LAW, GOVERNANCE, AND DEVELOPMENT RESEARCH & POLICY NOTES

ACCESS TO JUSTICE AND LEGAL EMPOWERMENT

Making the Poor Central in Legal Development Co-operation

INEKE VAN DE MEENE
BENJAMIN VAN ROOIJ

LEIDEN UNIVERSITY PRESS

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Law, Governance, and Development

Over a short period of time, the strengthening of law and governance has become a major focus for international development organizations, as well as for governments and organizations at the national level. These are now devoting a substantial portion of development funds into reform and capacity building programmes aimed at legal and administrative institutions in transitional and developing countries.

However, the 'building' of legal and governance systems is proving to be a dauntingly difficult and complex task and one in which the methods of approach are highly contested. It has been assumed that law and governance reform is a technical, managerial and financial matter, which allows for the export of laws and the transplantation of legal and administrative structures. The disappointing results of such reforms have illustrated, however, that not enough attention has been given to how laws, policies, institutions and stakeholders operate in reality, in their socio-political contexts. The uniqueness of individual countries, sectors and institutions is often insufficiently understood, and the actual experiences with the myriad of law and governance programmes and projects are not translated into knowledge on how law and governance reform promotes development.

In response, the Leiden University Press series on Law, Governance, and Development brings together an interdisciplinary body of work about the formation and functioning of systems of law and governance in developing countries, and about interventions to strengthen them. The series aims to engage academics, policy makers and practitioners at the national and international level, thus attempting to stimulate legal reform for development.

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Ineke van de Meene and Benjamin van Rooij

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For further information please contact: Van Vollenhoven Institute, Leiden University: vollenhoven@law.leidenuniv.nl.
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Outline

How law can aid development has been the focus of much recent discussion among development workers, scholars and policymakers. Indeed, reforms to improve poor people's *access to justice* and to promote their *legal empowerment* comprise the latest trend in legal development co-operation. The Dutch Ministry of Foreign Affairs, for example, allocated 21% of its "legal and judicial development" budget for "access to justice reform programmes" in 2006 (Bos-Ollerman 2007: 14). The interventions have included numerous approaches, from legal aid and the empowerment of vulnerable groups through legal training to increasing the efficiency and capacity of judiciaries. Access to justice and legal empowerment reforms are also supported by the Ministry in other policy areas, such as sustainable development and land reform.

This Research & Policy Note answers a number of basic questions about this new trend in legal development co-operation. It discusses:
- what *access to justice* and *legal empowerment* entail
- why they are important
- the obstacles that the poor and marginalised face in seeking justice and empowerment through the legal system
- the reforms proposed by these approaches to legal development co-operation.

This Research and Policy Note also outlines important considerations for policymakers when programming access to justice and legal empowerment reforms:
- *Access to justice and legal empowerment are sensitive areas with political limitations*
- *Conceptual focus on dispute settlement ignores the prevention of grievances*
- *Reforms need to address both state and non-state justice systems*
- *Both state a civil society must play a role*
- *Access to justice and legal empowerment in criminal cases should include both the victim and the defendant*
- *Setting realistic goals, prioritisation and co-ordination prevent disappointment*
- *Entry points and sequencing reform are context-related*
- *Measuring outcome and impact is essential.*

What are Access to Justice and Legal Empowerment?

Access to justice and *legal empowerment* are approaches to legal development co-operation that focus on the needs of the poor and marginalised. Reforms informed by these approaches support poor and marginalised people in their efforts to seek and obtain justice and to use the legal system to improve their lives.

"This shift from top-down institutional reform to bottom-up intervention informs the new focus on access to justice and the new strategy of legal empowerment."

Legal development co-operation efforts have traditionally sought to promote "the rule of law" through legal reform and institutional strengthening (mainly of the judiciary). While access to justice has sometimes been a part of these programmes, it was not their main goal. More recently, under the influence of the global struggle against poverty, legal reform programmes have shifted their focus to the justice seeker, in particular the poor and the marginalised, in particular women and indigenous people. This shift from top-down institutional reform to bottom-up intervention informs the new focus on access to justice and the new strategy of legal empowerment. Influential organisations in the area of conceptualising access to justice and legal empowerment reforms include the Ford Foundation, the Asian Development Bank (ADB), the UNDP, the World Bank, the UK Department for International Development (DfID), Penal Reform International and the Commission for Legal Empowerment of the Poor (CLEP).

The concepts *access to justice* and *legal empowerment* – and their reform strategies – have a significant overlap; some programmes use the terms interchangeably. Both target the poor and marginalised in society and make reference to state as well as non-state institutions and normative systems. Civil society plays an important role for both approaches. There are, however, some differences in their underlying assumptions and goals. Access to justice reforms focus on poor and marginalised people's lack of access to law and the legal system, which effectively deprives them of their ability to enjoy and protect their

rights. Efforts at legal empowerment focus on the lack of power, opportunities and capacities that impede poor and marginalised people's use of law and (para) legal tools to take control of their lives and improve their livelihoods.

Box 1: Some definitions used by different organisations and scholars

• ***UNDP***: Access to Justice is the "ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards" (UNDP 2005: 5).

• ***World Bank***: "Justice for the Poor is an attempt by the World Bank to grapple with some of the theoretical and practical challenges of promoting justice sector reform in a number of countries in Africa and East Asia. Justice for the Poor reflects an understanding of the need for demand oriented, community driven approach to justice and governance reform, which values the perspectives of the users, particularly the poor and marginalized as women, youth, and ethnic minorities" (*World Bank Justice for the Poor* Web site).

• ***Stephen Golub*** (based on experience within the Asian Development Bank and the Ford Foundation): "legal empowerment is the use of legal services, often in combination with related development activities, to increase disadvantaged populations' control over their lives." "...it is both an alternative to the problematic, state-centric rule-of-law orthodoxy and a means for making rights-based development a reality using law to support broader socio-economic development initiatives" (in Carothers 2006: 161).

• The Commission for Legal Empowerment of the Poor (CLEP) is dedicated to "the fight against poverty by identifying and providing the poor with legal and institutional tools that allow them to benefit from greater security and to create wealth within the rule of law" (CLEP 2006: 1). The CLEP's work is based on the view that "poor women and men generally lack effective legal protection and recognition for their economic assets and transactions" (CLEP 2005: 3). Thus the focus on the formalization of informal enterprises and land tenure arrangements. ⇨

• ***John W. Bruce et al.*** in a report for USAID: "Legal empowerment of the poor occurs when the poor, their supporters, or governments – employing legal and other means – create rights, capacities, and/or opportunities for the poor that give them new power to use law and legal tools to escape poverty and marginalization. Empowerment is a process, an end in itself, and a means of escaping poverty" (Bruce et al. 2007: 29).

Why are Access to Justice and Legal Empowerment Important?

Access to justice and *legal empowerment* are essential in the fight against poverty. UNDP, for example, writes: "Access to justice is closely linked to poverty reduction since being poor and marginalized means being deprived of choices, opportunities, access to basic resources and a voice in decision-making" (UNDP 2004: 3). "Access to justice is a fundamental human right, as well as a key means to defend other rights" (UNDP 2005: 3). The World Bank (*Voices of the Poor*, 2000) and Anderson (2003: 1-3) stress that especially the poor have limited access to legal institutions and that a state of "lawlessness" adversely affects the poor. Golub (2006) and the ADB (Golub 2001) argue that legal empowerment has helped advance efforts to alleviate poverty.

Over the past decades, the eradication of poverty has gained prominence within development discourse. Poverty entails lack of income, but also includes physical vulnerability and powerlessness within existing political and social structures (Bernstein in Anderson 2003: 3). Access to justice and legal empowerment have their roots in this shift in emphasis from macro-economic growth to micro-level relief. The concepts draw on the latest development policy documents and help donors justify the focus on law: to help the poor at the grassroots level, as legal interventions are framed on the basis of their needs.

"Research on the functioning of law and legal systems in developing countries has found that legal reforms, even when they aim to benefit the poor, do not always produce the expected results as asymmetric power relations work to their disadvantage."

Access to justice and *legal empowerment* are important responses to "rule of law" approaches that have focused on the top-down reform of legislation and state institutions. Over the years, research on the functioning of law and legal systems in developing countries has found that such legal reforms, even when they aim to benefit the poor, do not always produce the expected results as asymmetric power relations work

to their disadvantage. Legal empowerment and access to justice strategies therefore strive to address these unequal power relations.

What Obstacles do the Poor and Marginalized Meet when Seeking Justice?

Access to justice and legal empowerment reforms are based on analyses of the problems that the poor and marginalised encounter when seeking justice, and of the obstacles to their empowerment. While studies have presented different analyses, there is also a great deal of agreement. Below are the main obstacles that the poor face when seeking justice or empowerment through the legal system, grouped according to: (1) problems related to justice institutions (both state and non-state) and (2) problems related to the justice seeker him/herself.

Box 2a: Obstacles to Justice and Empowerment through the Legal System

Supply side
Also referred to as justice providers or duty bearers. Includes village elders, chiefs, local village authorities, regional authorities, national legislative and administrative bodies, police, prosecution services and court systems.

- Legislation and other norms in the formal and informal legal systems:
  - anti-poor and gender bias
  - excessive number of laws
  - norms expressed in alien, foreign or formalistic language
- Courts or other adjudicative and enforcement institutions (state and non-state):
  - anti-poor and gender bias
  - lack of judicial independence and impartiality
  - lack of transparency
  - slowness
  - costs
  - lack of adequate information regarding legal norms and legal practice
  - distance between the courts and in particular the rural poor
  - impunity of law enforcement agents, governments and political parties
  - absence of accountability for the legal profession and professional monitoring ⇨

  - widespread corruption and abuse of power
  - lack of effective enforcement of judgements and decisions
- Lack of legal aid systems or the availability of affordable legal representation
- Lack of alternative dispute resolution (ADR) systems

Box 2b: Obstacles to Justice and Empowerment through the Legal System

Obstacles on the Demand side
Also referred to as justice seekers or claim holders. Includes individual people, groups and private entities, in particular the poor, women and indigenous people.
- Lack of financial capacity
- Lack of experience in dealing with formal justice institutions
- Limited legal awareness and knowledge of the law and their rights
- (Economic) dependency prevents the poor and weak from enforcing their rights against employers, husbands or landlords
- Negative perceptions of legal institutions and litigation and social stigma incurred from turning to the law to seek justice
- Distrust of legal institutions and the law. Such distrust often coincides with perceptions that getting justice from the legal system is difficult or impossible
- Conditions of illegality regarding housing, payment of taxes or registration lead to fear of formal courts

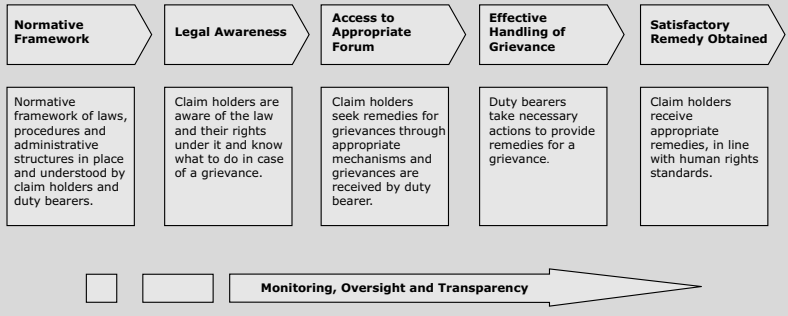
What Reforms do Access to Justice and Legal Empowerment Propose?

Access to justice and legal empowerment call for reforms and interventions that address problems of access and that empower the poor. They often focus on the barriers outlined in boxes 2a and 2b above. Donors use various analytical models to determine and design the approach the reforms and interventions should take.

One approach that has been applied by donors and scholars to conceptualise access to justice and legal empowerment is the "process" approach, which stresses the series of steps that need to be taken to effectively protect and claim one's rights. Political, social, cultural, economic, and psychological barriers that obstruct access to justice and legal empowerment are found at every stage of the access-to-justice and legal empowerment process. This "process" approach clearly illustrates that everything is linked, and that interventions at one stage of the process are likely to be insufficient to address the overall issue of access to justice and legal empowerment.

Box 3: Frameworks for Programming Reforms

Conceptual Framework for Access to Justice



In: *Doing Justice: How Informal Justice Systems can Contribute*, **UNDP (2006).** ⇨

Components of Legal Empowerment of the Poor
The outer circle depicts "the tasks that are linked to policy and program mechanisms to legally empower the poor".

In: *Legal Empowerment of the Poor: From Concepts to Assessmet.* **Report for USAID (2007)**

While there are differences, the proposed measures do overlap. Reforms under the *access to justice* label often focus on judicial institutions, for instance, capacity building. However, many approaches incorporate efforts directed at:

- improving ***legal aid*** to the poor, including legal clinics and public interest lawyers and paralegals, aimed at enhancing access to courts and out-of-court solutions
- enhancing ***legal awareness***, especially through (legal) education and (legal) literacy campaigns
- ***collective litigation and public interest law***
- developing ***alternative dispute resolution mechanisms*** and supporting ***local (customary) dispute resolution institutions***
- introducing ***hybrid courts and procedures*** that combine litigation and reconciliation
- strengthening ***civil society*** and community organization (UNDP 2004); Golub (ADB) 2001; Golub 2006).

Legal clinics and paralegals provide valuable services that enable the poor and marginalized to claim their rights and to solve their problems, often without having to go to court – for instance, by helping them with administrative procedures or by providing mediation. When

the poor do need access to the state justice system, the provision of free or subsidized legal assistance by a legal professional is indispensable. Services, however, vary in quality and there may not be many professional lawyers who are willing to work for reduced fees. These programmes often depend on donor-funding, making long-term sustainability a key concern.

Collective litigation and public interest law are used as strategies to secure rights and to prevent the systematic violation of these rights for groups of citizens rather than for individuals. While this may be generally beneficial to the poor and marginalised groups, it does not directly enhance their ability to use the legal system for solving individual issues.

Alternative dispute resolution (ADR) was introduced both in developed and developing countries as a panacea for weaknesses within state court systems. ADR generally includes arbitration, mediation and conciliation, and is often claimed to incorporate customary methods of dispute settlement. Because of its many varieties, it is difficult to make general assessments regarding ADR's capacity to aid access to justice for the poor. An important hypothesis that needs testing is that ADR functions best between equally powerful parties who share an interest in restoring and preserving their relations (Hammergren 2007: 152).

By introducing non-state and "grassroots" elements, ***hybrid courts and procedures*** alter how the judiciary provides its services. Hybrid courts and tribunals often employ lay people with a knowledge of local customs and who emphasize reconciliation over litigation. Nevertheless, these courts are often subject to problems of accessibility such as delays and gender bias.

Most approaches to *access to justice* and *legal empowerment* reforms share general principles (Golub 2006; UNDP 2004; Golub 2001; ADB 2000). They stress:

- ***participation***, involving poor and weak stakeholders, based upon their needs and preferences
- ***"mainstreaming"*** legal activities into other sectors of development work, both in recipient countries and within donor institutions
- recognizing the importance of ***non-state traditional normative and justice systems*** and support for these institutions as they are generally closer to the weak and poor
- ***patience***, avoiding tight project cycles and a too large portfolio of programmes
- ***tailor-made solutions*** that are as close to local realities as possible and avoiding the transplantation of existing (Western) models
- finding ***sufficient support for reforms*** and overcoming co-optation by vested interests.

Access to Justice and Legal Empowerment Reform – Eight Policy Considerations

Legal empowerment and access to justice are sensitive areas with political limitations

Many scholars agree with Golub (2003: 6) when he writes: "In many developing countries, laws benefiting the poor exist on paper but not in practice unless the poor or their allies push for the laws' enforcement." Unequal power relations undermine poor people's ability to exercise and protect their rights, to access services and institutions, and to participate in economic, political and social processes. Scholars now agree that reforms are more successful when they are complemented by efforts to address asymmetric power structures. With raised awareness and increased capacities, the poor and the community groups that support them are better qualified to overcome unequal power relations, both within and outside the legal system (Cotula 2007: 113).

The sensitive issue of power asymmetries raises complex questions for donors. Who should be empowered? Whose power should be limited? To what extent can or should a foreign actor intervene in local and national power structures? What about the sovereignty of states? These questions will be made all the more poignant when power asymmetries directly implicate authoritarian regimes.

Conceptual focus on dispute settlement ignores the prevention of grievances

Scholars, policymakers and practitioners gauge access to justice by the extent to which people can seek and obtain remedies against grievances through state and non-state mechanisms (UNDP 2005; DfID 2002). Grievances are understood as injuries or losses that people suffer as a result of other people's actions or omissions, which lead to disputes between people and between people and institutions such as government bodies. UNDP's conceptual framework for programming access to justice (see box 3 on pp. 12-13) identifies five steps in the process of obtaining a remedy against a grievance. UNDP acknowledges that within

each of these steps, various interrelated factors affect the process, e.g., people's level of legal awareness and trust in the justice system.

"Comprehensive conceptual frameworks on access to justice and legal empowerment need to focus explicitly on both the prevention of grievances and the obtaining of remedies against them."

The focus on obtaining remedies for grievances seems to ignore, at least on the conceptual level, the importance of preventing grievances from developing in the first place: for instance, the prevention of human rights violations at police stations and detention centres, the adequate delivery of public services and governance without corruption. Comprehensive conceptual frameworks on access to justice and legal empowerment need to focus explicitly on both the prevention of grievances and the obtaining of remedies against them. Fortunately, in practice, efforts aimed at preventing grievances, such as human rights education and sensitisation projects, frequently form part of access to justice and legal empowerment programmes.

Reforms need to address both state and non-state justice systems

The bulk of development assistance over the years has been allocated to state legal systems. Despite these efforts, poor and marginalised groups in many developing countries continue to have great difficulties accessing the state legal system: it is remote, slow, costly, biased, unreliable and so on. Because non-state and customary justice mechanisms are literally available "on peoples' doorsteps", they handle the majority of disputes, particularly in rural areas. They are perceived as quick, cheap and more adjusted to circumstances, for instance, because they promote reconciliation between people. In conflict and post-conflict situations, these non-state and customary mechanisms may be the only fora available to settle disputes in a peaceful manner. The donor community has thus begun to realise that access to justice reforms should also include non-state and customary justice systems.

"Research in Indonesia and Ghana has shown that although in most cases people prefer to settle their disputes and claim their rights through non-state and conciliatory means, at

times, they prefer to take their cases to a state court to obtain an authoritative or more just decision."

The fact that most cases are handled in non-state and customary fora does not mean they provide an "optimal" access to justice. The poor and marginalised may have access, but at times it is doubtful whether they obtain justice. First of all, enforcement of decisions is not guaranteed as the social pressure to comply may have eroded over time. Non-state and customary fora are also known to be discriminatory towards women, migrants and youth, to lack transparency and accountability, and to be vulnerable to elite capture. Sometimes they issue degrading and harsh (corporal) punishments. Donors therefore advocate the reform of non-state and customary systems to function in conformity with international human rights standards. A further complicating factor in customary law systems is the co-existence of contesting versions of customary law within a community. It is not always clear who determines which rules must be applied.

Research in Indonesia and Ghana has shown that although in most cases people prefer to settle their disputes and claim their rights through non-state and conciliatory means, at times, they prefer to take their cases to a state court to obtain an authoritative or more just decision (World Bank 2004; Crook 2007). Moreover, the "shadow of state law and the state judicial system" tends to strengthen alternative, non-state dispute settlement mechanisms; the possibility that one of the parties may take the matter to court is likely to stimulate the parties to settle cases before they have to face court sanctions. Supporting reforms of the state legal system thus remains crucial. The state legal system and non-state and customary justice systems compliment each other; both are required to provide access to justice to the poor and marginalised groups in society.

Box 4: Village Justice in Indonesia. Case Studies on Access to Justice, Village Democracy and Governance
Source: World Bank (2004: IV -V).

Main findings of the case studies on corruption in village development projects.
"Villagers and village leaders preferred to resolve disputes informally. Several considerations informed this preference. First, they perceived informal mechanisms to be cheaper, quicker and easier to use than the formal legal system. Time, distance and cost were especially serious obstacles in rural areas where, in one place, it took villagers three days and the equivalent of half the minimum monthly wage to travel to the district capital for police interviews. Second, villagers perceived informal negotiation to be less socially disruptive than using the legal system. Their emphasis on harmony largely reflected the realities of village life, where people are known to and depend on one another, but it also reflected a fear of revenge and – for village leaders – a desire to preserve the status quo and avoid external scrutiny. Finally, villagers knew little about the law, distrusted it and perceived it to be beyond their control. ...
Despite preferring to resolve problems informally, village communities were unable to do so successfully using existing village institutions in cases where there were large power imbalances between the parties. Village institutions were especially inadequate in cases where the perpetrators were government officials or had close ties to them. As a result of these power imbalances, the perpetrators did not fear social sanction or did not take the threat of legal sanction seriously. In cases without these power imbalances, village communities were able to resolve problems informally. They were able to do so through mobilizing social and political pressure and by using the threat of legal sanction to improve their informal bargaining power. ...
Even though village communities preferred to resolve problems informally and were aware of the well-known weaknesses of the legal system, they were willing to use the legal system as a last resort for defending their interests in cases where their existing village institutions had failed. ...
Villagers' access to the legal system tended to depend on whether they had facilitators with links to legal aid NGOs, local government or the management structures of the village development projects studied. Such facilitators provided access to information, helped community leaders with organizing skills and linked community leaders with civil society groups capable of monitoring the legal system's performance. ... ⇨

[O]n the whole, the legal system was able to overcome local power imbalances to sanction the perpetrators of corruption. The cases set a valuable precedent against corruption and helped to build some level of community trust in legal institutions. However, execution of court decisions was problematic. In none of the cases that went to trial was the court verdict fully executed. Poor communication back to the communities of the results of legal action also reduced the impact of the positive precedents. This made them reluctant to use the legal system in the future for similar cases."

Both state and civil society must play a role

Access to justice and *legal empowerment* often include co-operation with civil society organisations such as NGOs. By engaging civil society, reforms are better able to reach poor and marginalised groups. Engaging civil society also enables donors to implement programmes outside the state legal system.

In choosing to co-operate with civil society, several considerations need to be kept in mind. At times it is difficult to clearly distinguish between "state" and "civil society"; boundaries blur while (dis)connections may not be apparent. Another consideration is whether focusing on civil society organisations should preclude engagement with state institutions.

Based on his experiences working for the Ford Foundation and the ADB, Golub, a leading consultant on legal empowerment, advocates limiting co-operation mainly to civil society organisations. He states (2006: 168): "The most successful and creative legal services for the poor across the globe generally are carried out by NGOs, often in partnership with community organizations, or occasionally by law school programmes that effectively function as NGOs." Though not precluding a role for the state, Golub's approach to legal empowerment questions its value: "Despite the best intentions of many of such (state) personnel, various actors and factors, not least their co-workers, may block them from doing their jobs properly. Related considerations that frustrate government responsiveness to the poor's legal and other needs include inappropriate resource allocation, excessive bureaucracy, corruption, patronage, gender bias, and general resistance to change." Golub's legal empowerment approach therefore does not focus on reforming state institutions, which it finds will merely benefit elites.

"A singular focus on civil society organizations may do harm by disregarding the importance of the state in processes of access to justice and legal empowerment."

Nevertheless, a singular focus on civil society organizations may do harm by disregarding the importance of the state in processes of access to justice and legal empowerment (UNDP 2005). Golub (2001) and Anderson (2003) advocate comprehensive reforms which incorporate both state and non-state community and civil society institutions. Reforms should support NGOs and community based initiatives, but also promote and strengthen judicial independence, court reform, making legislation more pro-poor and training law enforcement officials in human rights.

Access to justice and legal empowerment in criminal cases should include both the victim and the defendant

Within *access to justice* and *legal empowerment*, criminal cases occupy a different position than non-criminal cases. A key characteristic of criminal cases is that the state has a monopoly on the prosecution of crimes. In minor criminal cases, customary and non-state justice mechanisms may be available alongside the state institutions. But in more serious cases, the prosecution monopoly of the state obliges the victim to turn to a state institution, the police or prosecution services. Here the victim may encounter incompetent officers, backlogs, corruption, etc. – obstacles that could be tackled by access to justice and legal empowerment reforms.

Access to justice and *legal empowerment* within the criminal justice system concerns alleged perpetrators of crimes (the defendants) as well as victims. Over the years, reforms have focused on the provision of free legal aid for defendants. Here the concept of access to justice is closely linked to international human rights standards for defendants and convicted persons: e.g. the right to a due process, the right to a fair trial, the right to (free) legal assistance. Alternative approaches in the field of legal empowerment are currently being explored, for instance the use of "community paralegals" in prisons who inform prisoners awaiting trial about procedures and their rights, and monitor their cases (Penal Reform International 2007).

Setting realistic goals, prioritisation and co-ordination prevent disappointment

Promoting legal empowerment and improving access to justice are enormous goals. The (potential) target group is vast and diverse, engaging with power relations is a delicate task and reforms need to address inter-linked processes and institutions simultaneously.

"Access to justice and legal empowerment are also the means to attaining other goals such as the reduction of poverty, the guaranteeing of individual rights, legal certainty, security against crimes and government abuse, and the reform of laws and legal procedures."

Realistic goals and priorities must thus be set to prevent disappointment and later criticism. While access to justice and legal empowerment are ends in themselves, they are also the means to attaining other goals such as the reduction of poverty, the guaranteeing of individual rights, legal certainty, security against crimes and government abuse, and the reform of laws and legal procedures (Hammergren 2007: 168). Strategic choices need to be made and made explicitly: which goals are realistic and gain priority, what problems need to be addressed to achieve these goals, and which segment of poor and marginalised people will be supported. Donors working in national and regional settings also need to co-ordinate their efforts so that larger goals can be attained. Tasks should be divided through donor harmonisation, according to each donor's policy priorities, expertise and resources.

Entry points and sequencing are context-related

While there is consensus that *access to justice* and *legal empowerment* reforms need to be holistic in addressing different institutions and processes at the same time, limitations of time and resources require strategic decisions regarding points of entry and the approaches to be taken: e.g., the perspective of the justice provider or that of justice seekers.

When programming for *access to justice* and *legal empowerment*, the question arises whether people benefit from access to incompetent and unjust systems. But as advocates of legal empowerment emphasize, better informed and more effective demands for justice services may lead to positive responses from justice providers. This is an argument to enter reforms by enabling justice seekers to voice their demands.

This approach, however, bears the risk that justice providers will fail to respond. When this is or becomes evident, justice seekers will likely refrain from seeking access to these justice providers.

"Limitations of time and resources require strategic decisions regarding points of entry and the approaches to be taken: e.g, the perspective of the justice provider or that of justice seekers."

Other factors when deciding on entry points and sequencing are the availability of resources and the time frame. Some obstacles are easier to remove than others but require substantial funding: for example, people's financial limitations could be solved by establishing a scheme for legal aid. Other barriers, such as biased courts or cultural stigmas attached to pursuing legal action, are more complex and require differentiated and long-term approaches.

Since reform programmes are highly context-dependent, "one-size-fits-all" solutions are unlikely to produce the desired results. There are, however, case studies and reports that show how certain entry points and sequencing methods have worked in particular circumstances: e.g., on legal empowerment of local groups against foreign investors (Cotula 2007), on paralegal services (Maru 2006), on legal aid for defendants (Penal Reform International 2007) and on access to non-state and customary justice systems (Penal Reform International 2001). Guiding questions when deciding on entry points and sequencing orders include: What results can be derived from opting for a specific entry point? Who will benefit? How will particular entry points affect other steps in the process of accessing justice?

Measuring outcome and impact is essential

Like other legal development co-operation interventions, projects and programmes to support access to justice and legal empowerment tend to evaluate output rather than outcome and impact. Law-and-economics scholars who have tried to measure the costs of justice (in terms of money, time, delay and emotional costs), and its quality, have encountered various difficulties (Barendrecht 2006). Outcome and impact evaluations are often not carried out due to the difficulty of developing indicators and other measurement tools, while the evaluations themselves are expensive and time consuming.

As a result, we know little about the actual effects of access to justice or legal empowerment programmes. The importance of quantitative data notwithstanding (for instance, on how many people have used the

courts, the length of pre-trial detention periods), output data generally do not shed light on whether people's concerns have been addressed or whether inequalities have been reduced (Hammergren 2007: 163; Van Rooij 2007). This is problematic as it bears on whether these interventions are indeed the best available means for meeting the needs of the poor and marginalised. It is therefore essential to invest time and money in developing tools for measuring the outcome and impact of *access to justice* and *legal empowerment* programmes. Such empirical information will enable better-founded strategies and the designing of more appropriate interventions to address the actual needs and injustices faced by poor people.

Box 5: Access to Justice Does Not Always Provide the Solution: the Issue of Child Maintenance in Ghana

Non-maintenance of children by their fathers is a pressing social problem in Ghana. As a result of *access to justice* reforms, Ghanaian mothers can now use various channels to pursue their claims. Many women have sought and obtained assistance to claim child maintenance, either through ADR or through court proceedings. In many instances, their claims have been found legitimate. This, however, did not always lead to fathers paying child maintenance. For various reasons, enforcement has been seriously hampered. Thus, although these mothers have (reasonable) access to justice, actual justice is not done.
This leads to the conclusion that other legal reforms may be more appropriate for solving the problem of non-maintenance of children, for instance, socio-economic legal reforms. The fact that the obligation of parents to maintain their children is based on international conventions such as the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of Discrimination Against Women (CEDAW) places the issue of child maintenance in the area of socio-economic rights. Parents thus held responsible should be enabled by the state to provide for their children's basic needs. For access to justice to be effective – and to increase possibilities for enforcement – legislation in the area of child support, education and health care is required. Other socio-economic options are also possible. South Africa, for instance, has introduced a state maintenance system that acts as a safety net in cases involving judicial procedures to obtain maintenance are unsuccessful.

Source: Van de Meene (2007) *Access to Justice for Ghanaian Mothers: Obstacles and Opportunities to Claim Maintenance for their Children* (forthcoming research report).

Further Reading

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About the Authors and Acknowledgements

This Research & Policy Note was written by Ineke van de Meene (coordinator of the Centre of Expertise on Rule of Law and Development – KREO) and Benjamin van Rooij (senior lecturer at the Van Vollenhoven Institute). The authors kindly thank Jaap Timmer and Theo Veenkamp of the Van Vollenhoven Institute for their comments and suggestions on this Research & Policy Note.

LAW, GOVERNANCE, AND DEVELOPMENT RESEARCH & POLICY NOTES

How law can aid development has been the focus of much recent discussion among development workers, scholars and policy makers. Indeed, reforms to improve poor people's *access to justice* and to promote their *legal empowerment* comprise the latest trend in legal development co-operation.

This Research & Policy Note answers a number of basic questions about this new trend in legal development co-operation. It discusses:

- what *access to justice* and *legal empowerment* entail;
- why they are important;
- the obstacles the poor and marginalized face in seeking justice and empowerment through the legal system;
- the reforms proposed by these approaches to legal development co-operation.

Furthermore, it outlines important considerations for policy makers when programming access to justice and legal empowerment reforms. One of the lessons learned is that access to justice and legal empowerment are not technical exercises, but touch upon sensitive areas with political limitations.

Ineke van de Meene is coordinator of the Centre of Expertise on Rule of Law and Development (KREO) at the Van Vollenhoven Institute of the Faculty of Law of Leiden University. *Benjamin van Rooij* is senior lecturer at the Van Vollenhoven Institute.

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