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Access to justice for persons living in poverty: a human rights approach

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Foreword

by the Minister for International Development,
Mr. Pekka Haavisto

Equal access to justice is a right that is based on human rights obligations. It is a guarantee against exclusion and inequality faced by many persons living in poverty. Access to justice means very concretely that people are capable of claiming their rights - to protect their livelihoods, income and assets or see a remedy against exploitation.

Justice is among basic services that all persons should have access to. It is also a fundamentally important element of stability which makes the promotion of the rule of law very important in fragile situations. A well-functioning justice system offers a mechanism to solve disputes without violence and weapons.

The strengthening of access to justice is relevant in all societies, not only in fragile contexts. As the study presents, Finland and similar countries also have some challenges in access to justice.

In developing countries the barriers of access to justice are most tangible. Furthermore, these barriers have the biggest impact on the poorest people. The study explains that the barriers can be related to reasons such as costs and long distances but also importantly to discrimination, inequality, lack of legal awareness, and corruption in the justice system. As the authors of this study show there is evidence that women are more likely to be affected by demands for bribes within the justice system.

Often traditional informal community based justice systems are the only ones the poorest women and men can access. While offering dispute and conflict resolution mechanisms that are close to the people and easily accessible, traditional justice systems also present several problems - starting with lacking linkage of decisions with human rights. In particular, these mechanisms often fail to ensure equal rights for women and other excluded and vulnerable groups. Increased openness and transparency of the procedures and decision-making as well as keeping records of the decisions would be useful for those mechanisms. Respect for human rights should always be required.

Finland's development policy underlines the promotion of the rule of law. Finland has supported rule of law related work in Afghanistan, Central Asia, Guatemala, Kenya, Laos, Nepal - just to mention some of the largest projects. Additionally, smaller projects, through international and local NGOs, are supported in many countries and regions.

Central themes in the rule of law projects Finland is funding vary but in the end all are targeted to promote better access to justice for people. This goal can be supported in many ways - through supporting a better functioning police (Afghanistan); through addressing issues of impunity (Guatemala); through strengthening the capacity of human rights monitoring bodies (Afghanistan, Kenya, Nepal); through promoting the ratification of international human rights treaties and their integration into national legislation (Laos); through supporting a constitutional process (Nepal) and of course directly by promoting activities, such as legal aid, that improve access to justice for vulnerable groups (Central Asia).

Gender equality, women's rights and women's access to justice have been important themes for Finland. Full prohibition of violence against women and the promotion of women's sexual and reproductive health and rights are measures that concretely advance women's access to justice. Yet, as this study very well shows, legal frameworks that do not prevent gender based violence are still way too common. Similarly, in far too many societies the equal right of inheritance is not guaranteed to women, leaving them without means to seek remedy to discrimination.

I find this study by Madgalena Sepúlveda Carmona and Kate Donald very relevant and topical. Its relevance for Finland's development policy is evident. It presents very effectively the links between poverty and the denial of access to justice. People living in extreme poverty have less opportunities to access their rights and are disproportionately affected by barriers of access to justice. Improved access to justice provides tools to claim one's rights and seek remedy - and to escape poverty. Through their practical analysis on problems related to access to justice, the authors also provide very concrete advice to development cooperation practitioners in the field of rule of law.

The timeliness of the theme is remarkable also in relation to the on-going discussions on the UN Post-2015 agenda. This study provides inspiration to considerations on how to concretely integrate human rights, the rule of law, access to justice, inclusion, meaningful participation and equality into the future global agenda.

To conclude, I found it quite saddening to read in this study that sometimes people living in poverty may think that justice can be obtained only by wealthier people. This is a concerning message and should encourage us all to continue our work in support of the rule of law. Law should be available for all women and men, and everyone should be able to enjoy the benefits of the rule of law equally without discrimination.

Acronyms

ACHR	American Convention on Human Rights
CAT	Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of all forms of Discrimination against Women
CERD	Convention on the Elimination of all forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
CLEP	Commission on Legal Empowerment of the Poor
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
FEANTSA	European Federation of National Organisations Working with the Homeless
FLAC	Free Legal Advice Centres
GA	United Nations General Assembly
HiiL	Hague Institute for the Internationalization of Law
HIV/AIDS	Human Immunodeficiency Virus / Acquired Immune Deficiency Syndrome
HRC	Human Rights Council
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labor Organization
MDG	Millennium Development Goal
NGO	Non-Governmental Organisation
NHRI	National Human Rights Institution
OAS	Organization of American States
OECD	Organization for Economic Co-operation and Development
TI	Transparency International
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNDP	United Nations Development Programme
UNICEF	United Nations Children's Fund

I. Introduction

In recent years there has been important progress in the fight against poverty. Millennium Development Goal (MDG) 1 - the target of reducing the extreme poverty rate by half - was reached at the global level in 2010, five years ahead of the 2015 deadline.¹ However, with more than 1 billion people still affected worldwide, the scale of extreme poverty remains appalling. Moreover, progress on poverty reduction has been very uneven across and within regions and countries². Many of those who have not been reached are ‘the poorest of the poor’, suffering from profound marginalisation and social exclusion.

Meanwhile, inequality is a significant problem both on a global scale and within countries. Globally, using market exchange rates, the richest population quintile gets 83 per cent of global income with just one per cent for those in the poorest quintile.³ Statistics clearly show that inequality has risen in recent years within wealthy, middle-income and developing countries in nearly every region of the world.⁴

The onset of the global economic and financial crises has exacerbated deprivations and resulted in poverty and inequality becoming not only more widespread, but more deeply entrenched. Across both developing and developed countries, 205 million people were unemployed in 2011⁵, the highest number of unemployed in history. Moreover, the austerity measures that some governments are implementing in response to the crisis are having a disproportionate impact on the poorest segments of society (see Textbox 1) increasing inequality and poverty even in developed countries.

Taking a human rights approach, poverty cannot be examined only through levels of income. Rather, poverty is a multidimensional phenomenon that includes as one of its components chronic social, political and economic inequality. From a human rights perspective, poverty is “a human condition characterized by the sustained or chronic depriva-

¹ United Nations 2013, Millennium Development Goals Report.

² UN MDG report 2013, p. 7: “1.2 billion people are still living in extreme poverty. In sub-Saharan Africa, almost half the population live on less than \$1.25 a day. Sub-Saharan Africa is the only region that saw the number of people living in extreme poverty rise steadily, from 290 million in 1990 to 414 million in 2010, accounting for more than a third of people worldwide who are destitute.”

³ Ortiz and Cummins, 2011, p. vii.

⁴ Beddoes, 2012. In OECD countries, for example, the average income of the richest 10 percent of the population is about nine times that of the poorest 10 percent, and across most of these countries the household incomes of the richest 10 percent grew faster than those of the poorest 10 percent over the past 20 years, so widening inequality (OECD, 2011, p. 22).

⁵ ILO, 2011, p. 12.

tion of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights”.⁶ Therefore, fighting poverty not only requires improving income levels and access to housing, food, education, health services and water and sanitation, but also that persons living in poverty have the resources, capabilities, choices, security and power necessary to enjoy the whole spectrum of human rights. Access to justice plays a crucial role in all parts of this equation. The exclusion of people living in poverty from the protection provided by the law denies them the opportunity to improve their enjoyment of rights.

Without equal access to justice, persons living in poverty are unable to claim their rights, or challenge crimes, abuses or violations committed against them, trapping them in a vicious cycle of impunity, deprivation and exclusion. The inability of the poor to pursue justice remedies through existing systems increases their vulnerability to poverty and violations of their rights, while their increased vulnerability and exclusion further hampers their ability to use justice systems. Ultimately, “poverty will only be defeated when the law works for everyone.”⁷

Although discriminatory patterns manifest themselves differently across regions and within countries, in every country in the world the poorest and most marginalized segments of society - commonly women and girls, ethnic minorities, indigenous peoples, undocumented migrants or those living in rural areas - continue to be excluded from accessing justice on an equal footing with the most privileged groups in of the population. Even in the most developed countries, legal disempowerment is rife and persons living in poverty do not have full *de jure* or *de facto* access to justice. This means that globally, persons living in poverty are often prevented from claiming, enforcing and contesting violations of their rights.

The United Nations Commission on Legal Empowerment of the Poor estimated in 2008 that four billion people were excluded from the rule of law.⁸ A more recent study estimates that an access to justice gap exists for a majority of the people in the world, perhaps even as many as two thirds.⁹ Every year, one in every eight people on earth runs into a serious conflict that is hard to avoid: at home, at work, regarding land, about essential assets they bought, or with local authorities.¹⁰ About half these people do not succeed in obtaining a fair, workable solution, although many of these problems could be addressed and solved with better access to justice. Many (if not the majority) of these people who are left without remedy or recourse will be people living in poverty, and the conflict and lack of solution will often evolve into a threat to their livelihood. A study on small samples of vulnerable people in Azerbaijan, Mali, Rwanda, Egypt and Bangladesh shows that they were more likely (compared to people in more prosperous settings) to report serious

⁶ E/C.12/2001/10, para. 8.

⁷ Soros and Abed, 2012.

⁸ Commission on Legal Empowerment of the Poor (CLEP), 2008, Volume I, p.1.

⁹ Hague Institute for the Internationalization of Law (HiiL), 2012, pp. 28-9.

¹⁰ Ibid.

problems in their vital relationships - family disputes, problems with employers, use and ownership of house/land and personal security problems.¹¹

Improving access to justice is a fundamental tool for poverty eradication¹² and the enjoyment of all human rights in a number of ways. Access to justice can play an important role both in protecting rights and in fulfilling those rights. It can serve to protect the personal security of people living in poverty, as well as other rights and entitlements (for example, it can protect them from sexual or economic exploitation, to which they are often vulnerable due to their marginalization and lack of power). Effective access to justice can also protect the livelihoods, income and assets of people living in poverty by preventing or remedying their exploitation by powerful public or private actors: for instance enforcing their labour rights against unscrupulous employers or their land rights against aggressive developers. Accessible justice systems can be tools to overcome deprivation, for example by enforcing access to basic public services for all and developing jurisprudence on social and economic rights. Violence and conflict can be reduced through the provision of fair, effective channels for peaceful dispute resolution.¹³ Finally, better access to justice enhances accountability, ensuring that public and private institutions, including public service providers, are accountable to the population they serve.

Overall, ensuring access to justice by the poorest segments of society is an issue of equity. Access to justice by the poorest is a crucial step in enabling them to enjoy their rights and to participate in society on an equal basis with the rest of the population. The multitude of obstacles that people living in poverty face in accessing justice create a system in which those who are better off in society have access to justice while the poorest segments are left without recourse. This undermines the very idea of equality before the law and impartial justice. Moreover, it exacerbates and perpetuates social, economic and political inequality and therefore stunts the economic development of many countries.¹⁴

Ensuring access to justice requires a comprehensive and holistic approach that looks beyond legal and judicial reforms and tackles broader structural, social and economic factors. Under international human rights law States have fundamental obligations to facilitate access to justice in a practical and tangible sense (see Annex 1).

¹¹ Ibid.

¹² The basic idea that access to justice is crucial for tackling the root causes of poverty, exclusion and vulnerability and ensuring enjoyment of human rights has gained broad acceptance, for example, the Commission on Legal Empowerment's mission was "built on the conviction that poverty can only be reduced if governments give all citizens, especially the poor, a legitimate stake in the protections provided by the legal system, which should not be the privilege of the few but the right of everyone." CLEP, Volume II, p. iii.

¹³ UNDP, 2005 p. 3.

¹⁴ There is increasing consensus that not only does income inequality have negative consequences in terms of social cohesion, but it is also harmful to economic growth. See e.g. Milanovic, 2011.

II. Power and impunity: the bigger picture

Access to justice is important from a human rights point of view because meaningful and unobstructed access to judicial mechanisms and systems is crucial for the realization and enjoyment of many civil, cultural, economic, political and social rights, as well as for tackling impunity. In this way, the issue of access to justice demonstrates the indivisibility, interdependence and interrelatedness of all human rights.

The human rights approach to access to justice seeks to develop people's capacity to demand accountability and the State's obligation to provide effective remedy in a holistic manner. This includes through strengthening of the judicial system, promoting capacity-building and empowerment at the individual and community level, and by tackling underlying structural and social obstacles, such as stigma, lack of access to education and social exclusion.

Under the human rights framework, States have an obligation to ensure *de jure* and *de facto* access to justice for all without discrimination of any kind. To this end, they must construct a legal and institutional framework that does not discriminate against any individual or group, that facilitates access to independent and effective judicial and adjudicatory mechanisms for all, ensures a fair outcome for those seeking redress. They must also ensure effective enforcement and compliance with judicial rulings or adjudicatory decisions.

However, a human rights approach recognizes that these steps alone will not be sufficient. It takes into account existing asymmetries of power and aims to change such power structures by empowering those who are more vulnerable and disadvantaged. Thus, reforms must prioritize the needs of those most disadvantaged, who must be considered active agents of change and not passive recipients of reforms. They must be enabled to actively and meaningfully participate in the decisions that affect their lives.

To ensure that persons living in poverty can benefit from the law and enjoy equal access to justice, a holistic set of reforms is necessary. While measures such as reforming the justice sector, improving legal information and education and implementing human rights training are necessary steps, action is also required to address the multidimensional causes of poverty and social inclusion. A human rights approach requires not only piecemeal measures but rather aiming for transformative change by addressing the systemic inequality of people living in poverty.

From a rights-based approach, improving access to justice by the poorest requires creating the conditions to enable those who are socially or economically disadvantaged to enjoy a real opportunity for justice or the benefits of due process of law in an equal manner. This requires, for example, a robust engagement not only with the functioning of the justice sector but also with the ideological underpinnings and biases of law and penal policy, which often have a disproportionate impact on the poor.

Inequality and discrimination at the heart of law and penal policy: examples

As laws and legal interventions usually reflect the interests or legitimize the claims of elites in society, they therefore sometimes indirectly discriminate against, or have a disproportionately harsh impact upon, persons living in poverty. Moreover, many laws do not recognize or prioritize the abuses that people living in poverty regularly suffer. For example, in many legal systems issues such as abuses in the informal employment sector, or exploitation of tenants by landlords, all of which are disproportionately suffered by persons living in poverty, are not legislated against in effective manner. Women living in poverty are particularly affected in this regard, because in many legal and constitutional frameworks issues such as gender-based violence, sexual violence, reproductive rights, equal pay for work of equal value and inheritance rights are not adequately addressed¹⁵, leaving them vulnerable to abuse and unable to seek remedies. When laws do not give due weight and consideration to the interests of persons living in poverty and the abuses that affect them, the poor are left with limited or non-existent formal or informal recourse to challenge injustices that they suffer.

Compounding the lack of legal protection, many States are increasingly implementing laws, regulations and practices that directly criminalise actions that are undertaken by persons living in poverty out of necessity. From Bangladesh¹⁶ to Hungary¹⁷, States and municipal authorities are increasingly imposing prohibitions or restrictions on vagrancy, begging, sitting, sleeping, loitering and urinating in public spaces. Often this type of regulation is vaguely worded, giving law enforcement officials wide discretion in application and increasing the vulnerability of persons living in poverty to harassment and

¹⁵ For example, one third of countries do not have laws specifically prohibiting domestic violence while around two-thirds do not criminalize marital rape. UN Women, 2011, p. 33.

¹⁶ See Vagrants and Shelterless Persons Act 2011.

¹⁷ See Bill T/10749, passed into law by the Hungarian Parliament on 30 September 2013 (see <http://www.bbc.co.uk/news/world-europe-24347061>).

violence. By making these activities or behaviours illegal, laws and regulations further marginalize the poorest segments of the population and increase their exposure to abuse and violence by both private individuals and law enforcement officials, which the victims are then unable to make complaints about for fear of exposing themselves to more abuse and jeopardizing their livelihoods further.

Sometimes, in addition to biased law, some supposedly “neutral” characteristics of the criminal justice system also have a heavier impact on the poorest. In many countries, there is an overreliance on detention and incarceration that disproportionately impacts on the poorest. Due to several factors, including the fact that law enforcement officials often use “poverty”, “homelessness” or “disadvantage” as an indicator of criminality, persons living in poverty come into contact with the criminal justice system with a high frequency. They also encounter considerable obstacles manoeuvring within or exiting the system. As a result, excessively high numbers of the poorest and most excluded are arrested, detained and imprisoned, which can be economically and socially devastating.

Detention means not only a temporary loss of income, but also often leads to the loss of employment, particularly where individuals are employed in the informal sector. The imposition of a criminal record creates an additional obstacle to finding employment. Detention and incarceration, even for minor non-violent offences, will often result in the temporary or permanent withdrawal of social benefits or the denial of access to social housing, for both the detainee and their family.¹⁸ Detention and incarceration therefore represents a serious threat to the financial stability of the detainee’s whole family, and serves to perpetuate the cycle of poverty. They can also have serious health implications for the poorest and most vulnerable, who are likely to be subject to the worst treatment and conditions, including overcrowded cells, inadequate hygiene facilities, rampant disease transmission, and inadequate health care.

Those who are poor and vulnerable are therefore likely to leave detention profoundly financially, physically and personally disadvantaged.¹⁹ This raises real questions about whether justice systems that rely so heavily on deprivation of liberty are producing real justice for people living in poverty, when sentencing and detention practices impact so negatively and disproportionately on them.

The underlying problem of poverty is lack of power. By definition, the negotiating and bargaining powers of those living in poverty are minimal. Thus, even when persons living in poverty do have access to a formal adjudicatory process, if adequate safeguards are not in place, a big disparity in economic or social status between them and their opponents can lead to a high risk of an unequal trial. This can be problematic when, for example, an impoverished worker wants to bring a case for unfair and unjust working conditions against their employer, or when a woman without personal income or resources

¹⁸ See e.g., Human Rights Watch, 2004.

¹⁹ See Open Society Justice Initiative, 2011.

brings a case of domestic violence against her partner. Inequality of arms in the litigation process may also adversely affect the livelihoods of entire communities. This is the case, for example, when resource extraction activity threatens the livelihood and rights of poor rural communities, who are in an extremely disadvantageous position to resist and challenge the corporations involved due to the asymmetries of power.

Procedural inequality can also arise in litigation against the State: when the poor are facing criminal charges, but also with respect to administrative procedures in which their rights are determined, such as child protection cases, benefit fraud matters, or eviction and immigration proceedings. When free legal assistance is not provided, people living in poverty are at a disadvantage and are more likely to receive and accept unfair or unequal treatment. Thus, ensuring equality in accessing justice and equality of arms, which are integral parts of due process, requires that the State create the conditions to ensure that whatever the economic status of the claimant or defendant, her rights can be exercised effectively and in full procedural equality with other parties.

In sum, from a human rights perspective, ensuring access to justice by persons living in poverty is not just a question of implementing judicial reforms; these measures may improve access to justice for some people but will hardly make a dent in the structural and systemic inequalities that obstruct the very poor. Empowering them to seek and access justice requires a comprehensive and holistic approach that looks beyond legal and judicial reforms and tackles broader structural, social and economic inequalities which are often reflected in and reinforced by policy and laws. Overall, it is the underlying lack of power of people living in poverty that should be addressed, ensuring that they do not only have access to justice on an equal footing with the rest of the population but that they also have the opportunity to receive a fair outcome.

Improving access to justice by the poor therefore requires measures on several fronts. It requires interventions focused on the legal and judicial system, including reform of the normative framework, improving the capacity of institutions to provide justice remedies without discrimination of any kind and creating the enabling conditions to ensure that the process and final outcome are fair. However, it also requires taking specific measures to empower the poor in a comprehensive manner, not limited to legal awareness and legal aid but rather increasing their social and political power overall to ensure a just outcome. All these areas must be covered in a coherent and harmonized strategy.

Taking the necessary measures is not just a policy option: under international human rights law States have fundamental obligations to facilitate access to justice in a practical and tangible sense for the poorest segments of society. (See Annex I for an overview of the relevant normative framework of international human rights law).

III. Obstacles to justice for persons living in poverty

In order for the important role that justice systems and mechanisms can play in reducing poverty and inequality to be realized, persons living in poverty need to be able to access them. Currently, however, in all countries of the world persons living in poverty face significant barriers that seriously impede or discourage them from seeking justice. Some of the obstacles relate directly to their lack of financial resources - the cost of legal advice, administrative fees and other collateral costs. Other obstacles, including lack of access to information, arise out of inequality and structural discrimination against the poorest and most marginalized. Furthermore, institutional and systemic obstacles are found in the ideology, design and operation of justice system that create barriers for the poor at all stages of the justice chain.²⁰ These include the inadequate capacity and resources of courts, police and prosecution corps, normative impediments embedded in the legal code, and the location of courts and police stations.²¹

Certain groups that suffer from structural discrimination and exclusion and are disproportionately represented among the poor - particularly ethnic and racial minorities, undocumented migrants and indigenous peoples - encounter additional barriers to accessing justice. These difficulties are multiplied for women living in poverty, who experience compounded discrimination and disempowerment, not to mention financial constraints. Therefore, across different contexts, women living in poverty experience particular difficulties in accessing justice mechanisms and winning judicial recognition, action and enforcement for crimes, discrimination and human rights violations they are disproportionately subject to. Children are often denied the due process guarantees that they are entitled to on the same level as adults, as well as additional protections that are necessary, in particular when they are particularly deprived or marginalized.

²⁰ The justice chain is the series of steps that a person has to take to access the formal justice system, or to claim her rights. UN Women, 2011, pp. 11-12.

²¹ The barriers addressed here refer to problems that persons living in poverty face in countries where the State's institutions operate on at least some level. In conflict or post-conflict situations, additional obstacles such as the complete inexistence of such institutions may take precedent.

A. Social barriers

In every country, developed or developing, historical social divisions and structural inequalities mean that the poorest and most excluded are in a disadvantaged position to claim their rights. Due to deep asymmetries of power, the stigma and discrimination they suffer and their socio-economic disadvantage, persons living in poverty often reasonably decide against bringing a case to court, thereby stymieing justice before any process has even begun.

Stigma

Due to deeply entrenched discriminatory stereotypes that assume that persons living in poverty are lazy, irresponsible, indifferent to their children's health and education, dishonest, undeserving and even criminal, police officers, court staff and other justice sector personnel, who reflect the discriminatory attitudes of wider society, often show discrimination or bias against the poor in their decisions or behaviour. As a consequence persons living in poverty are not treated fairly, efficiently and effectively throughout the justice chain, or in informal adjudicatory mechanisms.

Stigmatization and prejudicial attitudes generate a sense of shame,²² discouraging persons living in poverty from approaching public officials and seeking the support that they need. Not wishing to expose themselves to even greater social discrimination or abuse by the authorities, persons living in poverty may refrain from claiming entitlements or challenging abuses. This situation may be exacerbated when people living in poverty belong to groups that are under-represented in the justice sector and law enforcement personnel, such as ethnic minorities and indigenous peoples.

Fear of reprisal or sanctions

Persons living in poverty may choose not to seek justice due to fear of reprisal or sanction from more powerful actors within or outside their community. Certain groups such as ethnic minorities or indigenous peoples may be reluctant to engage with the justice system because of concerns relating to the respect of their own cultural or religious values. The fact that some persons living in poverty may not have a fully legal status in terms of their housing, civil registration or immigration status may prevent them from going to a formal court for fear of being sanctioned.

Women living in poverty often face particularly strong social barriers to pursuing cases. In some contexts there are strong cultural norms against women speaking on their own behalf

²² Sen, 1983.

in disputes.²³ Social sanction is a particular obstacle for women who are victims of domestic or sexual violence. These social constraints account partly for the disproportionately high under-reporting and attrition rates of gender-based violence.²⁴

Socio-economic subordination

Persons living in poverty suffer from chronic powerlessness and may be economically dependent on or socially subordinate to other groups or persons. This severely undermines the likelihood that they will be willing or able to bring justice claims relating to those who are in a position of power over them. For example, due to economic dependency poor women may be unable to approach justice systems to take action against abusive husbands, or workers may be prevented from submitting a claim against their employers. Migrant workers, in particular undocumented ones, face special barriers that limit their options to enforce their rights against employers. Less visible but equally as insidious, in very hierarchical societies some groups are unlikely to pursue justice claims against those who are perceived to be higher in the social strata. For example, research shows that Dalits in Nepal may be reluctant to pursue justice claims due to their economic dependence on non-Dalit groups. Dalits have expressed fears that seeking justice may result in social boycotts from non-Dalits that could jeopardise their already precarious livelihoods.²⁵

Limited legal awareness

Awareness and understanding of the existence of rights, and of the ways in which such rights can be invoked before and enforced by judicial and adjudicatory mechanisms, is fundamental to the enjoyment of human rights, and for remedying violations.

Persons living in poverty are often deprived from a young age of the chance to acquire the tools, social capital and basic legal knowledge necessary to engage with the justice system. They are unaware of the existence and content of their legal rights and entitlements, of the State's obligations and duties towards them, and how to secure the assistance they need. This is especially the case for those who also experience discrimination in accessing education or information on grounds such as ethnicity, gender or disability. In Thailand, research found that women survivors of sexual violence are often not aware of procedural rules stating that they do not have to confront the alleged perpetrator in Court or that they are entitled to be interviewed by female police investigators. This lack of information may make women hesitant to pursue complaints or prosecution, and therefore perpetuates impunity.²⁶

²³ UN Women, 2011, p. 52.

²⁴ UN Women, 2011, p. 50.

²⁵ Office of the High Commissioner for Human Rights in Nepal, 2011, p. 66.

²⁶ International Commission of Jurists, 2012, p. 63.

Simply making information available is not sufficient. States often do not take into account the difficulties that the poor face in accessing information, such as financial (e.g. fees), geographical (e.g. travel and opportunity costs), technological or linguistic barriers. In many States information about new statutes is disseminated in a very limited way²⁷. For example, in Bangladesh access to the limited copies of enacted laws is conditional upon the payment of a fee.²⁸ Information may only be available in written format, creating obstacles for those with low levels of literacy and persons with disabilities, published only online or in commercial newspapers, or only in one official language. In Timor Leste, for example, laws and regulations are written and published in Portuguese, a language that the vast majority of Timorese do not understand, and only a limited number of laws are translated into Tetum, the predominant language.²⁹

B. Geographical and physical barriers

The majority of the world's poor live outside of urban centres, often in remote, hard-to-reach areas at great physical distance from police, prosecutors, courts, information and registration centres, etc. Travel costs as well as indirect costs such as foregone work and childcare are unaffordable for many people living in poverty, and therefore the centralization of national justice systems constitutes a serious obstacle to access to justice for them.

While excessive police deployment is problematic in some communities living in poverty, especially in urban areas, the absence of police and other institutions necessary for the administration of justice in rural, poor and marginalized areas is a common problem. Courthouses, particularly appeal courts, are often located only in capital cities or large towns. Police officers, prosecutors and lawyers are also concentrated in urban areas, along with registries for land titling, and births, deaths and marriages. For instance, about 84 per cent of the population of Cambodia lives in rural areas, far from courts that are all installed at the provincial and municipal levels.³⁰ In such circumstances, persons living in poverty often have to travel long distances at great cost to engage with the justice system, exposing them to unfamiliar environments and unsafe conditions. Such factors often act as a persuasive deterrent against seeking redress from judicial or adjudi-

²⁷ For example, in Tajikistan, only the limited-circulation parliamentary gazette disseminates information about new statutes, and information about ministerial degrees is rarely provided. CLEP, 2008, Volume II p. 19.

²⁸ Ibid.

²⁹ According to the 2010 census, only 39.3 per cent of the population is literate in Portuguese, compared to 77.8 per cent who are literate in Tetum. See UN Special Rapporteur on Extreme Poverty and Human Rights, 2012 (A/HRC/20/25/Add.1).

³⁰ UNDP Cambodia, 2005, p. 2.

catory mechanisms, or may indeed represent an insurmountable obstacle for the poorest and most marginalized. Those who experience limited mobility, such as older persons or persons with disabilities, or those for whom travel is more difficult or dangerous, including women and children, are particularly affected.

For the poorest people, the need to travel a long distance to reach police stations, court houses or public registers often implies that they are in practice unable to seek redress or protection from violence, abuse and exploitation, and have greater difficulty in accessing documents such as birth certificates or land titles that are essential as evidence of their rights when they are contested, in land or inheritance proceedings or even forced evictions. Such distances may also affect the efficacy of the justice system and imply delays and needlessly lengthy detention periods. For example, in the state of Himachal Pradesh, India, there is only one ‘Special Home’ (juvenile detention centre) in the entire state, with young people from across the State detained here. Those detained are required to appear 3-4 times a month at Juvenile Justice Boards, which take place at a significant distance, without sufficient means to pay for travel costs. This situation contributes to unacceptable delays before the Juvenile Justice Boards, translating into longer detention periods for young people accused of a crime.³¹

The poor are also disproportionately impacted when courts and police stations are not appropriately designed to ensure accessibility for those with physical impediments, and when court processes are not adaptable to the needs of persons with physical disabilities. Even in developed countries, police stations and courts are often not wheelchair accessible. Where measures are not in place to enable physical access to all and to adapt their processes for those in need (whether they are defendants, claimants, witnesses or jurors), such persons are excluded from accessing and benefiting from the justice system.

C. Financial barriers

Persons living in poverty face daunting financial hurdles to engaging with the justice system on a fair and equal basis: not only the costs of legal assistance but also other direct and indirect costs.

Lack of quality legal assistance in criminal and civil matters

Legal aid is particularly important for persons living in poverty who are accused or are victims of crimes, as they face a range of obstacles such as negotiating bail procedures, pre-trial detention, trials and sentencing, and appeals.

³¹ Asian Centre for Human Rights, 2012, pp.1-2.

Legal assistance is also essential in civil matters when a person does not have sufficient resources to pay for legal assistance and without such assistance she is prevented from asserting her rights. Lack of legal aid for civil matters can seriously prejudice the rights and interests of persons living in poverty, for example when they are unable to contest tenancy disputes, eviction decisions, immigration or asylum proceedings, eligibility for social security benefits, abusive working conditions, discrimination in the workplace or child custody decisions. The exclusion of certain categories of claims from the scope of free legal aid, such as housing, divorce or child custody proceedings, or exclusion of representation before quasi-judicial tribunals such as welfare or employment appeal boards, discriminates against the poor. The legal processes which relate to such civil matters are often extremely complex and their requirements onerous, creating insurmountable obstacles for those without the assistance of a lawyer, particularly if the other party enjoys such assistance. A study in Ireland shows that those appealing social welfare decisions through the Social Welfare Appeals Office are not on an equal footing as they do not automatically have access to all information on their social welfare file, nor are they allowed access to previous decisions that may be relevant to their case. In addition, they cannot secure representation through the civil legal aid scheme and thus are forced to navigate the bureaucratic and legal labyrinth alone.³²

The lack of free quality legal aid in criminal and civil matters disproportionately disadvantages women, who often have less financial independence. Women victims of criminal offences such as rape, domestic violence or other forms of gender-based violence may be prevented from a fair trial, in particular when the accused has access to resources and thus a private lawyer. In the same vein, the lack of legal assistance in civil matters such as divorce, child custody or land inheritance is a serious impediment for women who lack resources. In both cases, the right to equality of arms could be seriously threatened.

Moreover, the criteria that govern access to State-funded legal assistance are often arbitrary and overly restrictive, and rely heavily on means testing to determine eligibility.³³ Means testing is frequently inaccurate in that it is unable to take account of the wealth distribution within a household, disadvantaging those who have restricted access to household wealth such as women and older persons. Furthermore, it fails to realistically reflect the options faced by persons living in poverty; for example, it may disqualify individuals if they have the option of disposing of household assets, even if those assets are used to produce food and generate subsistence income for the household.

The quality of legal aid services is significantly undermined by the inadequate allocation of human and financial resources by States. In many instances, the fees legal aid lawyers are paid are far from commensurate with the amount of time and effort required to effectively litigate a criminal or civil case. For example, in Lesotho, lawyers are paid for only

³² FLAC, 2012b.

³³ UNDP, 2005, p. 143.

one appearance per matter, and often not at all,³⁴ while lawyers in Sudan receive a total of USD \$100.00 to represent a client facing capital punishment, cases which can last for years.³⁵ Legal aid providers are often in short supply and overstretched and therefore have to turn down a large proportion of deserving applications. Sierra Leone, for example, had only three lawyers available through its legal aid programme in 2011,³⁶ and in the United States one legal aid attorney is available for every 6,861 persons (while in contrast there is one private attorney for every 525 people).³⁷ The Legal Aid Society, the largest provider of legal services in the United States, estimates that it turns down eight out of every nine people who request advice and assistance in civil legal matters.³⁸

Lack of funding also dramatically impedes the quality of free legal services, as legal aid lawyers may be very inexperienced. In 2011, of the 18 legal aid lawyers available in Malawi, sixteen had less than five years experience.³⁹ Of the 21 lawyers providing free legal advice and assistance in Liberia, all but two have recently graduated from law school.⁴⁰

The design and implementation of some legal aid programmes are also extremely problematic as they impede certain individuals and groups from accessing legal aid services on an equal basis with the rest of the population. For example, some programmes rely on telephone intakes or written applications, failing to take into account the needs and constraints of persons with disabilities, older persons, or those with lower levels of literacy. Inadequate or piecemeal support directed towards community-based paralegal programmes also restricts an important and more affordable source of legal assistance. Although all aspects of the legal profession should be regulated, excessive restrictions on the operation of paralegals, or lack of official recognition of their role, can also hamper the support they provide to persons living in poverty.

³⁴ United Nations Office on Drugs and Crime, 2011, pp. 9-11.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Udell and Diller, 2007, p. 4.

³⁸ Barnard, 2012.

³⁹ United Nations Office on Drugs and Crime, 2011, pp. 9-11.

⁴⁰ Ibid.

ACCESS TO JUSTICE IN A TIME OF AUSTERITY

AUSTERITY MEASURES that many governments are implementing in reaction to the global economic downturn are having a devastating impact on the poorest sectors of society. As well as negative impacts in areas such as housing and health services, in some countries - especially in Europe - court fees have been increased and the provision of legal aid has been cut, at a time when the demand for civil legal aid for several critical matters such as foreclosure proceedings, welfare review or asylum proceedings is in fact increasing.

In Ireland, for example, the resources allocated to legal aid have decreased while the number of applications for civil legal aid rose by 84 per cent from 2007 to 2011.⁴¹ In the U.K., the Legal Aid Sentencing and Prevention of Offenders Act 2012 reduces government spending on legal aid by a quarter over three years. The Ministry of Justice estimated that half a million potential clients will lose out, 90 per cent of whom would lose entitlement altogether.⁴² The cuts overwhelmingly affect family and social welfare law; the Ministry accepted that it would therefore have a disproportionate impact on women, on black and minority ethnic clients; and potentially on persons with disabilities.⁴³

In Spain a 2012 law (*Ley de tasas judiciales*)⁴⁴ increased court fees (now determined between 100 to 1,200 Euros) and put a price on many court proceedings which were previously exempted from fees, such as cases related to labour conditions, effectively blocking many people living in poverty from launching claims.

Fees and costs

As well as legal assistance, there are numerous other costs associated with accessing justice, which constitute a major barrier for those who simply cannot afford these expenditures. Fees are encountered at every stage of the legal process, alongside several indirect costs, such as for obtaining a legal document, commissioning independent expertise, photocopies and phone calls. The cumulative impact of these costs is a crucial factor in preventing the poor from accessing and benefitting from the justice system.

Costs are particularly burdensome in criminal cases, where defendants must often put up large sums of money to be granted bail, or risk long periods of pre-trial detention (see

⁴¹ Responses by the Minister for Justice and Equality to Parliamentary Questions on 21 March 2012 (available online at <http://debates.oireachtas.ie/dail/2012/03/21/00317.asp>) and 23 June 2011 (available online at <http://debates.oireachtas.ie/dail/2011/06/23/00010.asp>). Extracted from FLAC, 2012a.

⁴² Smith, 2012.

⁴³ Ministry of Justice, 2011.

⁴⁴ Law 10/2012, of 20 November 2012.

below), during which they may have to pay for food or telephone use. These fees can have the effect of prolonging an individual's detention and exacerbating the conditions in which they are detained. Moreover, it results in a situation in which criminal defendants with financial means are in a much more favourable position than those without.

In civil claims, fees are payable when filing claims and motions or when exceeding time limits. In addition, the unsuccessful party in a civil matter is often ordered to pay the legal costs of the successful party. Such fees are unaffordable for persons living in poverty, and act as a disincentive to instituting claims. In some countries the cost of divorce proceedings (including child custody claims) or filing a land inheritance claim is many times the monthly income of a person living in poverty, and again, an even greater barrier for poor women. For example, the average cost of divorce proceedings in Indonesia's General Court is approximately \$230.00, even when a lawyer is not retained - ten times the monthly income of a person living in income poverty.⁴⁵ In Kenya, filing a land inheritance claim involves 17 legal steps, including 13 separate procedural forms, and costs up to USD \$780.00.⁴⁶

The existence of administrative and other fees disproportionately disadvantages vulnerable groups such as poor women, migrants and minorities, who often have less access to financial resources. They may be prevented from filing criminal charges (e.g. domestic violence) or civil claims (e.g. divorce, child custody and land inheritance) when excessive fees are imposed.

In addition to formal administrative fees, persons living in poverty encounter other collateral costs in accessing justice. The cost of transportation to courts and accommodation, together with the loss of income while away from employment or subsistence activities, may be impossible for the poor. These costs are particularly severe for those who live in rural areas and may have to travel days to access the justice system. Persons that work in informal or precarious work are unlikely to get their employer's permission to take time off work to attend a hearing, even if they are willing to forego pay, so attendance would mean they risk losing their jobs and income altogether. Caregivers, the majority of whom are women, may not be able to leave home to submit a claim or to attend a court hearing. Most of the women who were interviewed for a project on access to justice for women in Thailand, expressed the view that women will not consider themselves able to devote time, money and efforts to pursuing legal remedies and justice.⁴⁷

⁴⁵ Akhmedi et al, 2010, pp. 1-5.

⁴⁶ Harrington and Chopra, 2010, pp.15-17.

⁴⁷ International Commission of Jurists, 2012, p. 67.

D. Institutional barriers

Several systemic problems in the operation of the justice system impact particularly harshly on people living in poverty, potentially obstructing them at every stage of the justice chain.

Inadequate capacity and resources

Shortfalls in financial and human resource allocations to courts, police and prosecution corps, and insufficient training and capacity-building for judicial and law enforcement officers, translate into failures in the judicial system that infringe upon access to justice. Such failures, including delays (see below), flawed or insufficient evidence-gathering, lack of enforcement, and abuse, undermine the effective functioning of judicial and adjudicatory mechanisms and undermine human rights. Poor functioning of the justice system particularly affects the poor, because pursuing justice requires a much greater effort and investment in terms of money and time for them, while their chances of a just and favourable outcome are worse.

When judicial systems receive inadequate financial and human resource allocation from State budgets, police stations, prosecution corps, and courthouses are understaffed and poorly equipped, and benches are deprived of adequate numbers of judges. The result is serious neglect and even mistreatment of those seeking justice, which is more pronounced for the most disadvantaged, whose cases are usually under-prioritized.

Non-registration of complaints by the police is a practice common in over-burdened and under-resourced criminal justice systems. In such cases, it is usually the complaints of persons living in poverty that go unregistered, due to bias, discrimination, and their disempowerment and lack of knowledge and information about their rights. Cases involving gender-based violence, notably rape allegations, are often left unregistered, particularly when the victim is a woman living in poverty and lacks awareness or means to pressure the police to investigate.

The rights and interests of women are thus especially compromised by badly resourced and trained judicial systems and police forces, State organs that traditionally reflect and prioritize the interests of men and are dominated by men. Not only do women living in poverty come up against stark power imbalances, discriminatory cultural norms, and other social structures when instituting legal proceedings, they are also disadvantaged by the lack of training afforded to officials on the application of laws related to gender-based violence and the proper treatment of victims and handling of complaints. For example, evidence from South Africa demonstrates that many members of the police force do not have adequate training about their roles and duties under the Domestic Vio-

lence Act or the accompanying National Instruction. This translates into inadequate or inappropriate police responses to domestic violence claims.⁴⁸ Women living in poverty have even less power and capacity to challenge this state of affairs.

Excessive delays

Due to lack of adequate resources and qualified staff, limited budgets and inadequate infrastructure and logistical support, often there are unnecessary delays in adjudicating cases and enforcing judgments. In some jurisdictions, millions of legal cases are pending and civil and criminal cases take up to a decade to be completed. As reported in 2008, in India there are only 11 judges for every million people and well over 20 million legal cases pending; Kenya has a backlog of a million cases; while each judge in the Philippines had an average of 1,479 cases pending before them.⁴⁹ Recent evidence from Sub-Saharan Africa shows that both civil and criminal cases take up to a decade to be completed.⁵⁰

While these problems affect all people seeking justice through the formal justice system, they have a disproportionate impact on the poor, for whom a long process is not only a denial of justice but also unaffordable and may aggravate their situation. Often their cases are under-prioritized due to biased preferential treatment to the wealthy or lack of sensitivity or understanding of the impact of the delay on the poorest claimants. Those with power and resources are not only able to assume the costs of the long waiting period, but they also have access to informal ways to speed up a process.

LENGTHY TRIALS are not only a problem in developing countries. At the Council of Europe level one of the most commonly invoked provisions in the judgments of the European Court on Human Rights has been Article 6 of the European Convention on Human Rights and Fundamental Freedoms which lays down the requirements for a “fair trial” including the requirement that the proceeding should take place within a “reasonable time”. For example, data shows that in 2010 alone Italy was found in violation of this provision due to excessive length of proceedings 50 times.⁵¹ In the particular case of Finland, excessive length of proceeding constitutes one of the most persistent and serious problems of the judicial system. Between 2000–2008 the European Court of Human Rights gave 44 judgments against Finland for length of domestic judicial proceedings.⁵²

⁴⁸ Combrinck and Wakefield, 2009, p. 2.

⁴⁹ CLEP, 2008, Volume I, p. 32.

⁵⁰ United Nations Office on Drugs and Crime, 2011, p. 13.

⁵¹ De Santis, 2012.

⁵² European Union Agency for Fundamental Rights, 2011b.

Corruption

In many countries, partly due to overstretched and underfunded judicial systems, corruption is endemic within police forces and prosecution corps, and amongst judicial officials. Illicit payments and favours enable those with financial and social capital to access the justice system with greater efficiency and effectiveness, and even to secure a certain outcome. When people living in poverty cannot afford to pay requested bribes for services that should be free, their claims and cases are delayed, denied or discontinued.

Persons living in poverty are more likely than other individuals to be confronted with requests for bribes, and to resort to paying bribes.⁵³ In Burundi, a ‘certificat d’indigence’ is supposed to ensure that people living in poverty benefit from free legal advice and legal fee waivers; however in practice the intended beneficiaries face many abuses in trying to obtain this certificate, often being told that “poverty has a cost”.⁵⁴ Moreover, bribes represent a greater burden for persons living in poverty, often meaning that they have to sell assets or sacrifice their health or education costs in order to meet such demands. Evidence shows that women are more likely to be affected by demands for bribes within the justice system,⁵⁵ and in many cases they are also subject to harassment or abuse by law enforcement officers themselves.

Persons living in poverty are not only denied access to justice when they are unable to meet the costs of bribes or engage in other corrupt activities, but they are also deterred from accessing the justice system when they perceive the system to be corrupt. In many States, individuals think that justice can only be obtained by wealthier people: 96.8 per cent of people in Colombia believe that judges are “bought” by rich claimants, and 88.7 per cent of marginalized people in Chile believe that there is one justice for the poor, and another for the rich.⁵⁶ Such perceptions can have the seriously detrimental consequence of deterring people living in poverty from even attempting to access the justice system to have their rights enforced and to claim remedies from violations.

Excessive and arbitrary use of pretrial detention

Across developing and developed countries, the provision of bail pending trial is subject to stringent and onerous conditions which are extremely difficult for the poor to comply with. Requirements such as connections with the community, a fixed address or permanent employment, a cash deposit or bond as guarantee have a disproportionately harsh impact on the poor. These requirements are impossible for the poorest and most marginalised to meet in the vast majority of cases and, as a result, they are more likely to remain in detention pending a trial. In most countries, people living in poverty are una-

⁵³ Transparency International, 2007, p. 13.

⁵⁴ Avocats Sans Frontieres, 2011, p. 56.

⁵⁵ UN Women, 2011, p. 54.

⁵⁶ Gargarella, 2004.

ble to afford bail. For example, a study of bail review hearings in Maryland, USA, found that 70 per cent of respondents indicated that paying bail would mean they would be unable to afford other important costs like rent, utilities or groceries.⁵⁷

Remaining in pre-trial detention dramatically increases the likelihood that a person will ultimately be convicted: not only does it put them in a vulnerable position whereby they will be more inclined to accept unfair ‘plea deals’ or to make admissions of guilt in order to secure a swifter release, it contributes to the deterioration of the individual’s appearance and demeanour, impedes their ability to liaise with lawyers or obtain character witnesses and causes them to lose their employment or social housing, thereby creating a disincentive for the court to give a suspended or community sentence.⁵⁸

Lack of coordination between criminal justice agencies, often exacerbated by a shortage of resources, may result in accused persons not being placed before a court, or persons placed in pretrial detention (overwhelmingly the poor) not being returned to court for a review of their detention. Once a person is detained in custody, lack of recording or tracking systems may mean that they are ‘lost in the system’.⁵⁹ For example, in Nigeria, where periods of pretrial detention in excess of ten years are not unusual, a presidential committee found in 2005 that nearly 4 per cent of pretrial detainees were in prison because their case files were missing.⁶⁰

E. Procedural barriers

Several requirements or restrictions related to judicial procedures can prevent or deter those living in poverty from accessing justice or enjoying equality of arms during a judicial proceeding, increasing the likelihood of an unfair or unjust result.

Lack of legal identity

Many persons living in poverty are *de facto* deprived of accessing courts and other public services such as education and healthcare as they lack a legal identity. According to UNICEF’s calculations of registrations at birth, the number of people without a legal identity is in the tens of millions,⁶¹ with more than 51 million births going unregistered every year.⁶²

⁵⁷ Abell Foundation, 2001, p. 52.

⁵⁸ UN Working Group on Arbitrary Detention, 2006, E/CN/4/2006/7, para. 66.

⁵⁹ Open Society Justice Initiative, 2012a, p. 35.

⁶⁰ Nwapa, 2008, p. 89.

⁶¹ UNICEF, 2005.

⁶² UNICEF information available at: http://www.unicef.org/factoftheweek/index_53718.html

There are several reasons why many children and adults are not formally registered. Persons living in poverty may lack information about formal registration or its benefits and so fail to register without full understanding of the impacts of not doing so. Moreover, high cost, complexities, excessive documentation requirements, geographically distant offices and time-consuming processes of registration are great disincentives to accessing registration services for the poorest and most marginalized. In addition, social barriers that prevent the registration of particular groups of children, such as children with disabilities and children from minority ethnic groups, impact disproportionately on the poor. While in some countries birth registration may be provided free of charge in health centres, many people living in poverty do not give birth at health centres. When people try to register their children at a later date to obtain government benefits such as education and social welfare, they face even more complicated, costly, and lengthy hurdles to registration.⁶³

In Indonesia, approximately 60 per cent of children under five years of age do not have birth certificates, and half are not registered anywhere. Compounding the lack of comprehensive birth registration, bureaucratic hurdles and an over-centralized system have led to public apathy towards registering children. Corruption is also an issue as many middlemen seek to profit from the civil registration mechanism. Consequently, instead of benefiting from a free service, many people end up paying a third party anywhere from Rp100,000 to Rp800,000 (about \$10 to \$80) for this basic task, a tremendous financial burden for most Indonesian families.⁶⁴

In addition, in many countries barriers to registration result from discrimination against certain groups. For example, in the Dominican Republic many children of Haitian migrants are unable to register themselves or their children with the Civil Register⁶⁵. Indeed, in many countries, financial and administrative barriers are coupled with laws and practices that limit and restrict late registration or exclude non-nationals such as refugees, migrants and stateless persons from registration, perpetuating and exacerbating their vulnerability.

Formalism

Without the resources to retain private legal assistance, and with restricted access to legal aid (see above), persons living in poverty are often forced to navigate the judicial system alone. In doing so, they encounter a complex labyrinth of laws, traditions and interactions with copious paperwork, the use of legal jargon, mainstream languages and restrictive time limits, all of which can deter the poor from seeking justice under formal systems and impede fair outcomes.

⁶³ Harbitz and Boekle-Giuffrida, 2009, p. 25.

⁶⁴ UNICEF website, 'Indonesia', available at: http://www.unicef.org/indonesia/protection_2931.html

⁶⁵ See, for example, *The Yean and Bosico Children v. Dominican Republic*, Judgment of September 8, 2005, IACtHR, (Ser. C) No. 130 (2005).

These barriers are particularly damaging in areas of law that frequently impact upon the most marginalized, including property disputes, welfare claims, and immigration proceedings, and can often prevent commencement of claims to enforce rights and seek remedies.⁶⁶ Even when they do not bar engagement with the judicial system altogether, cumbersome and complex procedural requirements may still obstruct access to justice by increasing the financial and time costs, which people living in poverty can ill afford.

Persons living in poverty may be unfamiliar with, and often intimidated by, regulations regarding dress codes, the hierarchy of the court system, confrontational design of courtrooms, and traditions about when to sit, stand and address the judge. As a result, they are in an unequal and disadvantaged position before they even walk into the courtroom.

Requirements that demand a high level of evidentiary proof before civil claims can be instituted can have a disproportionate impact on the poor who are hampered by their lack of financial resources, time, and understanding of the law and of legal processes. For instance, after the 1996 Marcopper Mining Disaster in the Philippines, many poor farmers were not compensated because they were unable to document that they had owned a particular number of cattle or grazed them on the particular area of land in question.⁶⁷ Collating evidence, obtaining expert opinions, and preparing forms in the correct language can be an almost impossible process without the assistance of a competent legal representative.

Persons living in poverty are even further disadvantaged when they are conducting proceedings or making a claim against corporate entities or the State, whose power, reach and resources far outweighs theirs. This is particularly evident in criminal cases, where the State controls the collation and production of evidence. The process of collecting exculpatory evidence or obtaining expert testimony may prove prohibitively costly for the poorest and most vulnerable individuals and is even more difficult for those forced to remain in pre-trial detention because of their inability to make bail or pay the necessary bribes. In such cases, individuals have little hope of having their charges fairly adjudicated at trial.

Illiteracy and differences in language and culture

While many people find it difficult to understand legal or judicial terminology, the complexities increase in multilingual and multiethnic societies. In such countries, legal proceedings are often conducted in the official language, while many persons living in poverty only speak local languages or dialects. Similarly, judicial systems that are heavily reliant on paper forms and written submissions put illiterate persons in a disadvantaged position. These problems often affect those among the poor (including women, indigenous populations, ethnic minorities and migrants) who are excluded from education ser-

⁶⁶ United Nations Office for Drug Control and Crime, 2001, p. 4.

⁶⁷ Foti and de Silva, 2010, pp. 11-12.

vices due to discrimination, and therefore less likely to have received adequate schooling in the official or predominant language.

While individuals facing a criminal charge have the right to a free interpreter under international human rights law⁶⁸, in practice this service is often limited, unavailable or reserved for those who speak a foreign language, rather than a minority language or local dialect, and is rarely provided in civil cases. In Latin America, for example, individuals from indigenous communities who do not speak the dominant languages of Spanish and Portuguese are often excluded from judicial and adjudicatory mechanisms because of the unavailability of translators.⁶⁹ In Turkey, where 42 per cent of women above the age of 15 are victims of domestic violence, Kurdish women face numerous obstacles in making complaints or accessing domestic violence services because insufficient numbers of interpreters are available to enable them to communicate with authorities.⁷⁰ People living in poverty are also vulnerable to abuse or exploitation by interpreters without sufficient training, whose cultural prejudices may inform their translation.

Even when the predominant language is spoken, cultural differences (alongside the imbalance of power) can impede communication within the judicial system. In some cultural groups, different terminology may be used for specific occasions or to speak to people in a different relationship, and time and place may be described in different ways. Furthermore, inter-cultural communication between indigenous groups or ethnic minorities and judicial officers can be impeded by differences in perceptions of politeness; cultural taboos which prevent the giving of certain evidence; and reliance on interrogatory methods. For example, research shows that Australian indigenous persons under questioning in criminal trials often adopt a method of 'gratuitous concurrence', where they answer 'yes' to questions, meaning only 'yes, I hear you'.⁷¹ When judicial processes do not adopt measures to facilitate cross-cultural communication and adapt to cultural differences, this may contribute to higher rates of conviction of criminal charges, undermining the right to a fair trial.

Lack of legal standing

Legal standing is the gateway for access to justice. To have access to the formal judicial system, it is necessary that the courts extend legal standing without discrimination, ensuring all receive equal treatment when bringing claims, protesting violations, or seeking remedies. In practice, however, restrictions on legal standing in many States directly and indirectly exclude persons living in poverty from accessing judicial and adjudicatory mechanisms. For example, in some States, legislatures and judicial systems limit standing for certain groups, such as women and children. Discriminatory

⁶⁸ See art. 14.3(f) ICCPR. In addition, see Annex 1 of this document.

⁶⁹ UN Women, 2011, p. 54.

⁷⁰ Human Rights Watch, 2011, p. 3.

⁷¹ Stroud, 2010.

laws deprive women of legal competency and require that they be under male guardianship before instituting a claim or giving evidence. In Saudi Arabia, for example, women may need a guardian's permission to testify or appear in court,⁷² and some judges have restricted women from giving testimony themselves, deeming the sound of a woman's voice shameful and requiring it to be relayed by a male representative.⁷³ Lacking other avenues to seek justice, those women living in poverty are left without real recourse.

More commonly, narrow rules relating to legal standing prevent civil society organisations from taking a more direct role in litigation, or engaging in judicial proceedings on behalf or in support of persons living in poverty and other disadvantaged groups who may lack the resources or capacity to do so themselves. For example, in ten EU Member States, the domestic rules on legal standing are considered overly restrictive: in these States, individuals cannot bring a claim to court unless they have full legal capacity (often excluding those with certain disabilities) and are directly concerned in the matter.⁷⁴

State restrictions on public interest litigation or the filing of amicus briefs by civil society organisation can close off yet another avenue for access to justice for persons living in poverty. This is especially so in terms of remedy for structural or systemic abuses or discrimination which affect large number of persons living in poverty.

Limited impact of litigation

In many jurisdictions, the effect of judgments is limited to those who litigate or bring a claim, even in cases that have a much wider significance. This means that only those individuals with the capacity or tenacity to overcome all the barriers to accessing justice will benefit from important judgments. However, often those living in poverty are impacted by widespread practices or broad government measures that generate situations where the rights of many individuals are at stake and which would be better addressed by collective remedies.

⁷² UN Special Rapporteur on the independence of judges and lawyers, 2011, para. 32.

⁷³ Human Rights Watch, 2008, p. 21.

⁷⁴ European Union Agency for Fundamental Rights, 2011a, p. 40.

IV. Conclusion

Persons living in poverty face obstacles in each of the steps that they must take to seek redress through the justice system. All these obstacles to access to justice result in the perpetuation and entrenchment of poverty. They increase the vulnerability of people living in poverty to abuse, violence, exploitation and crime, and therefore create a vicious circle and increase the likelihood that poverty will be passed down through the generations, and become endemic in certain communities, groups and areas.

From a human rights perspective, the prevalence of the obstacles described above is a source of major concern, and a serious barrier to the enjoyment of several human rights, including the right to access to justice. They also undermine the dignity of people living in poverty. These obstacles they face are linked not only to lack of financial resources or to the direct functioning of the legal system, but also to wider social and structural issues, often related to entrenched discriminatory attitudes against the poor.

While several barriers described above affect everyone in society, they uniformly have a disproportionate impact on the poorest. The mere existence of these barriers constitutes a major threat to the principles of equality and non-discrimination, one of the fundamental pillars of international human rights law. All these barriers de facto impede access to justice by persons living in poverty, perpetuating a system where access to justice is ensured only for the wealthier segments of the population. If this is not changed as a matter of priority, existing levels of inequality in terms of power, resources and knowledge will be reinforced or even exacerbated.

Therefore, strong and targeted efforts must be made by States, as well as civil society, to ensure that people living in poverty enjoy access to justice on an equal basis with the rest of the population. While the most effective method for doing so will vary across different contexts, it is essential that access to justice interventions do not merely focus on the 'low-hanging fruit' - people whose access to justice can easily be improved by small improvements or adjustments to existing justice mechanisms. Instead, interventions must be designed with the aim to improve access to justice specifically for the poorest or most marginalised segments of society. It is clear from practice on the ground that civil society, international organisations and NGOs can play an important role in this

task. Because the obstacles the poor face in accessing justice are diverse, these efforts must be comprehensive and holistic, implemented within a long-term sustainable policy framework, involving collaborations at all levels- central, state and local - as well as in partnership with civil society organization and grass root movements.

Overall, although in some contexts progress has been made in improving access to justice for people living in poverty, long-term success will require taking a wider view and tackling a range of structural, social, cultural and economic obstacles that all too often make justice unattainable for people living in poverty. Ultimately, the aim must be to build justice systems that are within reach of the poor: socially, geographically and financially.

Annex I: Normative human rights framework

A human rights approach to access to justice is necessary and appropriate, because the issue directly engages several human rights enshrined in international treaties.

Persons living in poverty have a right to access justice without discrimination of any kind and a right to due process, understood as the right to be treated fairly, efficiently and effectively throughout the justice chain. States have assumed obligations in this regard, by committing to respect, protect and fulfil several rights described below.

The *right to an effective remedy* (e.g. art. 8 UDHR, art. 2.3 ICCPR, art. 6 CERD, arts. 13 and 14 CAT) is a key element of human rights protection and serves as a procedural means to ensure that individuals can enforce their rights and obtain redress. The lack of effective remedies for violations of human rights such as discrimination is still a pressing reality in many jurisdictions, as is the lack of judicial protection for economic, social and cultural rights. However, this concept entails more than improving access to judicial and adjudicatory mechanisms. It also implies that remedies must be effective and legal and judicial outcomes must be just and equitable. The right to an effective remedy also includes reparation, restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

The *right to equality before the courts and tribunals and the right to a fair trial* (e.g. art. 10 UDHR, arts. 14 and 15 ICCPR). While the rules regarding equality before the courts and tribunals are included in several provisions of international human rights treaties, particularly relevant is article 14 ICCPR, which provides that “all persons shall be equal before the courts and tribunals” in criminal and civil cases,⁷⁵ and creates an obligation upon States to ensure that everyone has access to “a fair and public hearing by a competent, independent and impartial tribunal established by law”, in “the determination of any criminal charge or of his rights and obligations in a suit at law”.

The quality of a court cannot be assured if the rights of the applicants are not assured. A set of rules and practices related to the right to a fair trial have been developed, including: the right to a fair hearing; the right to a public hearing and pronouncement of judgment; equality of arms; presumption of innocence; freedom from compulsory self-incrimination; the right to know the accusation; adequate time and facilities to prepare a defence; the right to legal assistance; the right to examine witnesses; the right to an interpreter; the right to appeal in criminal matters; the rights of juvenile offenders; no punishment without law; *ne bis in idem*; and the right to compensation for miscarriage of justice. The right to a fair hearing also depends on many factors, such as the presentation of evidence or the behaviour of the members of the court, public and press.

⁷⁵ Human Rights Committee, General Comment No. 32, para. 13.

The *right to legal assistance*, enshrined in many major global and regional human rights instruments (e.g. art. 11.1 UDHR and art. 14.3(b & d) ICCPR), is essential to ensuring due process and equality before the courts. The provision of free and competent legal advice and assistance to those who are otherwise unable to afford it is a fundamental pre-requisite to ensuring that all individuals have fair and equal access to judicial and adjudicatory mechanisms. International human rights instruments explicitly establish the right to free legal assistance in criminal proceedings for those accused of a crime, but also to victims of crime⁷⁶. Free legal assistance is also essential in civil matters when a person does not have sufficient resources to pay for legal assistance and without such assistance she is prevented from asserting her rights.⁷⁷

The right to legal assistance for the poor has been further developed by a variety of international standard-setting documents, for example the United Nations Basic Principles on the Role of Lawyers⁷⁸, which states in Principle 3 that “Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons.” The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems⁷⁹, among other relevant principles, states in Principle 9 that “States should also ensure that legal aid is provided to persons living in rural, remote and economically and socially disadvantaged areas and persons who are members of economically and socially disadvantaged groups”.

⁷⁶ Art. 14 ICCPR and Principle 4, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, adopted by the UN Commission on Crime Prevention and Criminal Justice, April 2012.

⁷⁷ Human Rights Committee, General Comment No. 32, para 10: UN Draft Declaration on the Independence of Justice, art. 95; Council of Europe, Basic Principles on the Role of Lawyers, art. 1. This right is also well-established in some regional mechanisms, see e.g. ECtHR, *Airey v. Ireland* (Application No.6289/73) and *Steel and Morris v. The United Kingdom* (Application No.6841/01) and IACtHR in the *Exceptions to the Exhaustion of Domestic Remedies*, Advisory Opinion OC-11/90, August 10, 1990, (Ser. A) No. 11 (1990).

⁷⁸ Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

⁷⁹ Adopted by the United Nations Commission on Crime Prevention and Criminal Justice, 2012.

The *principle of equality and non-discrimination* (e.g. art. 2 UDHR, art. 2 ICCPR, art. 2 ICE-SCR) obliges States to take measures to ensure all individuals are entitled to equal access to judicial and adjudicatory mechanisms without distinction on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and that all parties in a judicial or legal proceedings are treated without any discrimination. The principle of equality and non-discrimination extends to prevent discrimination on the basis of social and economic status (as implied in the phrase “other status”).⁸⁰ Not every distinction or difference in treatment will amount to discrimination. In general international law, a violation of the principle of non-discrimination arises if: (a) equal cases are treated in a different manner; (b) a difference in treatment does not have an objective and reasonable justification; or (c) if there is no proportionality between the aim sought and the means employed.⁸¹ The principle of equality can in certain circumstances require a state to take affirmative action in order to diminish or eliminate conditions that cause or help to perpetuate discrimination.

The *right to equal protection of the law* (e.g. art. 7 UDHR, art. 26 ICCPR) provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protections against discrimination on any of the enumerated grounds.⁸² The importance of Article 26 ICCPR arises when there is a legislative provision or a State action or omission with a discriminatory impact on the enjoyment of the rights not set forth in the ICCPR. As the Human Rights Committee has noted: “when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights that are provided for in the Covenant.”⁸³

⁸⁰ Human Rights Committee, General Comment No. 32, para. 9 and Committee on Economic, Social and Cultural Rights, General Comment No. 20, para. 35. Economic and social status is explicitly included as a ground of discrimination in the American Convention on Human Rights, art. 1.

⁸¹ See, for example, Human Rights Committee, General Comment No. 18, para. 13. These requirements have been expressly set out by international human rights supervisory bodies, including the European Court (see, e.g., *Marckx v. Belgium*) and the Inter-American Court of Human Rights (see, e.g. Advisory Opinion No. 4, para. 57).

⁸² Human Rights Committee, General Comment No. 18.

⁸³ Human Rights Committee, General Comment No. 18, para. 12.

The *right to recognition as a person before the law* (e.g. art. 6 UDHR, art. 16 ICCPR, art. 7 CRC, art. 15 CEDAW, art. 12 CRPD) is at the core of the right to access justice and is central to the conception of human rights, as it expresses the right and the capacity of each human being to be the holder of rights and obligations under the law. It has often been described as the “right to have rights” and as a direct consequence of the right to respect for human dignity.⁸⁴ This right is violated when, for example, people living in poverty are unable to access civil registration systems and therefore do not have documents to prove their identity or citizenship. Because they are not officially registered, many children and adults have no legal existence and thus cannot enjoy their rights or seek protection through formal justice systems. However, the right to recognition as a person before the law should not be contingent on any formal civil status (or lack thereof) but rather is an absolute right. In addition, the UDHR and ICCPR (among others) specify the right to recognition everywhere as a person before the law, meaning that non-citizens and stateless persons must also be recognized.

The *right to seek and receive information* (art. 19.2 ICCPR) implies an obligation to proactively put information of public interest in the public domain, and ensure easy, prompt, effective and practical access to such information for all persons.⁸⁵ In the context of access to justice, this requires, for example, that States proactively inform the public about new or changing laws, and make legal materials (such as laws, judgments, trial transcripts and adjudication procedures) available and reasonably accessible.

In addition, various international human rights instruments specifically include the issue of access to justice for particular groups, for example the Convention on the Rights of Persons with Disabilities (art. 13) and the Declaration on the Rights of Indigenous Peoples (arts. 5 and 40).

⁸⁴ UN Working Group on enforced or involuntary disappearances, 2011.

⁸⁵ Human Rights Committee, General Comment No. 34, para 19.

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Access to justice for persons living in poverty: a human rights approach

People living in poverty face numerous daunting barriers to access to justice, denying them the chance to challenge crimes, abuses or human rights violations committed against them. This situation exacerbates their poverty and social exclusion, in a vicious circle of impunity, powerlessness and injustice. Empowering people living in poverty to claim their rights is therefore fundamental to fighting poverty and tackling growing global and national inequalities. Moreover, access to justice is a fundamental human right in itself and also essential for the protection and promotion of all other civil, cultural, economic, political and social rights.

This publication analyses the obstacles to access to justice for the poor, including financial costs, socio-economic subordination, the location of courts and police stations, lack of information, and the unnecessary complexity and formal requirements of judicial processes. It emphasizes that persons living in poverty suffer most when justice mechanisms are corrupt, ineffective or out of reach, often creating a threat to their livelihoods. The authors conclude that improving access to justice for persons living in poverty depends not only on improving the legal tools, information and services available to them, but also requires a holistic approach based on human rights principles and taking into account the structural, social and economic factors that prevent the poor from seeking and obtaining justice on equal terms.

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