially, culturally, politically and practically feasible.[24]

Targets

Formal state institutions may not always be the most relevant institutions to target in a reform program. The way non-state justice operates is essential to social stability and the livelihoods of women, men, boys and girls living in poverty.[25]

Mainstreaming

Mainstreaming access to justice activities into poverty reduction programs is mutually beneficial and can lead to improved dispute resolution mechanisms as well as better poverty reduction programs.[26]

Locally initiated reforms

Reforms have the best chances of success when they grow out of domestic or local initiatives.[27]

Community participation

Stakeholder and community participation is essential for successful institutional reforms.[28] Stakeholders and communities should as far as possible play a role in identifying shortcomings, developing solutions, sustaining implementation and monitoring of results.

Broad reform coalitions

Broad political coalitions involving key actors from across institutions and sectors are necessary to ensure that reform efforts are not undermined. Support from political leaders that are prepared to accept the constraints to power that come with RoL is particularly essential.[29]

Leadership

Reform of the courts and other state institutions require strong leadership from within these institutions.[30]

22 Lise Rakner et al., Democratisation's Third Wave and the Challenges of Democratic Deepening: Assessing International Democracy Assistance and Lessons Learned, Overseas Development Institute, August 2007; Commission on Legal Empowerment of the Poor (2008); INPROL, Assessing the Status of Administrative Law, 2009; Kirsti Samuels (2006); William G. O'Neill (2004); International Crisis Group (2002); and Mohan Gopal, Development and Implementation of Reform Initiatives to Ensure Effective Judiciaries, in: Asia Pacific Judicial Reform Forum, Searching for Success in Judicial Reform, 2009

23 Robert L. Nelson and Lee Cabatingan, Introductory Essay, New Research on the Rule of Law, Conference Draft, May 2008, Thomas Carothers (2008); David M. Trubek and Marc Galanter (1974); Lise Rakner et al. (2007); Goran Hyden and Ken Mease (2003); International Crisis Group (2002); and Janine Rauch and Elrena van der Spuy, Recent Experiments in Police Reform in Post-Conflict Africa: A Review, October 2006

24 Commission on Legal Empowerment of the Poor (2008); Vivek Maru, Access to Justice and Legal Empowerment (2009); and ICHRP (2000).

25 See for example, Stephen Golub (2003); Lise Rakner (2007); and World Bank, Forging the Middle Ground: Engaging Non-State Justice in Indonesia, May 2008

26 ADB (2009); ADB and TAF, Legal Empowerment for Women and Disadvantaged Groups, 2009; Commission on Legal Empowerment of the Poor (2008); and A Framework for Strengthening Access to Justice in Indonesia, http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/A2JFrameworkEnglish.pdf

27 Kirsti Samuels (2006); Livingston Armytage, Searching for Success in Judicial Reform: Voices from the Asia Pacific Experience, in Asia Pacific Reform Forum, Searching for Success in Judicial Reform, 2009; and Vivek Maru, Access to Justice and Legal Empowerment (2009)

28 Livingston Armytage (2009); International Council on Human Rights (2000);
William G. O'Neill (2004); and OSCE, Implementation of Police-Related Programmes: Lessons Learned in South-Eastern Europe, SPMU Publication Series vol. 7, 2008

29 Commission on Legal Empowerment of the Poor (2008); and Robert L. Nelson and Lee Cabatingan (2008)

30 Livingston Armytage (2009); and William G. O'Neill (2004)

Time

Reform of justice sector institutions takes time. A long-term development perspective must be applied.[31]

Evidence based-learning

Governments and donors need to invest more in structured assessments of what impact reform programs have and of what works.[32] Positive impact is too often assumed rather than proven. The fact that law can be an instrument for oppression, as well as an instrument for ensuring rights, is often overlooked.

Donor coordination

Donor harmonization is essential to avoid scattered and contradictory legal and institutional frameworks. Without effective donor coordination there is also a considerable risk that development cooperation efforts are duplicated and that reform programs neglect essential parts of a legal system.[33]

Sector-wide approaches

Sector-wide approaches have sometimes been successful, but are often undermined by turf wars or the different interests of the foreign and domestic actors involved. They are particularly difficult in post-conflict societies.[34]

3.2 Legal protection

Norms that exists in a society can be classified as those being of a formal nature and those of an informal nature. To the formal legal framework belong such instruments as laws adopted by the legislature and various types of regulations and orders issued by the executive branch of government, as well as jurisprudence. Informal law is made up of norms that have "evolved through social interaction and are either internalized or enforced informally", usually by non-state actors.

The legal frameworks

A major problem in many countries, and in particular in conflict and post-conflict societies, is the absence of a coherent legal framework that serves to ensure human rights, uphold law and order, reduce the cost of economic transactions and is generally suitable for the social, cultural and economic context in question. The legal framework may be inconsistent, contain gaps or be overly complicated to interpret and apply.

Even in countries with an otherwise reasonably well developed set of laws and regulations, the legal framework often fails to provide adequate protection for certain situations and groups and may contribute through discriminatory provisions and non-recognition, to the further marginalization of disadvantaged groups.

Women may for instance be discriminated against in terms of inheritance, property ownership and political participation. It may also be that the legal system does not criminalize or provide protection against such acts as marital rape and domestic violence. Ethnic minorities, sexual minorities, religious minorities and children are examples of other groups that are often denied adequate legal protection under formal or informal norms.

People may also be denied adequate legal protection as a result of the overly broad protection from prosecution sometimes given to such groups as military personnel and police officers. In many countries, 19th century colonial laws that contain provisions in direct conflict with international human rights standards are still in force.

Handbooks on RoL and access to justice propose a range of interventions to strengthen normative protection, including strategies for ratification of and accession to international human rights instruments, ensuring that domestic laws are consistent with international treaty provisions, monitoring the impact of laws on disadvantaged groups, building capacity to develop progressive judicial decisions, gathering and dissemination of information on discriminatory social and cultural norms and practices, and challenging discriminatory practices in court.

31 Lise Rakner, et al. (2007); William G. O'Neill (2004); ICHRP (2000); Janine Rauch and Elrena van der Spuy (2006); and OSCE (2008)

32 Livingston Armytage, Monitoring Performance of Legal and Judicial Reform in International Development Assistance: Early Lessons from Port Moresby & Phnom Penh, International Bar Association, September 2006; Stephen Golub (2003); Lise Rakner et al. (2007); and Stanley Kahn and Safoora Sadek, Swedish Support to the Access to Justice in South Africa, Sida Evaluation 04/28, January 2004; Thomas Carothers, Promoting the Rule of Law Abroad: The Problem of Knowledge, Carnegie Endowments Working Papers, No. 34, 2003

33 Lise Rakne et al. (2007); Kirsti Samuels (2006); and ICHRP (2000)

34 Christopher Stone et al., Supporting Security, Justice, and Development: Lessons for a New Era, April 2005; and GSDRC, Help Desk Research Report: SWAps and Justice, April 2007

Providing legal identity

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 property, open bank accounts and receive the benefits of anti-poverty programs.

There is evidence that efforts made to provide people with legal identity, which is a right laid down in international human rights treaties, have been successfully implemented by for instance integrating them into general census, health and education programs.[35]

It has been noted, however, that efforts to provide people with legal identity have to be "mindful of the possible dangers and political consequences for the people being registered."[36]

Transplantation of foreign law

New laws are often inspired by or copied from laws used in other countries. However, experience shows that laws and practices that work well in one country or context do not necessarily work well in others.

Borrowed laws tend to work best when they have been borrowed from a country with similar political and legal heritage.[37] The implementation of foreign laws and concepts is particularly difficult with regard to those areas of law that are strongly historically or religiously anchored, such as family law.[38]

In post-conflict contexts, there has been a shift from the development and implementation of transitional laws to the creation of various kinds of best practice guidelines and handbooks. It has been noted, however, that the transfer of best practices may not necessarily be easier than to transfer entire laws and institutional models.[39]

Ratification of human rights treaties

Ratification of international human rights treaties is generally seen as an important step towards ensuring legal protection. In some countries, adopted treaties automatically become part of domestic law, while other countries require a specific legislative act before the provisions of an international treaty becomes part of domestic law.

In either case, there is ample evidence, as manifested by the recommendations of the UN treaty bodies, that ratification does not necessarily mean a readiness to ensure that the rights in question are upheld. Nevertheless, the fact that a state has ratified an international treaty gives citizens, civil society actors, foreign governments and others a tool to use in their advocacy or dialogue-related activities.

Codification

Legal protection is often undermined by a legal framework that is scattered and difficult to navigate. An effective way of trying to address this problem is to consolidate laws into comprehensive codes.[40]

Criminalization and decriminalization

When discrimination is based on criminalization of certain acts, such as abortion or homosexual conduct, advocacy campaigns to promote decriminalization might be effective.[41] Amending legal provisions to ensure that certain acts are no longer subject to prosecution can, in addition, reduce the number of cases that enter the justice system and thus help reduce case backlog.

Legal protection for a vulnerable group can also be increased through criminalization of acts carried out by others. Even though there is often a wide gulf between the adoption of a new law and its actual implementation, new laws can sometimes have significant impact on behavior. There is for instance evidence that legal reforms regarding gender based-violence have led to higher reporting levels, better police and judicial responses, and increased numbers of convictions.[42]

35 Legal Commission for Empowerment of the Poor (2008), and Vivek Maru, Access to Justice and Legal Empowerment (2009); and Per Bergling et al., Rule of Law in Public Administration: Problems and Ways Ahead in Peace Building and Development, Folke Bernadotte Academy, 2008

36 Vivek Maru, Access to Justice and Legal Empowerment (2009)

37 Daniel Berkowitz et al, Economic Development, Legality, and the Transplant Effect, April 2001; and John Gillespie, Globalisation and Legal Transplantation: Lessons from the Past, Deakin Law Review, 2001

38 Per Bergling et al. (2008)

39 Per Bergling et al. (2008)

40 Per Bergling et al. (2008)

41 An example is the decade long Indian campaign to decriminalize homosexuality. In 2009, the New Delhi High Court ruled the penal code provision making homosexual conduct a crime unconstitutional.

42 Morrison et al, Addressing Gender-Based Violence: A Critical Review of Interventions, World Bank Research Observer, 2007

Removal of impunity provisions

Problems in finding justice for a human rights violation are often related to the existence of laws that in effect shield members of the armed forces, law enforcement personnel and public servants from arrest and prosecution. Governments are often reluctant to hold members of the security forces to account for violations of human rights as their power tends to depend on the loyalty of these forces. However, 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 with the government in question has in some cases yielded results and led to changes in existing legislation.

Public interest litigation

Support to groups seeking to produce systemic changes to laws and public policies through the judiciary has in several countries been an effective way of strengthening legal protection for disadvantaged groups. Such public interest litigation has for instance contributed to fillings gaps in existing legal frameworks and to expand rights. 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 favor of reform.[43]

In countries where groups of individuals who are victims of the same legal injury are not allowed to pursue their claims collectively, the introduction of a mechanism that allows such actions may be valuable.[44]

3.3 Legal awareness

A lack of legal awareness is a serious impediment to accessing justice and may be directly related to non-existent or undeveloped policies, procedures and activities for broad dissemination of information about laws and regulations. Where the concept of access to information is not well developed there may also be a harmful reluctance among government officials to share legal texts. Women, people living in poverty and people with no or little formal education are in many countries among those who are likely to have particularly low awareness of laws and rights, and among those who have the most significant problems in accessing the justice system.

Legal literacy

Legal literacy programs can be implemented by state actors as well as non-governmental organizations and the media. Experiences regarding the implementation of such programs suggest that they should be relevant to the day-to-day lives of the target population and preferably connected to specific efforts at finding justice.[45]

Integrated approaches that pair legal literacy activities, as well as legal assistance, with mainstream development programs in such fields as health, education, natural resource management and local governance have proven successful.[46] Involving judges, prosecutors, police and other government actors in training for local communities may 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.[47]

Plain language drafting

Laws and regulations have traditionally been drafted in a convoluted manner and language difficult to understand for most citizens, as well as for those tasked with applying them. This opens up for arbitrary application and undermines legal protection. Experience shows that laws can be drafted in ways that make them easily understood by people who have the language skills necessary to read a daily newspaper.[48]

Standard-form documents

Issuing of standard-form documents for common legal transactions may increase the ability of people to use the justice system and secure rights. It should be noted, however, that the legal profession is likely to object to the introduction of such instruments, as it may perceive it as a threat to its monopoly on interpreting and applying the law.[49]

43 See for example, Helen Hershkoff and Aubrey McCutcheon (2000); Ayesha Dias, Shared Challenges in Securing Access to Justice-The Indian and Sri Lankan Experiences, in Asia Pacific Judicial Reform Forum, Searching for Success in Judicial Reform, 2009; and ABA Rule of Law Initiative, Cambodia's First Public Impact Litigation Law Firm Launches Operations, July 2009

44 Commission on Legal Empowerment of the Poor (2008)

45 Vivek Maru, Access to Justice and Legal Empowerment, (2009); and A Framework for Strengthening Access to Justice in Indonesia, n.d.

46 ADB and TAF (2009)

47 ILAC (2008); and A Framework for Strengthening Access to Justice in Indonesia, n.d.

48 See Barbro Ehrenberg-Sundin, Plain language in Sweden, results after 30 years, conference speech, http://www.plainlanguage.gov/community/world-sweden.cfm

49 Commission on Legal Empowerment of the Poor (2008); and interview with Shahdeen Malik, February 2010

Training of legislative drafters

Many countries with a lack of people with legislative drafting skills tend to rely on foreign legal advisors for the development of new laws and regulations. While these foreign advisors may possess the relevant subject matter knowledge, they often have limited knowledge of the legal system in question and of the political, economic and social context in which the laws are to be applied. They therefore regularly fail to prepare laws that can be easily implemented. Often a reliance on foreign legal advisors will also result in a "patchwork" legal framework that contains serious inconsistencies. If a country does not have a pool of competent legal drafters, efforts to train civil servants or legislators in preparing laws that are easy to understand, suitable for the context in question, consistent with each other and possible to implement may thus be essential.

Public consultations

In order to ensure that new laws reflect the needs of a country's population and institutions, there is often a need to create a more consultative law-making process that includes comment periods and public hearings. A participatory law-making process can also serve to create better understanding of and broader support for new laws, and thereby facilitate their enforcement.[50]

3.4 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. Such assistance may also serve to correct the inequalities in power, education and status that parties to a dispute often have, and that tend to influence its outcome. In practice, disadvantaged populations frequently have limited access to legal advice for reasons of cost and physical access.

Mixed approach

While there are a range of distinct models for providing legal assistance, all of which have certain advantages and disadvantages, available evidence suggests that a mix of different approaches give the best result and that lawyer-centered legal aid systems should be combined with other service models.[51]

Conventional lawyer-based legal aid schemes

Relying on unsubsidized private lawyers to ensure legal assistance to people in need is hardly a viable option anywhere in the world considering the cost of such services. Even in countries where lawyers, due to tradition or legal requirements, provide some services free of charge to people living in poverty, such services are usually limited in scope and availability.

Legal aid schemes under which the state subsidizes private lawyers providing legal assistance to people in need exist in many countries. However, the cost for the state for these schemes can be substantial and they are therefore often underfunded. An additional problem that affects these schemes is that the distribution of lawyers is often low in rural and lower-income areas. People living in poverty may thus be excluded from the services provided for reasons of physical access.[52]

An alternative, or complement, to the state-subsidized private lawyer schemes is publicly or privately funded legal aid offices staffed with lawyers that provide free or subsidized legal services. An advantage with these legal aid offices is that they generally allow the employed lawyers to specialize on legal aid problems unique for disadvantaged people and communities. However, the system often suffers from problems similar to the legal aid schemes based on subsidized private lawyers, including problems in ensuring long-term funding. Experience also shows that the model's likelihood of receiving public funding may be negatively linked to its legal and judicial reform focus. The system may receive little support from private lawyers and bar associations as they may see it as undermining their business interests.[53]

It should be noted that a problem with all conventional lawyer-based legal aid systems is that they are rarely equipped to deal with the non-state legal orders that have a significant bearing on people's rights in most countries.

50 Kathryn Hendley (1999)

51 Robert Rhudy, Expanding Access to Justice: Legal Aid Models for Latin America, in: Bibesheimer and Mejia (eds), Beyond Our Borders: Judicial Reforms for Latin America and the Caribbean, Inter-American Development Bank, 2000; and Vivek Maru, Access to Justice and Legal Empowerment (2009)

52 Robert Rhudy (2000)

53 Robert Rhudy (2000)

Paralegals

Paralegals are non-lawyers assisting poor and disadvantaged people and communities with their justice needs. They can operate within the framework of specialized organizations, but can also provide services through community-based associations such as micro-finance institutions. Typically they assist people with their justice needs by providing legal advice and assistance in accessing relevant administrative or justice institutions. They also work on settling disputes through mediation, reconciliation and negotiation.

While programs promoting paralegal services exist in many shapes and forms, there is considerable evidence that they often have significant impact.[54] The programs appear to work best, however, when the financial stakes involved in the issues handled are limited. There are examples of paralegal programs failing when the rent-seeking opportunities for the paralegals have been high.[55]

With regard to criminal law, paralegal programs have in several countries in Africa empowered inmates to defend themselves and significantly contributed to reduce the prison population in seriously overcrowded prisons.[56] In other parts of the world, programs that have relied on young law graduates to carry out similar tasks have also contributed to ensure the release of significant numbers of inmates.[57]

One of the strengths of a paralegal approach to legal aid comes from the paralegal's knowledge of both state law and the functioning of the government, on the one hand, and her or his knowledge of local realities and social-movement type of tools, on the other. In comparison with a lawyer-focused approach, paralegal programs are generally also cheaper and have better outreach. In countries with plural legal orders, paralegal programs may contribute to a positive evolvement of non-state law.

The characteristics of a successful community-based paralegal program have been said to, among other things, include:

- Training for the paralegal in substantive law as well as in mediation, investigation, negotiation, advocacy and organizing skills;
- Regular training and supervision of the paralegal by lawyers; and
- Cooperation with lawyers that can take up cases that are not suitable for the paralegals to handle.[58]

Law school clinics

Law schools in different parts of the world run clinics in which law students, under some level of supervision, provide free legal services. In terms of providing people living in poverty access to justice they have been found to be less effective due to the fact that their services are generally provided at the premises of law schools and not where those who need their services the most live. However, when the clinics have been working in close cooperation with non-governmental organizations (NGO) they have in some cases contributed to furthering various social justice issues.

Often law school clinics have also been valuable in terms of fostering professional understanding of the situation and legal problems of poor and marginalized groups. An additional strength is that they may be able to operate in contexts where overt human rights activities are not possible.[59]

Legal aid NGOs

Legal aid NGOs exist in almost all countries of the world. Many of them have a clear human rights focus in their work and activities. Apart from providing legal services to disadvantaged clients, they are often engaged in community legal education activities and in advocating for legal and justice sector reforms. Where legal aid NGOs have been set up by, or staffed with, prominent national level lawyers, they have often con-

54 See for instance Open Society Justice Initiative, Between Law and Society: Paralegal and the Provision of Primary Justice Services in Sierra Leone, 2006; Jeffrey Hatcher et al, Securing the Land Rights of the Rural Poor: Experiences in Legal Empowerment, IDLO, 2009; Adam Stapleton, Empowering the Poor to Access Criminal Justice: A Grassroots Perspective, IDLO, 2009; Stanley Kahn and Safoora Sadek (2004); and Commission on Legal Empowerment of the Poor (2008)

55 Interview with Shahdeen Malik, February 2010

56 Adam Stapleton (2009)

57 SIPU, Review of Experiences Gained within Swedish supported Development Cooperation in Haiti 1998-2009 with a focus on Human Rights, Democracy and Rule of Law, Report for Sida, June 2009

58 Open Society Justice Initiative (2006)

59 Aubrey McCutcheon, University Legal Aid Clinics: A Growing International Presence with Manifold Benefits, in Mary McClymong and Stephen Golub, Many Roads to Justice: The Law Related Work of Ford Foundation Grantees Around the World, The Ford Foundation, 2000; and Robert Rhudy (2000)

tributed to important legal reforms of relevance for marginalized groups.[60]

3.5 Redress and conflict resolution

There is a massive step between ensuring legal protection, legal awareness and legal assistance, on the one hand, and ensuring fair conflict resolution or redress for a grievance, on the other. 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. The reasons for this may be directly related to mandates that are unclear, discriminatory or not abided by in practice. It may also be that the institutions lack sufficient human resource capacity or are overloaded with cases and generally have poor operational efficiency. Often the institutions lack in integrity, accountability and independence. Access to justice can also be hindered by the geographical, economic, linguistic, cultural and gender related barriers the potential users of the justice institutions face.

Most developing countries have a spectrum of different mechanisms for dispute resolution that may span from formal courts to traditional or religious mechanisms that operate without any sanction of the state. In between can be such arrangements as traditional mechanisms that operate in cooperation with NGOs, or state-sanctioned bodies that solve disputes by applying a mixture of state and non-state law.

Case management reform

Various initiatives have been undertaken around the world to reduce backlogs of court cases and to ensure a more efficient disposal of cases. These initiatives may range from improved case-tracking systems to the establishment of systems for referral of cases to mediation.

Court management reform initiatives have sometimes contributed to reduce fees involved in court proceedings and to improve the right to a speedy trial and other due process indicators. A genuine commitment to the reform initiatives among leading representatives of the judiciary appears to be a prerequisite for success.[61]

It should be noted that judiciaries are often overloaded with cases because of a poorly functioning system for registration of property. In some countries more than 75% of all court cases are related to land disputes. As these disputes often tend to result in violent crimes, a large share of all criminal cases may also be directly related to a dysfunctional land-registration system.[62]

NGO-assisted conflict-resolution

Various forms of alternative dispute resolution mechanisms (state and non-state), including small-claims courts and other arbitration, mediation and conciliation mechanisms, have proven to be able to provide 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.[63] However, like all conflict-resolution mechanisms, they work best when the economic stakes are not too high and the parties are fairly equally armed in terms of financial strength and power.[64]

In some contexts NGOs have successfully worked with traditional, local government connected or sector specific conflict resolution mechanisms to improve fairness. They have been doing so by for instance including women and members of disadvantaged groups as mediators/arbitrators, training mediators/arbitrators in law and human rights, introducing simple standardized procedures and case recording systems, providing support staff and connecting the mechanisms to legal aid so that the parties to a conflict have the option to pursue their claims within the formal system.[65]

NGOs have also contributed to gender sensitization and increased knowledge of international human rights law among judges in the formal judiciary.[66]

60 Robert Rhudy (2000)

61 See for example, Zenaida Elepano, Case Management Reform-The Philippine Experience; and Paulus Lotulung et al, Backlog Reduction-The Indonesian Experience, in Asia Pacific Judicial Reform Forum, Searching for Success in Judicial Reform, 2009

62 Interview with Shahdeen Malik, February 2010

63 Commission on Legal Empowerment of the Poor (2008)

64 Interview with Mizanur Rahman, ELCOP, February 2010; and Sakuntala Akmeemana, World Bank, February 2010.

65 See for example, World Bank, Framing Local Justice in Bangladesh, 2009; ILAC (2008); and DFID, Briefing: Justice and Accountability, May 2008

66 ILAC (2008)

Volunteer networks of mediators

In Nicaragua, a network of volunteers, so called judicial facilitators, with legally established mediation duties was established in the 1990s. These judicial facilitators are elected by the local community where they live, report to the local judge and are provided with regular legal training. They are mainly engaged as mediators to deal with property disputes, violence and issues of family law. They also provide legal advice to local communities and inform people of their rights.[67]

In several assessments the program has been regarded as a success as it has given people in remote communities access to a cheap and respected dispute resolution mechanism and is believed to have raised awareness of rights, increased public trust in the formal legal and judicial system, and contributed to reduced crime levels.

A concern relating to the system has been that the "minor" criminal cases the facilitators take on (in particular issues of domestic violence) may in effect shield perpetrators from being prosecuted for matters that from a human rights perspective are serious issues.

Mobile courts

For reasons of distance and existing infrastructural arrangements, 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. In Guatemala, for instance, the World Bank has supported such courts to provide mediation services and a forum for resolving small claims as well as family and labor disputes. These courts appear to have been of particular importance for women.[68]

Similarly, arrangements in which judges hold pre-trial hearings in prisons rather than in court have provided positive outcomes. They have for instance reduced the time pre-trial detainees have to spend in incarceration without having their detention tried by a tribunal.[69]

Court buildings

If a sufficient number of judges and other court staff exist, the establishment of new courts can obviously help improve access to justice by reducing the distance people have to travel to get to a court. New courthouses can also help increase the status of the judiciary and improve the working conditions of court personnel. In Nicaragua, where Sida supported the construction of 122 local court houses, it was found that the creation of living quarters connected to the court houses served as an incentive for judges to take up positions in remote areas and helped them maintain their independence from influential local people and the authorities.[70]

Where judges have been involved in selecting contractors for renovations and construction of new buildings it has sometimes been alleged that the contacts between judges and business actors have resulted in increased judicial corruption.[71]

Anti-corruption initiatives

Corruption, including nepotism, is often the most serious problem people face in finding justice. Corruption undermines the ability of the state to implement laws, reduces the possibility of poor people to claim their rights and turns courts and other institutions and conflict resolution mechanisms in favor of those in relative positions of power and financial strength. Human rights problems also tend to be particularly grave in societies with serious corruption problems.[72]

The literature contains a number of recommendations for reducing justice sector corruption, including promoting presence of lawyers and human rights workers in police stations and courts; developing codes of conduct; simplifying legal and administrative procedures; ensuring that information about applicable fees is publicly displayed; organizing litigants to make corruption public; ensuring easy access to all decisions

67 Sara Westerlund and Marlene Widenbladh, The Rural Judicial Facilitators Programme in Nicaragua: An Exemplary Model of Restorative Justice?, MSF-report, Department of Law, Umeå University, 2007; Nils Öström and Elisabeth Lewin, Outcome Assessment of Swedish Cooperation with Nicaragua 2001-2008, December 2009; and Edmundo Quintanilla, Support for the Administration of Justice in Nicaragua – The Rural Judicial Facilitators Program, World Bank, 2004

68 See Kirsti Samuels (2006)

69 Adam Stapleton (2009)

70 Elisabeth Lewin et al., Access to Justice in Rural Nicaragua: An independent evaluation of the impact of Local Court Houses, Sida, 1999

71 Interviews with lawyers in Bangladesh, February 2010.

72 Bergling et al. (2008)

by courts and other conflict resolution mechanism; and promoting strategic use of the media.[73]

There is research indicating that programs based on extensive public scrutiny of judicial processes can help address the corruption problem.[74] Strategies that combine monitoring of justice system institutions through methods such as citizen charts, checklists and indexes with advocacy for reform are promising. For such strategies to be effective a reasonable level of freedom of expression and a climate conducive to public debate must, however, be in place. If a free press exists, ensuring that journalists have the knowledge and skills necessary to monitor and report on corruption may be worthwhile.[75]

While there appears to be a relationship between salary structures and levels of corruption, initiatives to increase salaries for judges and other court personnel do not necessarily reduce corruption notably as the potential bribes received may in any case dwarf wage income.[76]

De-politicization efforts

The formal neutrality of law does not hinder it from being in practice an essential tool for many political elites trying to ensure their continued political and economic dominance. By establishing or maintaining a level of de facto control over the judiciary, political elites can effectively undermine political dissent and ensure favorable outcomes of disputes.

With the aim of depoliticizing the judiciary, donors have in many countries supported the establishment of independent entities (often referred to as judicial councils) that have taken over the responsibility of appointing and promoting judges from the executive branch of government or supreme courts. Studies from Latin America have shown that these councils, which are typically made up of a mix of judges, representatives from other branches of government and professional associations, have not been a great success. However, they are regarded as having the potential of being of some importance in depoliticizing the judiciary if a genuine political commitment to the idea of judicial independence already exists.[77]

Transplants of institutional models

As with laws, successful institutional reform initiatives are not easily transferrable from one justice system to the other. Institutional mechanisms and setups that have worked well in one country often fail to work when transplanted to another country.[78]

Legal education and training

Judicial training programs have usually failed to sustain impact. The reasons for this have either been the inability or unwillingness of judges and other court personnel to change the way they have traditionally carried out their functions, or the fact that the training programs have been poorly designed or implemented.[79]

Best practice suggests that legal education for practitioners should be based on active learning, participation, problem solving and real in-country problems.[80] 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.[81] Joint training courses for judges, prosecutors, police officers and lawyers have been found to be effective.[82] To the extent possible, local expertise should be used in order to avoid translation-related problems and ensure relevance and sustainability.[83]

Legal skills and knowledge can be used to increase freedoms as well as for purposes of oppression. It is worth remembering that one of the main criticisms of the early law and development movement, which had hoped to reform legal cultures through improved legal education, was that it ignored that, "the formal neutrality of the legal system is not incompatible with the

73 See for instance, SDC, Human Rights and Development: Learning from Experiences, Conference paper, 2006
74 See USAID, Reducing Corruption in the Judiciary, USAID Program Brief, June 2009
75 USAID (2009); and Bergling et al. (2008)
76 Bergling et al (2008)
77 Linn Hammergren, Do Judicial Councils Further Judicial Reform, Carnegie Endowment Working Paper no. 28, June 2002
78 See for instance, Timothy Waters, Overview: Design and Reform of Public Prosecution Services, in Open Society Institute, Promoting Prosecutorial Accountability, Independence and Effectiveness, 2008
79 Kirsti Samuels (2006)
80 Bergling et al. (2006)
81 Morrison et al (2007)
82 Juan Faroppa and Tina Lundh, Rättsreform i Paraguay, Sida Evaluation 07/34, December 2007
83 Bergling et al. (2008)

use of law as a tool to further domination by elite groups."[84]

Associations of women judges

In terms of empowering women as judicial actors, it has been suggested that associations of female judges can be very effective. Such associations can, among other things, play a role in encouraging women to join the judiciary, examine hiring and promotion policies, and generally promote gender equality within the judiciary.[85]

Institutional performance information

The existence of reliable data about the performance of judicial institutions is regarded as important both in terms of devising appropriate strategies for improving institutional capacity and for creating public pressure for reform.

Assessed over time, the use of data regularly collected by government institutions or NGOs can, particularly if disaggregated by such factors as gender, ethnicity, income, profession, education and geographic location, provide information about changes in the demands on institutions; their ability to meet these demands; the extent to which individuals have access to and resort to various types of institutions for dispute resolution; levels of corruption; and the extent to which procedural guarantees are upheld.[86]

3.6 Enforcement

A major problem with many formal and informal justice systems is that the decisions handed down by courts and similar institutions are never enforced due to factors such corruption, political interference, lack of resources and mismanagement of funds, and poor administrative routines and coordination. Another problem with the enforcement process is that it is often accompanied by human rights abuses, including harassment, intimidation, unlawful detention and physical abuse.

With regard to policing, the challenge is often, in particular in conflict and post-conflict societies, to facilitate a move from a model based on repression and social control to one that is focused on serving the people and protecting their human rights. It should be noted that non-state policing agencies, including private security companies, are gaining increasing importance in many parts of the world. However, most donor-supported initiatives have been directed at public police agencies functioning under the auspices of the state and there is little experience of working with non-state entities.

Combine human rights and crime control perspectives

If police reform should be effective, police officers must be convinced that reform initiatives will contribute to decrease crime and disorder. Reform efforts focusing on the human rights perspective of policing should be combined with a crime control perspective.[87]

Police training

While human rights training is often necessary, it is not sufficient to ensure a rights-respecting police force.[88]

Too often, donor supported police training programs have not been sufficiently context specific and foreign trainers have often been found to have insufficient knowledge of the domestic legal framework in question.[89]

Police accountability

A heavy emphasis on police accountability is necessary in any police reform program. Incentive structures that reward those who carry out their tasks the right way and sanction those who do not should be established. The existence of public complaints procedures and internal disciplinary procedures is crucial, even though it is often a difficult task to get these procedures to work as envisaged.[90]

Community-based policing

Community-based policing programs have obtained considerable interest from donors. These programs strive to promote positive relations between the police and the communities in order to ensure improved crime control and pre-

84 Trubek and Galanter (1974)
85 ILAC et al. (2008)
86 See, Linn Hammergren, Performance indicators for Judicial reform, World Bank, March 2002
87 William G. O'Neill (2004); and International Crisis Group (2002)
88 David H. Bayley, Police Reform as Foreign Policy, Australian and New Zealand Journal of Criminology, vol. 38, no. 2, 2005; and William G. O'Neill (2004)
89 OSCE (2008); and Eirin Mobekk, Identifying Lessons in United Nations International Policing Missions, Geneva Centre for the Democratic Control of Armed Forces, November 2005
90 William G. O'Neill (2004); and OSCE (2008)

vention, focusing on the most urgent needs of the communities.

The results of community-based policing programs are mixed. Sometimes they have contributed significantly to improved public confidence in the police and to reduced crime levels. However, it has frequently also been found that these programs have failed to overcome accountability problems and the public's distrust in the force. In some cases the programs have led to further repression of ordinary citizens as the intelligence capabilities of the police have increased. The programs have also been found to sometimes reinforce local community hierarchies.[91]

Multi-ethnic police services

Efforts to create a multi-ethnic police service have often been successful and have significantly contributed to increase the confidence of minority populations in the police. It has been suggested that the establishment of a multi-ethnic police force is best facilitated if police officers have to work and live together during the early stages of their career and at police academies.[92]

Improving gender balance

On average, women make up less than 10% of the total number of police officers in low-income countries. An increase in the number of female police officers is expected to contribute to better community relations and better prevention of abuses of women's rights. There are several examples of successful strategies to increase the number of female officers in the police force and of ensuring that they are not relegated to the lower ranks. Associations of women police officers have helped to create a culture of mutual support among the members.[93]

Specialized police stations for gender-based violence

It appears that special police stations or units for women increase reporting of abuse and the chances that women are given forensic exams, counseling, emergency contraception and protection against sexually transmitted deceases. However, special women's police stations have often been severely underfunded and staffed with officers who lack adequate training. It has also been found that women officers do not automatically show better attitudes towards female victims simply by virtue of their sex. Even when the stations have been working relatively well, their impact has often been undermined by the poor functioning of other parts of the justice system.[94]

It has been suggested that a "whole system" approach through which all police officers, male and female, receive training on how to deal with cases of gender-based violence may be more effective than establishing specialized police stations.[95]

Juvenile justice

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. To be successful, initiatives should take into account, among other things, the need for appropriate legislation, establishment of alternatives to the formal justice system, strengthened non-custodial interventions, and training and awareness raising among relevant institutional actors. Efforts should be made to consult children

91 Hesat Groenewald and Gordon Peake, Police Reform through Community-Based Policing: Philosophy and Guidelines for Implementation, International Peace Academy, September 2004; Peace Building Initiative, http://www.peacebuildinginitiative.org/index.cfm?pageId=1872 ; International Crisis Group, Bangladesh: Getting Police Reform on Track, Asia Report No 182, December 2009; COWI, External Evaluation of the Tripartite Programme for Democratic Policing (PDP) between the Rwanda National Police (RNP), the Swedish National Police Board (SNPB) and the South African Police Service (SAPS), July 2009; Pradeep Sharma and Peter Lee, Case Studies on Access to Justice by the Poor and Disadvantaged: Lessons Learned from Community Policing in India, UNDP, Asia-Pacific Rights and Justice Initiative, July 2003; and Janine Rauch and Elrena van der Spuy (2006); Eirin Mobekk (2005); and OSCE (2008)

92 OSCE (2008); International Crisis Group (2002); and Janine Rauch and Elrena van der Spuy (2006)

93 UNDP-UNIFEM, Policy briefing paper: Gender Sensitive Police Reform in Post Conflict Societies, October 2007; and Knud Olander et al., Cooperation between Sri Lanka Police and Swedish National Police Board, Sida Evaluation 07/43, December 2007; and Finn Hedvall and Busisiwe Mazibuko, What difference has it made? Review of the Development Cooperation Programme between the South African Police Service and the Swedish National Police Board, Sida Evaluation 05/14, January 2005

94 Morrison et al. (2007)

95 Morrison et al. (2007)

and young people in the design and implementation of programs.[96]

Prevention of torture

Regular outside monitoring of places of detention is possibly the most effective way of preventing torture in prisons and police stations. Where NGO-workers have been given regular access to prisons, been allowed to conduct confidential interviews with inmates and been able to publish their findings, the levels of physical abuse have sometimes been reduced significantly.[97]

Corruption

The general strategies used to reduce corruption in the adjudication process are applicable and used also with regard to institutions responsible for enforcement of judgments and decisions. Involving stakeholders in monitoring enforcement of decisions by courts and other decision-making bodies has proven effective not only as a way to reduce corruption but also to improve performance generally.[98]

3.7 Institutional oversight and monitoring

Oversight and monitoring mechanisms can serve to ensure that justice sector institutions and their representatives are liable for their actions and called to account for malpractice and abuse of power. Oversight can be provided, by the executive, parliament or independent statutory bodies, as well as through internal institutional arrangement.

Independent statutory bodies

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 institutions 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 cannot be expected to have significant impact in contexts in which these other institutions are not fulfilling their legitimate roles.[99]

Internal oversight bodies

Even when considerable resources have been spent on strengthening internal oversight bodies, these bodies often remain weak. Their ability and willingness to investigate cases of misconduct is often hampered by corruption, nepotism and undue external influences. When scrutinized by the media and civil society actors, their effectiveness is often increased.[100]

Other government initiatives

While oversight bodies have generally had limited impact in terms of increasing accountability, other government initiatives have increased accountability by opening up spaces for civil society participation. Among these initiatives are actions such as the adoption of freedom of information legislation as well as more specific measures aiming at institutionalizing participation of civil society in the design, decision-making and control of programs.[101]

96 UNICEF, The Development of Juvenile Justice Systems in Eastern Europe and Central Asia: Lessons from Albania, Azerbaijan, Kazakhstan, Turkey and Ukraine, 2009; UNICEF, Thematic Evaluation of UNICEF's Contribution to Juvenile Justice System Reform in Montenegro, Romania, Serbia and Tajikistan, 2007; and UNICEF, Justice for Children: Detention as a Last Resort, Innovative Initiatives in the East Asia and Pacific Region, 2004. For guidance on juvenile justice and international human rights standards see UN Committee on the Rights of the Child, General Comment No. 10: Children's rights in juvenile justice, 2007

97 See for instance Licadho prison reports 1997-

98 Ayesha Dias (2009)

99 See for example, Brian Burdekin et al., Protecting and Promoting Human Rights in Palestine: An Evaluation of the Palestinian Independent Commission for Citizens' Rights, June 7, 2007; ICHRP, Performance & legitimacy: national human rights institutions, 2004; G. O'Neill and Gerelmaa Sandui, Assessment of the HURISTMON and the National Human Rights Action Program, December 2005; and Robert Williams and Allan Doig, Achieving Success and Avoiding Failure in Anti Corruption Commissions: Developing the Role of Donors, U4 Brief, January 2007; John R. Heilbrunn, Anti Corruption Commissions: Panacea or Real Medicine to Fight Corruption?, World Bank Institute, 2004

100 OSCE (2008); and Janine Rauch and Elrena van der Spuy (2006).

101 See for example, John Ackerman, Social Accountability in the Public Sector: A Conceptual Discussion, Social Development Papers, Paper No. 82, March 2005; and World Bank Institute, Social Accountability in the Public Sector: A Conceptual Discussion and Learning Module, World Bank Working Papers, 2005.

3.8 Reform claims by rights-holders

Experience shows that there is often considerable resistance to reforms that make institutions accountable and responsive to the needs of people living in poverty. It also shows, however, that reforms, at least in some contexts, can be encouraged and institutional performance improved through strategies that increase public pressure for reform, accountability and service delivery.

The nature of such strategies will have to vary from situation to situation, and their potential for success will, among other things, be dependent on the nature of political governance, levels of access to government held information, role of the media, state capacity, civil society capacity, state-civil society synergy and the scope for institutionalization of social accountability mechanisms within the state. Nevertheless, successful demand-side pressure initiatives generally require that civil society actors (a) have, or acquire, relevant information and knowledge, (b) are able to organize and build coalitions, and (c) can access decision makers and decision making institution.

Information and knowledge

An effective strategy for claiming reforms requires that civil society obtains credible evidence pertaining to the functioning of the institutions and actors targeted. Depending on the context, evidence can be obtained through collection of data or information held by the state or other duty-bearers (supply-side information), or through information gathered from the users of the justice sector institution in question (demand-side information).

While the former can be promoted through effective implementation of appropriate access to information legislation, demand-side information can be generated through various participatory methods and tools such as citizen and community report cards, participatory monitoring and evaluation techniques, and public hearings. Apart from providing data on the functioning of justice sector institutions they can contribute to raising public awareness and mobilize communities to engage with these institutions and policymakers in an evidence-based dialogue. Though there is limited experience of using these types of methodologies in relation to the justice sector, they have contributed to considerable improvements in other government institutions.[102]

Organization and coalition building

In order to secure change in policy and practice citizens must generally be able to organize around particular issues and build coalitions with other actors who share their concerns. While donor-supported NGOs have sometimes played important roles in mobilizing citizens around particular reform demands, they have often pursued their own advocacy activities without ensuring an active and primary role of the public.[103]

In the legal empowerment discourse it is stressed that local level membership groups coordinating issues such as microcredit, health education, and local resource management measures have been suitable vehicles for collective action.[104] However, rights-holders may also, depending on the issue at hand, be able to forge coalitions with actors in the commercial sector and with unions, politicians, ombudsmen, national human rights institutions and other public offices.

Since the early days of the legal and judicial reform programs, donors have made efforts to engage lawyers and bar associations in creating pressure for reform of justice institutions. While individual lawyers in some parts of the world have played a crucial role in promoting reform and ensuring rights for disadvantaged populations, cooperation with bar associations has rarely been an effective way of increasing pressure for reform.

Fairly often bar associations are politicized, exercise limited independence in relation to the executive branch of government or face difficulties in reaching organizational consensus on reform due to the fact that they represent members with quite different convictions and interests. Furthermore, lawyers often have vested interests in maintaining status quo, as innovative changes may be a threat to their status and financial well-being. They may also be reluctant to engage in open reform discussions, as they fear that judges and other court officials will

102 Vivek Maru, Allies Unknown: Social Accountability and Legal Empowerment, IDLO, 2009
103 See for example, Alffram and Hassan, An appraisal of human rights NGOs supported by Sida in Bangladesh, 2007
104 See for example, ADB and TAF (2009)

become biased against them if they appear critical of their performance.[105]

Access to decision-makers

For reform claims by rights-holders to be successful, citizens and civil society actors must obviously be able to directly or indirectly influence duty-bearers to meet their demands. While this may be done through face-to-face interactions, it is often required that gathered evidence is brought into the public sphere, through the media and other means, and that a sustained public debate is promoted around them. Public debates may not only force decision-makers to act, they may also serve to further strengthen mobilization for reform.

If the political will exists, state actors can facilitate interactions between citizens and decision-makers in a number of ways, for instance by involving people in the law-making process through public consultations on draft legislation, or through the creation and strengthening of more permanent institutions through which citizens can channel concerns and demands.

While media outlets will typically play an important role in any social accountability efforts, it can also be an essential accountability mechanism in its own right. Where freedom of expression is respected, the media relatively insulated from corruption, and journalists skilled and resourced to do their own investigations, the media can be a deterrent to abuse of power. Donor-supported investigative journalism initiatives have often contributed to shed light on law and justice issues and have contributed to increased transparency. However, in many countries contempt of court legislation undermines the ability of journalists to report on judicial misconduct

105 Harry Blair and Garry Hansen, Weighing in on the Scales of Justice: Strategic Approaches for Donor-Supported Rule of Law Programs, USAID, 1994

4 Reflections on Customary, Indigenous and Religious Law

In recent years, donor agencies have paid increasing attention to the role of customary, indigenous and religious law in poverty reduction. This trend may be explained by a number of different developments, including the efforts to reform overburdened state systems. The increasing relevance that non-state law, according to some observers, has obtained in the face of globalization and resurgence of religious law in some parts of the world may also be a contributing factor.

Most important, however, is probably a growing recognition of the fact that women and men living in poverty rarely have their justice needs met within the structures of the state. For them, customary law is often the dominant form of regulation and dispute resolution. Customary law is for instance said to affect 90% of all land transaction in Mozambique and Ghana.

While governments and donors increasingly recognize the relevance of non-state legal orders, there is often limited knowledge about their functioning and considerable uncertainties about how to approach and work with them, if at all. In the academic world there has been, over the past few years, a fairly intense discourse on how states, and donors, should relate to customary, indigenous and religious law.

In his widely discussed book *The Mystery of Capital* Hernando de Soto, who was also one of the co-chairs of the Commission on Legal Empowerment of the Poor, argues that the principal cause of poverty in the developing world is the absence of formal property rights. Unless informal property claims are formalized, legally recognized capital formation cannot take place and economic development will be impeded. Therefore, de Soto argues, the "extralegal" sector should be incorporated into the state legal system.[106]

De Soto's conclusion that pluralistic legal systems should be replaced with a monistic system of state law has been questioned on several grounds. It has been pointed out that such undertakings can be unreasonably expensive; that they have repeatedly failed in the past;[107] that it can be the very independence of non-state systems from distrusted state structures that give them legitimacy;[108] that neo-patrimonial governance arrangements in many of the world's least developed nations mean that there are few incentives for the ruling elites to reform legal systems;[109] and that de Soto's approach is made complicated by the absence of a clear distinction of what is state and what is non-state law and that different legal orders are often intertwined.[110]

Policy makers and development practitioners have had a somewhat ambivalent approach to the formalization agenda. They have often supported

106 H de Soto, The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else, Basic Books, New York, 2000

107 Caroline Sage and Michael Woolcock (2005); and M Stephens, The Commission on Legal Empowerment of the Poor: An Opportunity Missed, Hague Journal on the Rule of Law, vol. 1, 2009

108 UNDP, A case study of Cambodian indigenous traditional legal systems and conflict resolution in Rattanakiri and Mondulkiri Provinces (2007); and M Kane et al., Reassessing Customary Law Systems as a Vehicle for Providing Equitable Access to Justice for the Poor, Arusha Conference, New Frontiers of Social Policy, 2005

109 D Adler et al., Legal Pluralism and Equity: Some Reflections on Land Reform in Cambodia, World Bank, Justice for the Poor, vol. 2, issue 4, 2008; and S Golub, The Commission on Legal Empowerment of the Poor: One Big Step Forward and A Few Steps Back for Development Policy and Practice, Hague Journal on the Rule of Law, vol. 1, 2009

110 B Rajagopal (2008); see also Boaventura de Sousa Santos (2006)

it on issues such as land registration[111], but have at the same time backed projects that fundamentally regard non-state law as something that could be strengthened rather than formalized.[112] Approaching customary law is challenging for donors regardless of whether the purpose is formalization or strengthening. Even though non-state legal orders are frequently seen as flexible, inexpensive, accessible, speedy and easily understood by the users, they also tend to suffer from some the same weaknesses as many state legal orders, including problems relating to corruption, discrimination, low levels of accountability and poor enforcement of decisions.[113]

One particular problem is that non-state law, perhaps to a higher extent than state law, tends to disenfranchise vulnerable groups and perpetuate discriminatory practices.[114] In many parts of the world customary and religious legal orders apply and reinforce societal norms regarding the appropriate role and behavior of women, and may at the same time authorize the use of violence against them. For governments and concerned donors the challenge is thus, as stated by Asia Pacific Forum on Women Law and Development, to make sure that safeguards and procedures are developed that "ensure that women's rights are not subordinated, that the informal processes are not used to control women and enforce discriminatory societal or religious norms, and that women have full and free choice as to whether to have their complaint dealt with by either the formal or informal mechanism without fear or ostracism or threats of further violence."[115]

In addition to the problems that specifically relate to customary, indigenous and religious legal orders, the very existence of two or more legal orders operating in parallel opens up for "forum shopping", which means that those with financial resources and contacts have the possibility to choose the legal order and dispute resolution mechanism that is likely to give them the most favorable outcome. Those who lack resources to navigate the complex arrangements that characterize plural legal orders may thus find themselves in a disadvantaged position.[116]

In an attempt to draw a line between state and non-state legal orders it is regularly decided or suggested that the latter should only have jurisdiction over "minor" matters, which often includes issues of family law and criminal matters considered to be of a less serious nature, including domestic violence. However, it has been pointed out that such "minor matters" often have major human rights consequences, not least for women, and that there thus are no convincing arguments why they should be subject to a lower standard of legal process than what is provided for in the formal court system.[117]

It should finally be noted that states are commonly turning a blind eye to violations emanating from the way customary, indigenous and religious law is being applied and in many cases state actors, such as the police, even help enforce decisions that violate both state law and international human rights norms.[118] However, it is well established in international human rights law that states have the following fundamental obligations in relation to both state and non-state actors:

- To take reasonable steps to prevent human rights violations;
- To conduct a serious investigation of violations when they occur;
- To impose suitable sanctions on those responsible for the violations;
- To ensure reparation for the victims of the violations.

111 A Palacio, Legal Empowerment of the Poor: An Action Agenda for the World Bank, World Bank, March 2006

112 See for example, the World Bank's 'Justice for the Poor', UNDP's 'Access to Justice', work carried out by ADB, and AusAid's projects on religious courts.

113 Open Society Institute (2006); ICHRP (2009)

114 T Benjaminsen et al., Formalisation of land rights: Some empirical evidence from Mali, Niger and South Africa', Land Use Policy, vol. 26, no. 4, 2008; SF Joireman, The Mystery of Capital Formation in Sub-Saharan Africa: Women, Property Rights and Customary Law, World Development, vol. 36, no. 7, 2008; and AusAid, Making Land Work: Reconciling customary land and development in the Pacific, vol. 1, Canberra, 2008

115 Asia Pacific Forum on Women, Law and Development, Realising Our Rights: Holding the State Accountable for Violence against Women in the Asia Pacific Region, 2005

116 ICHRP (2009)

117 ICHRP (2009)

118 Asia Pacific Forum on Women, Law and Development (2005)

5 Measuring Results

Even though there is no blue-print on how to proceed with a reform agenda, a holistic approach that strives to take into consideration all, or at least the most important, aspects of a legal order is generally recommended in the literature. This, however, requires a good understanding of the overall context to which a specific intervention relates and implies new challenges when it comes to assessments, measurement of change and understanding of the results and effects of interventions.

Donors generally recognize the importance of context. Nevertheless, there is ample evidence that interventions have often been affected by incorrect assumptions and by a failure to fully understand underlying power relations and dynamics. In the literature there is, thus, broad agreement on the need for better assessments of what is socially, culturally, politically and practically feasible.

The importance of distinguishing between outputs and outcomes of interventions is also frequently highlighted. Program and project evaluations have so far mainly focused on the degree to which activities have been implemented in accordance with pre-established log frames. Few efforts have been made to measure long-term outcomes. There are thus considerable uncertainties whether, and how, reform initiatives contribute to real change and there is a great need to find out if causal assumptions are supported by empirical evidence. One observer notes:

"There is a striking lack of systematic results-based evaluations of the programs, especially independent rigorous cross country evaluations, or comprehensive case studies of all the programs in a country. The RoL expertise that exists is not centralized or institutionalized, and resides in individuals who have often learnt through trial and error."[119]

The RoL literature has for many years recommended governments and donors to invest more in research and in-depth evaluations. To assess the successes and failures of interventions in the justice sector is, however, a complicated task that requires that the long-term nature of objectives is taken into account and that it is accepted that substantial periods of time will have to pass before results become visible.[120]

Proper assessments also require the development of indicators and mechanisms that manage to capture the experiences of poor and marginalized groups. To ensure this, it is suggested that indicators are developed and surveys and studies conducted in close consultation with these groups.[121] Experience shows that an approach that involves the beneficiaries may also improve the sustainability of results.

To be able to effectively measure, as well as to ensure better design and monitoring of interventions, the need for comprehensive baseline studies is frequently highlighted. [122] These baselines should contain objective and quantitative standards that can be compared over time. In order to ensure "ownership" it is suggested that baseline studies before finalization are validated among key stakeholders. If several different baselines are

119 Kirsti Samuels (2006)

120 See for example, Livingston Armytage (2006)
See for example, Livingston Armytage (2006); Stephen Golub (2003); and Kevin E. Davis and Michael J. Trebilcock (2008)

121 Vera institute of Justice (2008)

122 UNDP Asia Pacific Rights and Justice Initiative, Codification of Case Studies: Access to Justice Case Studies from the Asia-Pacific Region, 2004; Bergling (2008); and INPROL, Measuring the impact of Judicial training, Consolidated Response (07-005), 2007

conducted that cover different aspects of the justice sector, it is useful to bring these studies together to obtain as a holistic picture as possible.

The literature contains, however, some warnings against producing higher-level indices that aggregate data in order to make complex information and ideas easily understandable. The risk of important nuances being lost is considered significant.[123] If the experiences and situation of different disadvantaged groups is to be reflected, disaggregated data is essential.

123 Vera Institute of Justice (2008)

6 Aid Modalities

There is broad agreement among both observers and donors that effective coordination, collaboration and information-sharing are prerequisites for successful justice sector interventions. In recent years there has also been a move from scattered and uncoordinated projects to donor harmonization and more programmatic aid modalities. While these modalities may come in many shapes and forms, joint programs in support of government-owned sector-wide strategies have become increasingly common.

One of the main purposes of these so-called Sector-Wide Approaches (SWAps) has been to ensure national leadership and alignment of aid programs with recipient country priorities. However, coordination of aid efforts has also been considered essential to deal with the sheer complexity of the justice system and the challenge of working with the wide array of institutions of which it is made up.[124]

The justice SWAps carried out in different parts of the world have varied in terms of objectives, operational detail, comprehensiveness and capacity of actors involved. It should be noted, however, that their main focus have generally been formal justice sector institutions, even though support to NGOs and non-state justice sector institutions has sometimes also been included.

While there is broad agreement about the need for further initiatives to document experiences and learn from past and ongoing SWAps[125], available evidence gives a mixed picture as to their usefulness and effectiveness. In the literature it has been pointed out that successful SWAps require:

- Genuine and long-term government commitment to reform.[126]
- Appropriate fiscal arrangements and sufficient government capacity to administer and effectively spend significant amounts of funding.[127]
- Genuine and long-term donor commitment.[128]
- Better knowledge and understanding among donors regarding both political and technical issues.[129]
- A higher degree of forthrightness among donors about aid conditionality. [130]
- Development of monitoring and evaluation systems that measure real outcome and impact. [131]
- Donors and a government that listen to civil society when setting priorities and implementing interventions, and engage civil society organizations as central actors in the reform efforts.[132]

It has also been found that SWAps:

- Risk undermining funding to NGOs, in particular those critical of the government and its reform initiatives (especially if civil society

124 Laure-Hélène Piron, National Criminal Justice Reform, Donor Assistance to Justice Sector Reform in Africa: Living Up to the New Agenda?, Open Society Justice Initiative, n.d.

125 See for example, Open Society Institute, Towards a New Consensus on Access to Justice, Summary of Workshop 28-29 April 2008, 2008.

126 Open Society Institute (2008); Open Society Justice Initiative (2008); and Deloitte, Governance, Justice, Law and Order Sector Reform Programme: A path for progress, Draft 2, December 2009.

127 OSJI (2008); and SDC, Rule of Law, Justice Sector Reforms and Development Cooperation, 2008.

128 OSJI (2008)

129 OSI (2008); Laure-Hélène Piron (n.d.)

130 OSI (2008)

131 OSI (2008)

132 OSI (2008); Christopher Stone et al. (2005)

funding is channeled through the government coffers).[133]

- Are generally easier to implement in unitary states than in federal republics. [134]
- Have been negatively affected, in particular in post-conflict settings, by difficulties in recruiting and retaining managers and advisors with strategic and subject matter skills needed.[135]

133 OSJI (2008); Paolo de Renzio et al, Illustration papers on human rights and the partnership commitments of the Paris Declaration: Harmonisation, ODI, September 2006

134 OSJI (2008)

135 Christopher Stone et al. (2005); and Deloitte (2009).

7 Policies

The UN Secretary-General's "Guidance Note" on how the UN is to approach RoL assistance, and Sweden's policy on democracy and human rights, are of immediate relevance for how Sida is to work on RoL and justice sector issues.

Sweden's democracy and human rights policy

The Swedish democracy and human rights policy states that priority should be given to three focus areas: (a) civil and political rights, (b) institutions and procedures of democracy and the RoL, and (c) actors of democratization. In order to ensure its implementation in strategies, programs and dialogue and to ensure an effective and focused use of resources, the policy stresses the importance of:

(a) analysis and assessments;
(b) a human rights perspective;
(c) program-based approaches;
(d) capacity building;
(e) dialogue; and
(f) aid effectiveness and goal fulfilment.[136]

The policy outlines a number of additional principles of relevance for justice sector intervention. As implied in the human rights-based approach, the situation, needs, capabilities and priorities of women, men, girls and boys living in poverty should be the point of departure. Interventions should be context specific and able to gain public legitimacy. The justice chain should be addressed as a whole and the strategic role actors within the formal justice systems, traditional justice systems and civil society should be considered. High attention should be given to management for results and learning and to popular participation in the formulation and follow-up of development polices.

United Nations Approach to Rule of Law Assistance

The UN Secretary-General has laid down the following principles that are to guide UN rule of law activities in all circumstances and contexts:

- Base assistance on international norms and standards.
- Take account of the political context.
- Base assistance on the unique country context.
- Advance human rights and gender justice
- Ensure national ownership.
- Support national reform constituencies.
- Ensure a coherent and comprehensive strategic approach
- Engage in effective coordination and partnerships

136 Aid effectiveness should be ensured through democratic ownership, alignment with recipient country systems, harmonization of donor efforts, increased focus on results and effects, and mutual accountability for development results.

8 An Equal Access to Justice Approach

This section outlines an EA2J approach that is grounded in the UN approach to RoL assistance, Sweden's democracy and human rights policy, Sida's enhanced thematic focus and the terms of reference for this assignment, and draws on the mapping of past experiences and recent thinking regarding traditional state-centered RoL programs, legal empowerment approaches and social accountability strategies.

In line with Sweden's democracy and human rights policy, it puts civil and political rights at the centre through its primary focus on contributing to upholding the right to equality before the law, while, at the same time, recognizes EA2J as the precondition for ensuring that a range of other human rights are respected, protected and fulfilled. It maintains a direct focus on the institutions of democracy and the actors of democratization by paying attention to the need for developing the capacity of both rights-holders and duty-bearers of importance for the delivery of justice.

The approach has been designed to be of relevance in the preparation of new country and thematic strategies; when designing, implementing and assessing justice sector programs and projects; and when identifying justice related entry points in sectors primarily concerned with other development outcomes, including health, education and democratic governance.

8.1 Definition

In line with the definitions used by UNDP and others, EA2J is here defined as:

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.

8.2 Point of departure and core features

While traditional RoL programs take as their starting point an assessment of the functioning of existing justice sector institutions and proposes remedies for how identified weaknesses can be addressed to ensure that RoL is upheld, an EA2J approach strives to first of all identify the primary justice needs of women, men, boys and girls living in poverty and the barriers they face in obtaining justice. It thus takes as its point of departure the primary justice needs of the right holders and the obstacles they encounter in finding justice. The methods for this can vary and will depend on the extent to which this has already been documented by others and the resources available, but may range from a review of relevant literature and interviews with key informants to surveys and, preferably, more participatory approaches.

Once the justice needs and obstacles have been identified, an EA2J approach should aim to empower the rights-holders to access and utilize the state and non-state institutions that are most relevant for them in claiming a right, obtain redress for a grievance or settle a dispute.

As improved access to state and non-state justice institutions is of little relevance for the rights-holders unless these institutions operate fairly, predictably and with reasonable effectiveness, an EA2J approach should also take into account the need to strengthen the capacity of institutions considered relevant by the rights-holders. This requires assessments of what the obstacles to an institution's proper functioning are and interventions designed to overcome these obstacles.

As initiatives to reform laws and institutions often meet resistance from quarters with vested interests in maintaining a status quo, an EA2J approach should also strive to empower rights-holders to more effectively demand necessary reforms.

8.3 Guiding principles and considerations

In addition to the core elements presented above, an EA2J should be grounded in the following, sometimes overlapping, principles and considerations:

Apply a system-wide perspective

As weaknesses in one part of the justice chain can effectively undermine improvements in others parts of the chain, the application of a system-wide perspective that recognizes that the justice system is made up of several interlinked parts is essential. While this does not mean that all weaknesses in a justice system have to be addressed simultaneously, it does mean that all interventions should be based on an analysis of what the obstacles to justice are, how weaknesses in one part of the systems affect its other parts, and how certain interventions may improve the chances of women, men, girls and boys living in poverty to obtain justice for grievances.

Take account of the national or local context

There is no universally applicable strategy on how to prioritize and sequence interventions. On the contrary, reform initiatives will always have to be tailored to the specific context in which they are to be implemented. It is essential to not only consider what is needed to ensure better access to justice, but also to carefully consider what is socially, culturally, politically and practically feasible in a particular situation. Laws and institutional setups that work well in one country tend to be difficult to transplant in other countries and contexts.

Pay regard to the need for politi cal commitment

Institutional reform initiatives have small chances of success unless national stakeholders are convinced of their benefits and political power holders are prepared to accept the limits to their power that comes with adherence to the RoL. Thus, due regard has to be paid to the political aspects of justice sector interventions. Assessments need to be made of the extent to which long-term political will to reform exists, the risks 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. The dialogue should be used as a tool to foster political space for reform and for insulating RoL from undue political interference.

Apply a long-term perspective

The nature of most efforts to reform the functioning of justice sector institutions are such that it may take years, or perhaps decades, before any significant changes to the way justice is being delivered become visible. A long-term development perspective must be applied, and the fact that several years often have to pass before impact can be measured must be taken into account before the start of a project or program.

Apply a human rights perspective

As implied in the core features, a human rights-based approach grounded in international and regional human rights instruments should be

applied to all aspects of an EA2J intervention.[137] Interventions should be guided by and aim to enhance the principles of non-discrimination, participation, openness and transparency, and accountability.

Stakeholder and community participation in identifying obstacles to justice, developing solutions, implementing interventions and monitoring of results should be strived for in order to guarantee transparency and accountability and to ensure that projects and programs are based on the needs and perspectives of the rights-holders.

It should be considered that even if a society has established the formal structures of the RoL there is no guarantee that it will provide justice to all citizens. Legal systems have traditionally been developed by male elites and have largely served to protect and promote their interest. As a result, formal and informal laws often discriminate against, or pay insufficient attention to, the situation and interests of women, children, sexual 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.

There are many roads to justice

Implied in the focus on both state and non-state institutions is the recognition that there may be many roads to justice and that different justice needs may be addressed through different institutional setups. Even though customary, indigenous and religious justice systems often suffer serious problems in terms of accountability, corruption and discrimination of marginalized groups, it is important to pay attention to these non-state systems as they are often the only available form of regulation and dispute resolution for people living in poverty. An EA2J intervention may be directed at these justice systems provided that the intervention's primary purpose is to increase their compliance with international human rights norms and to reaffirm through dialogue or others means that the state is ultimately responsible for ensuring that they conform to such norms.

Focus on amendable institutions

Linked to the importance of paying regard to the level of political commitment to reform is the need to assess which state and non-state institutions that are likely to embrace or resist change. A particular problem for the traditional legal and judicial reform programs has been the limited number of institutions with which they are concerned. An advantage with an EA2J approach is that it opens up to working with a much broader pool of institutions of relevance for the justice needs of people living in poverty and that it thus may become easier to identify institutions that are open to, or less likely to resist, change.

Mainstreaming

The possibility of mainstreaming justice activities into other poverty reduction programs should be considered. Experience show that such mainstreaming can contribute to improved dispute resolution mechanisms as well as better poverty reduction programs.

Transitional justice initiatives

Where transitional justice initiatives of a limited duration are being implemented, coordination with other justice sector programs should be strived for to ensure that the initiatives reinforce

137 When applying a human rights perspective to EA2J, the following international and regional instruments are of particular relevance:
International instruments: the 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, 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, and Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms.
Regional instruments: American Convention on Human Rights, and African Charter on Human and Peoples' Rights, Charter of Fundamental Rights of the European Union, and European Convention for the Protection of Human Rights and Fundamental Freedoms.

these programs and contribute to strengthening the permanent RoL architecture. [138]

Pay attention to impact assessments and learning

Structured assessments of justice sector programs have often been sorely missing, or given low priority, in past justice sector reform programs. A system for monitoring and evaluation should be developed during the planning phase of an intervention and baseline studies against which progress can be measured over time should be prioritized.[139]

Promote national ownership

National ownership grounded in the principles of inclusion, participation and transparency should be ensured and reform efforts should preferably grow out of national or local initiatives. Broad coalitions involving key actors from across institutions and sectors are important to ensure that reform efforts receive the support needed and are not undermined. Reform of the courts and other state institutions require strong leadership from within these institutions.

Support national actors for reform

Linked to the core feature of enhancing the capacity of rights-holders is the need to support national reform constituencies, including human rights organizations, women's groups, professional associations and media outlets, 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. The dialogue should be used to ensure that these groups can conduct their activities and raise their voices without undue interference.

Ensure donor 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. Coordination is also essential to ensure that aid efforts do not neglect essential parts of the legal system.

Combine technical assistance with dialogue

Both dialogue and technical assistance should be used to promote access to justice. The dialogue may focus both on advocating rights and on ensuring greater efficiency in development projects and programs. While the particular country context will have to determine the specific issues to be raised, the dialogue should in general promote commitment to reform, compliance with established human rights norms, initiatives that are grounded in the needs and perspectives of people living in poverty, approaches that balances the need to empower rights-holders with the need to enhance the capacity of relevant duty-bearers, and civil society as a key actor in any reform activities.[140]

138 Transitional justice processes strive to respond to past systematic or widespread violations of human rights, that cannot be fully addressed by the existing judicial structures, in such a manner that a nation and its people can move forward towards reconciliation and sustainable peace. In achieving these goals transitional justice processes typically provide or consider a mixture of judicial and non-judicial initiatives, including criminal prosecutions and trials before regular or extraordinary tribunals, truth commissions, reparations programs, memoralization efforts and reforms of existing state institutions.

139 See Annex III for an example of a results matrix for a comprehensive EA2J intervention.

140 See Annex III for a description of some of the general ideas on how to best proceed with a dialgoue agenda.

9 Adjusting Interventions to Country Situations

Sweden's democracy and human rights policy differentiates between five country situations: (a) authoritarian states, (b) conflict and post-conflict situations, (c) fragile democracies in the early stages of democratization, (d) new democracies in the process of consolidation, and (e) stagnating democratization processes. Even though it is not possible to provide any absolute and universally applicable directions on how to sequence justice sector reform initiatives, the policy and past experiences provide some general guidance on where to start and what to focus on in different situations.

Cross-cutting considerations

A particular context may of course be more or less conducive to certain interventions and it may be that one or several links in the justice chain cannot be meaningfully addressed in a specific context at a particular point in time. Nevertheless, efforts should be made to apply a system-wide perspective and such a perspective is of particular importance in conflict and post conflict situations where there is a need to rebuild the justice system from scratch, or near scratch. In such situations, there will often also be a need to address past abuses through a transitional justice process before or at the same time as more long-term development initiatives to rebuild the justice system are implemented.

Support provided in the early stages of a transition to democracy is of particular importance, as the foundation for a new justice system is often laid down during the first few years after an old regime has fallen. Whether or not such support is of a transitional justice nature, it should be designed to reinforce or lay the foundation for future long-term development cooperation and to strengthen forces committed to build a society based on RoL.

In all contexts, it will be essential to build broad-based coalitions comprising actors from different parts of society that can increase pressure for reform and push the reform agenda forward. In authoritarian states special efforts have to be made to ensure that EA2J interventions do not, and are not perceived to, provide legitimacy to the regime in power and undermine possibilities for democratic change.

Legal protection

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. While initiatives to develop new polices and laws are often unlikely to have much impact in an authoritarian state with little regard for human rights and the RoL, there may still be space for limited reforms that are not perceived as a threat to existing power structures. However, the fact that there is often a wide-gulf between laws and their actual implementation should always be taken into account. Where such a gap exists, and there are no well-founded reasons to believe that it might be possible to narrow this gap in the foreseeable future, the usefulness of an intervention must be carefully considered. Initiatives that are not aiming 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.

Legal awareness

Initiatives to increase citizens' legal awareness should be considered if there is a normative framework in place that protects rights and there are avenues for having these rights realized. If the

framework and avenues do not exist, and there are no reasonable prospects of being able to create sufficient pressure to have them established, legal awareness raising may be of limited relevance.

Legal 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. In situations where civil society activities are severely repressed, it has sometimes still been possible to provide legal assistance through legal aid clinics connected to law schools. In post-conflict contexts, the establishment or rebuilding of bar associations should often be prioritized.

Redress and conflict resolution

In all states, but in particular in authoritarian states and other contexts with poor respect for established democratic norms, it is important to consider that efforts to strengthen state justice institutions may be used to enhance oppression, strengthen those in power, and undermine empowerment of people living in poverty. Efforts should not be made to increase the capacity of the judiciary unless such efforts are combined with government commitment to reform and goes hand in hand with interventions to ensure independence, transparency, accountability and adherence to fair trial standards. Where a lack of commitment to reform makes support to the judiciary undesirable, it may still be possible to support alternative dispute resolution bodies operating with or without the sanction of the state. If customary, indigenous or religious conflict resolution mechanisms are considered, the primary purpose of the support should always be to strengthen their compliance with international human rights norms.

Enforcement

Efforts to increase the effectiveness of law enforcement agencies should only be prioritized in countries where there is government commitment to establish or uphold a system in which the primary purpose of these agencies is to serve the people and protect human rights. Regardless of country situation, interventions to improve the effectiveness of the police and other enforcement agencies should always be accompanied with efforts to ensure transparency, accountability and adherence to established human rights norms.

Monitoring and oversight

In fragile, consolidating and stagnant democracies, special attention often has to be paid to ensuring increased transparency and accountability for those in power in relation to the citizens in order to improve the effectiveness of, and increase trust in, the legal system. While past experiences show that the there have often been an exaggerated belief in the potential impact of state-bodies with oversight and monitoring functions, it may be important to support such bodies if it is deemed that they may be allowed to operate effectively and independently. Government initiatives aiming at opening up spaces for increased civil society participation in the promotion of accountability should be encouraged.

Reform claims by rights-holders

Regardless country situation, it will, if at all possible, be essential to pay attention to civil society actors that can monitor the performance of state and non-state institutions and, if government commitment is weak, advocate for reform.

In some authoritarian states, support to actors that can increase demand and lay the ground for future reforms may be the only possible and desirable avenue for contributing to EA2J. Often this means that the support should target civil society actors working on monitoring and reporting on human rights and justice sector issues, and, if possible, on increasing legal awareness among the citizens. Priority should be given to civil society organizations operating inside the country in question, but support to exile organizations and media focusing on and promoting debate about justice sector issues can also be considered. In some authoritarian states it may be possible to identify and work with change actors operating within the structures of the state to increase demand for reform, including academic institutions. In societies allowing public debate about issues of justice and service delivery, social accountability strategies should be prioritized, as should the scrutinizing role that the media and NGOs can play.

Annex I: Approaches by Different Donors

To provide a comprehensive description of what different donors are doing in the field of equal access to justice is beyond the scope of the consultant's assignment. Only with regard to judicial reform it is said that donors are supporting no less than 5,000 activities in more than 75 countries.[141] Within the broader access to justice field, it can be safely assumed that the number of activities is many times higher.[142]

Below is, however, a brief outline of the approaches used by a select number of multilateral and bilateral donors. A list of some of the programs and projects they support is also provided. While many donors still pay particular attention to the courts and other state justice institutions, the descriptions below strive to highlight more recent ideas and approaches, some of which take into consideration both the supply side and the demand side of justice reform in the program formulation.

American Bar Association[143]

The program area Access to Justice and Human Rights forms part of the ABA's Rule of Law Initiative. The other program areas of this initiative are Anti-Corruption and Public Integrity, Criminal Law Reform and Anti-Human Trafficking, Judicial Reform, Legal Education Reform and Civic Education**,** Legal Profession Reform and Women's Rights. ABA defines access to justice as the ability to approach and influence decisions of those organs that exercise the authority of the state to make laws and to adjudicate on rights and obligations. The concept also covers the ways in which the law and its machinery are mobilized, and by whom or on whose behalf.

Types of projects considered

- Strengthening local NGO's capacity to provide legal assistance
- Impact litigation
- Traveling lawyer programs
- Civil and criminal legal aid programs
- Pro bono assistance
- Legal support networks for human rights workers
- Human rights campaigns
- Training of legal professionals, government officials and students
- Support to local human rights non-governmental organizations
- Strengthening of legal norms that are protective of the rights of individuals

Examples of programs supported

- *Burundi* – Judges, prosecutors and the police are trained to better prepare them for the issues that arise in dealing with former child soldiers. Legal professionals are helped and trained to defend former child soldiers who are awaiting trial on criminal charges. The program also includes a component where former child soldiers get social, educational, vocational, psychological, medical and physical rehabilitation services.
- *Cambodia* – The Public Interest Legal Advocacy Program builds cases and brings class action lawsuits to publicize human rights violations, primarily illegal land seizures.
- *Macedonia* – Training of volunteer legal professionals and representatives of local non-governmental organizations to assist members of the Roma population in obtaining citizenship.
- *Azerbaijan* – Training of recent law school graduates to work as Legal Advocacy Lawyers, focusing primarily on bringing human rights cases on behalf of indigent persons. The lawyers represent clients in civil disputes concerning family law, immigration, land and

141 Mohan Gopal (2009)

142 For an inventory of activities undertaken within the United Nations system see Report of the Secretary-General, The rule of law at the national and international levels, 2008

143 Yash Ghai and Jill Cottrell (2008)

pension rights, and employment. The lawyers have also hosted business law training for rural women and constitutional rights and human trafficking trainings to local civil society groups.

- *Moldova* – Program to broaden access to legal services in rural and remote parts of the country. Free consultations and court representation to indigent clients, with special focus on disputes related to employment, family law, land use and government benefits. Villagers are educated about their legal rights.
- *China* – Support to municipal-level regulations on environmental public participation, networks of volunteer lawyers working on children's and migrant workers' rights and a bar-supported online resource centre for lawyers representing death penalty defendants.
- *Lebanon* – Cooperation with La Sagesse University with the aim of developing a culture of public interest advocacy. The cooperation has also focused on introducing interactive teaching techniques.
- *Kyrgyzstan* – Law students trained to provide human rights trainings at secular and Islamic secondary schools. The students also provided pro bono representation.
- *Philippines* – Support to efforts to combat extrajudicial killings through a series of multi-sector summits and targeted forensics training through which lawyers and civil society members are trained on basic crime scene preservation techniques and effective use of physical evidence.

Asian Development Bank[144]

Earlier definitions of access to justice by ADB included a narrow and mostly formal set of institutions and activities. Research on legal empowerment supported by ADB has demonstrated the need to expand the boundaries of what is meant by access to justice and the institutions involved in enhancing it. In this context, ADB primarily uses the concept legal empowerment, which has been defined as, "The use of law to increase the control that disadvantaged populations exercise over their lives."

Types of projects considered

- Access to justice
- Anti-money laundering
- Competition law
- Cross-border insolvency
- Financial sector reform
- Gender and the law
- Justice sector reform (reforms in the judiciary; prosecutorial service; police service; and other institutions engaged in the delivery of justice)
- Labor and human resource law
- Land registration and land tenure issues
- Legal aspects of regional integration
- Legal empowerment
- Legal identity and social inclusion
- Secured transactions
- Trade and globalization

Examples of programs supported

- *Pakistan* – Program aiming at strengthening government legal services and supporting access to justice. New methods of alternative dispute resolution, improved legal information and the use of local language introduced to promote legal remedies for the poor. The program will work with various stakeholders, including the federal and provincial bench, civil society groups, and various government agencies, to also deal with issues as diverse as: legal education, judicial, training, case management, and long term financial sustainability of key institutions.
- *Philippines* – The Action Program for Judicial Reform aims at addressing the challenges faced by the Philippine judiciary to improve delivery of judicial services. The program addresses six areas: (1) Judicial Systems and Procedure; (2) Institutions Development; (3) Human Resource Development; (4) Institutional Integrity Development; (5) Access to Justice by the Poor; and (6) Reform Support Systems.
- *Regional Asia (Bangladesh, Indonesia, Philippines, Thailand)* – The Access to Justice for the Urban Poor project is designed to generate

144 ADB, Annual Report, Law and Institutional Reform: Catalysts for Inclusive Development in the Asia Pacific Region, 2003; ADB, Special Evaluation Study, Technical Assistance for Justice Reform in Developing Member Countries, August 2009; and ADB, Report from the ADB Symposium on Challenges in Implementing Access to Justice Reforms, 26–28 January 2005

insights and guidance that can contribute to the development of institutions to help the urban poor effectively resolve disputes over urban assets.

Danish International Development Agency [145]

Danida underlines that establishing justice and the RoL is at the heart of societal development. It emphasizes poor people and marginalized groups in its sectoral approach that includes both support to the state/supply side and the civil society/ demand side.

Types of projects considered

- Making legal services accessible - physically, and in terms of language, procedures, and the availability of affordable legal aid, lawyers, paralegals, mediators and defendants.
- Strengthening frameworks, procedures and mechanisms for addressing civil or administrative matters - for example, birth, marriage and businesses registration; and disputes over family relations, inheritance, land tenure and labour rights.
- Human rights awareness.
- Support to alternative dispute resolution and rights-aligned community mediation.

Examples of programs supported

- *Tanzania* – The Support to Good Governance, Human Rights and Democratisation 2008-2010 Program consists of three components where both supply and demand side is supported: democratization and domestic accountability, human rights and access to justice, and public financial management. The human rights and access to justice component focuses on review of legislation, construction of courthouses, education of legal officers and ensuring availability of legal services to poor and vulnerable groups. Support is given to the Legal Sector Reform Programme and to legal aid/legal services and human rights protection initiatives, including support to three NGOs.
- *Uganda* – The Access to Justice Component of the Democracy, Justice and Peace Programme 2006 – 2010 forms one of three components of the program and supports interventions at the supply and the demand side in tandem. On the supply side, support will be given to the Justice Law and Order Sector more broadly, considering the Judiciary as part and parcel of the SWAp that the Government of Uganda has developed. On the demand side, the program will support CSOs as service providers and advocacy units within a legal aid provision system. The long-term aim is to support the Government to fulfil its obligation to provide legal aid to the underprivileged.
- *Bangladesh* – The Access to Justice Human Rights & Good Governance Programme Phase II consists of the three components Access to Justice, Transparency and Accountability, and Promotion of Human Rights. The Access to Justice component supports initiatives that enable and improve access to and delivery of services from the formal and informal justice systems, with a special emphasis on women, children, and ethnic minority groups. The component aims to support duty-bearers' capability to comply with human rights obligations and rights-holders' capacity to claim redress for violations.
- *Cambodia* – The Human Rights and Good Governance Programme- HRGG (2009–2010) Phase II comprises three components: Access to Justice, Defending Human Rights and Transparency and Accountability. In the Access to Justice component support is given to the Reform Secretariat in coordinating and communicating the governments' reform agenda. The component also strives to increase access to justice through support to protection of indigenous peoples' rights, expansion of legal aid to poor and vulnerable people becoming victims of land disputes, and empowerment of local communities whose access and user rights to land and other natural resources is under threat.

145 Ministry of Foreign Affairs of Denmark; Democratisation and Human Rights for the Benefit of the People, June 2009; Danida, Democracy, Justice and Peace Programme Uganda 2006 – 2010, Programme document, October 2005; Danida, Programme Document Good Governance, Human Rights and Democratisation in Tanzania 2008-2010; Danida, Human Rights and Good Governance Programme (2009 – 2010) Cambodia, Programme document; and Danida; Human Rights and Good Governance Programme Bangladesh, http://www.ambdhaka.um.dk/en/menu/DevelopmentIssues/HumanRightsAndGoodGovernance/PhaseII20062010/

Swiss Agency for Development and Cooperation[146]

SDC considers RoL to be a means to hold state authorities accountable for the use of state power, to further peaceful relations, security and trust among all social groups, to ensure human rights to all, including women, and to promote human and economic development for everybody, including the poor.

Types of projects and institutions considered

- Judicial reform
- Police reform
- Prison system reform
- National human rights institutions
- NGOs protecting and nurturing the rights of the individual and of poor and disadvantaged groups

Examples of programs supported

- *Kyrgyzstan* – "Legal Assistance for Rural Citizens".
- *Pakistan* – "Shirkat Gah's Women Law and Status Programme".
- *Ukraine* – Reforming the justice system and prisons.
- *Vietnam* – Support to the National Legal Aid System.
- *Bosnia and Herzegovina* – Law enforcement and community policing.

UK Department for International Development[147]

DFID emphasis that improving access to justice requires that judicial systems are understood from the perspective of the users and address the barriers that stop those users seeking and securing redress. DFID believes that is important that justice is strengthened as a system, including the police, prosecution services, courts, lawyers, penal institutions, quasi-judicial bodies and civil society. Linkages should be made to the security sector where appropriate. It is stressed that traditional informal justice and security organizations are just as important as the formal justice system.

Types of institutions considered

- Police
- Prosecution services
- Courts
- Lawyers
- Penal institutions
- Quasi-judicial bodies
- Civil society organizations
- Traditional informal justice organizations
- Security organizations

Examples of programs supported

- *Indonesia* – Partnership for Governance Reforms: Convening a series of "Law Summits", involving the judiciary, attorney-general, law ministry, and others, for developing an integrated justice reform plan.
- *Nigeria* – Training of traditional rulers to introduce a case record-keeping system to improve transparent decision-making.
- *Malawi* – Programme to improve community level justice.
- *Bangladesh* – Alternative dispute resolution, legal aid and legal education. The vast majority of the beneficiaries are women.
- *The Democratic Republic of Congo* – Security and justice program striving to ensure that views of poor people are fed into the policy making processes. Support to the police to deal with sexual and gender based violence.
- *Sierra Leone* – Support to the establishment of nation-wide Family Support Units, staffed jointly by police officers and social workers. Together, they address cases of sexual and domestic violence, including child abuse.

UNDP[148]

UNDP has defined Access to Justice as "The ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in

146 Swiss Federal Department of Foreign Affairs and Swiss Agency for Development and Cooperation, Rule of Law, Justice Sector Reforms and Development Cooperation, Concept Paper, 2008

147 DFID, Eliminating World Poverty: Building our Common Future, July 2009; DFID, Governance, Development and Democratic Politics: DFID's work in building more effective states, 2007

148 UNDP, Access to Justice: Practice Note, 2004; UNDP Asia-Pacific Rights and Justice Initiative (2005); Ramaswamy Sudarshan (2003); and UNDP, Regional Access to Justice Conference and Knowledge Fair focused on Europe and the CIS, Bratislava 17-18 June 2009

conformity with human rights standards." UNDP views justice as closely related to human development and poverty eradication, and is committed to using a human rights-based approach in its programming. Supporting justice and related systems in order to ensure that they work for those who are poor and disadvantaged is regarded as UNDP's specific niche within the broader context of justice reform.

Types of projects considered

- Legal protection
- Legal awareness
- Legal aid and counsel
- Adjudication
- Enforcement
- Civil society and parliamentary oversight

Examples of programs supported

- *Guatemala, Haiti, Peru and Paraguay* – Comprehensive programs to reform judicial processes and the justice systems, which involve ministries of justice, the courts, attorneys-general, legal aid officials and civil society organizations.
- *Costa Rica, Panama, Argentina and Ecuador* – Consensus-building processes aimed at elaborating national agendas for reforming the justice systems.
- *Venezuela, Brazil and the Dominican Republic* – Judicial education particularly in relation to human rights issues.
- *Vietnam* – Reform of the legislative process; enhance the efficiency and effectiveness of law implementation by State Agencies; ensure the adequacy in quality and number of human resources at all relevant levels, inclusive of civil servants and professionals engaged in the judiciary; enable popular access to the legal system by the development of appropriate and efficient legal information and legal dissemination systems.
- *Somalia* – The program has adopted a 'top-down' approach of training and infrastructure rehabilitation with a 'bottom-up' approach that includes legal empowerment and confidence building of the Somali public, including legal clinics, legal aid, and awareness raising at community levels.

The World Bank[149]

The World Bank uses the concept "Improving Access to Justice for the Poor", one of four different entry points for law and justice reform. The other three entry points are "Private Sector Development", "Fighting Corruption" and "Justice Reform in Fragile States". The World Bank emphasizes that justice reforms can be undertaken from various angles, depending on the development goals the projects aims at achieving.

Regarding access to justice for the poor, the World Bank states that," improving, facilitating and expanding individual and collective access to law and justice supports economic and social development. Legal reforms give the poor the opportunity to assert their individual and property rights; improved access to justice empowers the poor to enforce those rights. Increasing accessibility to courts lessens and overcomes the economic, psychological, informational and physical barriers faced by women, indigenous populations, and other individuals who need its services. New legislation, subsidized legal services, alternative dispute resolution, citizen education programs, court fee waivers and information technology, are other means to improve access."

Types of projects considered

- Legal Empowerment
- Legal Information and Public Awareness
- Right to Court Access
- Legal Aid
- Pro Bono Work
- Public Interest Litigation
- Small Claims Tribunals
- Informal Justice Systems

Examples of programs supported

- *Guatemala* – The Guatemala Judicial Reform Project includes assessment of the socio-economic, geographic, and cultural characteristics (including customary practices) and judicial service needs of rural and urban communities, including communities of high geographic mobility such as indigenous, refugees, and internally displaced populations.

149 Kirsti Samuels (2006); and http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:20745998~menuPK:1990386~pagePK:210058~piPK:210062~theSitePK:1974062,00.html

It also supports the enhancement of multilingual communication capabilities in the Judicial Branch, including the publication of documents and reports. Mobile courts have been created which provide free mediation and conciliation services.

- *Russia* – The Russia Legal Reform Project supports legal education in secondary schools. The WB has also supported periodic surveys of users of judicial services on access to, quality of and satisfaction with judicial services and enforcement of judicial decisions, and public dissemination of the survey results; research and analysis on further development of transparency, publication, openness and accessibility of judicial decisions; the development and piloting of criteria, indicators and a policy to assess and periodically report on the effectiveness of the judicial system.
- *Ecuador* – The Ecuador Judicial Reform Project finances five legal service centers for poor women, which provide legal consultations and representation, counseling, referrals, and alternative dispute resolution services. It also contains a Special Fund for Law and Justice, which awards grants to NGOs and CSOs to support research and access to justice activities.
- *Armenia* – Armenia Judicial Reform Project supports training for journalists on legal issues and the development of a public relations strategy for the judiciary.
- *Honduras* – The Honduras Judicial Branch Modernization Project seeks, among other things, to enhance judicial accountability and transparency; and promote equitable access to justice to address shortages and disparities in justice services, especially for the disadvantaged.

Annex II: Dialogue

The development of a dialogue strategy for the justice sector should build on the general experiences on how to effectively work on dialogue issues. While this paper does not purport to summarize these experiences, a few of the general considerations that ought to guide the dialogue should be mentioned:

- First, the dialogue should take place at different levels and forums. It may be carried out in meetings with government officials and justice sector representatives, donor forums, program coordination meetings and interactions with NGOs and the media.
- Second, the dialogue should as far as possible be coordinated with other donors and civil society actors. In general, broad participation and interaction between stakeholders should also be strived for in order to promote exchange of information, make sure that the perspectives of women, men, girls and boys living in poverty are reflected, ensure involvement of relevant expertise, strengthen the influence of change agents and increase legitimacy.
- Third, the dialogue strategy should aim to ensure that consistent messages are delivered. As policy changes tend to take time it should also be guided by the need for persistency and a long-term perspective. However, as timing is another key feature in terms of being able to influence change, it should at the same time allow for a high degree of flexibility.
- Fourth, those involved in the dialogue should, apart from a thorough understanding of the specific dialogue issues, have a good understanding of the justice system in question and of general human rights and RoL principles. There should also be a preparedness to share Swedish experiences. Knowledge of relevant aspects of the Swedish legal system will therefore also be valuable.
- Fifth, a framework for evaluating the impact of the dialogue ought to be developed and benchmarks against which progress can be measured decided on when developing a dialogue strategy. A key issue to assess will be the willingness of the government to bring about necessary reforms.

The dialogue may focus both on advocating rights and on ensuring greater efficiency in development projects and programs. While the former should obviously be based on the international human rights framework, the latter can in the field of justice draw on the core features and guiding principles of an EA2J approach as set out in this paper.

Annex III: Results Matrix

Objective: Ensure that people living in poverty 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.

Outcome	Intervention	Indicator	Means of verification
Enhanced capacity of rights-holders to **access and utilize** state and non-state institutions most important for them in obtaining justice	Increasing legal awareness	Legal literacy levels	Survey data
	Expanding and improving quality of legal assistance	People's access to lawyers and paralegals, and perception of quality of assistance received	Survey data/user interviews
Enhanced capacity of rights-holders to **demand reforms** of state and non-state institutions most important for them in obtaining justice	Strengthening reform claims by rights-holders	Degree of access to information, in law and in practice	Review of access to information legislation/ survey data/key informant interviews
		Degree of organization and coalition building	Survey data/key informant interviews
		Degree of access to and influence on decision makers	Survey data/key informant interviews
Enhanced capacity of duty-bearers to **deliver justice**	Increasing normative protection	Degree to which laws comply with international human rights norms.	Review of laws
	Strengthening mechanisms for redress and conflict resolution	Levels of corruption	Survey data
		Levels of satisfaction among users	Survey data
	Strengthening enforcement institutions and mechanism	Levels of human rights abuse	Survey data/human rights monitoring reports
		Level of satisfaction among users	Survey data
	Strengthening of oversight and monitoring bodies	Degree to which interventions have led to changed practices.	Institutional reports

Annex IV: Terms of Reference

1. Background

Sida has since the early 1990s provided legal sector support (broadly understood as 'rule of law', judicial systems, access to justice issues) support to a number of partner countries in order to make their legal and judicial systems more effective and responsive to poor people. Much of Sidas' work has been to strengthen institutions and by this way increasing service delivery in the legal area. Currently, Sida support in this area amount to approximately SEK 230 million per year (2008).

In the area of democratic governance and human rights, support to RoL has recently been identified by Sida as a thematic focus area (cf DG decision on Enhanced Thematic Focus, dated August 2009). In particular, *equal access to justice* (EA2J) will be a high profile issue guiding Sida's future work on legal sector support. With a view to explore international experience in this area – partner countries', Sida's and other actors' – a working group within Sida has been established to generate a discussion and formulate an approach to 'what works' when supporting EA2J. Put differently, the challenge is to identify approaches on how to empower poor women and men, girls and boys through legal sector support. The intention is to take a broad perspective on access to justice, going beyond the judiciary to include other state and non-state actors, formal and informal, judicial and non-judicial means by which people can realise their rights, solve disputes, obtain remedies and affirm rules that protect individuals. The two perspectives guiding Swedish development cooperation – the perspective of poor women and men, and the rights perspective – are fundamental to EA2J.

In order to facilitate the work of the working group, in terms of both consultation processes within Sida, documenting lessons learned and drafting a paper to serve as 'guidelines' for Sida in this area, a consultant will be hired. The scope of the assignment, competence required and timing of the work are elaborated below.

2. The assignment

The consultant will carry out three main tasks:

A. *Document some international approaches, results and lessons learned* with regard to legal sector and EA2J support, which can inform and inspire Sida's thinking and help shape our conceptual framework. The documentation should be made available in a user-friendly way, providing good overview of what key international actors (e g UNDP, WB, DAC, DFID) do in this area and include brief country- and local-level cases and examples, with key recommendations of 'good practice' as well as 'less good practice' based on the results & experiences analysis. In addition, any other relevant materials (research reports, evaluations, policy documents etc) might be included in the overview, as agreed between the consultant and the working group.

B. *Produce draft Guidelines for Sida's work with legal sector and EA2J support*, on the basis of the mapping of results, experiences and approaches in task A. The work with the guidelines must be harmonized with the on-going revision of the 'Sida at Work' web-based manual for Sida programme officers (the working group will play an important role to guide and monitor this consultancy task). The Guidelines should include suggestions on user-friendly indicators to measure results regarding EA2J, and an M&E framework for Sida's EA2J work.

C. *Design training modules for Sida (and other) staff* on legal sector and EA2J support. The Guidelines produced will be the basis for designing these training modules. The preparation of modules should be based on consultations with relevant staff of Sida's Empowerment network as well as Team Competence in the Management pillar, in order to (a) meet the requirements of Sida's training programme structure, (b) be as

realistic as possible in terms of scope, budgets etc., and (c) in addition as effective as possible in meeting the needs of Sida staff working with this area of support.

3. Profile of the consultant

The competence required for this consultancy includes at least the following:

- Documented legal education, training and experience
- Documented competence and experience from development cooperation in the legal sector, preferably including knowledge of Sida's work and organisation
- Documented experience of working with human rights-based approaches and/or gender equality, and/or the perspectives of poor people on development, preferably in the legal sector
- Documented experience of working with human rights and/or RoL and EA2J issues on the global level, e g from a UN agency or international NGO
- Excellent knowledge in English

4. Methodology

The consultant should propose the appropriate methodology for carrying out the above tasks. However, close collaboration will be necessary with the EA2J working group at Sida. Necessary communication with regard to the assignment will create opportunities to build a common understanding in the working group and among other relevant staff in Sida's Empowerment network on RoL and EA2J support. Thus, it will be necessary to help organise meetings and workshops at Sida and elsewhere, as well as hold telephone interviews and meetings with relevant staff of Policy teams or Operations teams (country, regional or global teams).

In addition, field visit by the consultant to one or a few selected countries should take place as part of this assignment.

5. Time-frame and reporting

The consultancy is expected to start during the month of October 2009 and last until August 2010. The deadlines for different tasks will be as follows:

Task A will be on-going throughout the assignment. The working group will discuss the timing of various consultation events and processes with the Consultant. The draft Mapping of Experiences should be reported no later than *31 January 2010*. A final paper should be submitted no later than 4 weeks after Sida has submitted comments on the draft paper, or as otherwise agreed between the Consultant and Sida.

Task B (draft Guidelines) should be reported no later than *30 April 2010*. Deadline for the final version should be no later than 4 weeks after Sida has submitted comments on the draft paper, or as otherwise agreed between the Consultant and Sida.

Task C (draft Training modules) should be reported no later than *15 May 2010*. Deadline for the final version should be no later than 1 June, or as otherwise agreed between the Consultant and Sida.

6. Budget

Sida estimates that a maximum of 15 weeks ("person weeks") are required for the assignment. The consultant will during the process of the assignment be in close cooperation with Sida. Contact person at Sida will be Anders Emanuel, anders.emanuel@sida.se, tel. 08 698 4584.

The contract for this assignment will include an option for a one-year extension, depending on the needs as identified by Sida (Empowerment Department) and the availability of funds.

Annex V: References

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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.

Equal Access to Justice

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