

# Access to Justice and the Rule of Law

## 1. Introduction

---

The Commission on Legal Empowerment of the Poor (CLEP) emphasises reforms to the law and justice sector that will provide poor people with the institutional environment, protections, and incentives that they need to realise their full capabilities and reap the maximum potential return on their existing assets. This in turn requires legal protection for physical assets (property rights), human capital (labour rights), and the ability to engage in profitable market transactions (entrepreneurial rights). Poor communities also require basic services that cannot be supplied efficiently in the private market, such as essential utilities, a healthy environment, public security, and a social safety net. The legal system must protect access to both private rights and public goods if poor people are to be able to escape poverty.

Poor people tend to live in communities with scarce resources. The challenge for the justice system, those who govern and their international partners is formidable: How to turn the law into an effective tool for those living in absolute poverty — people living with less than a dollar a day?

The optimistic goal of our working group for Chapter 1 was to identify promising strategies for legally empowering poor people to have access to justice. In the process, we investigated best available practices and solicited suggestions during a series of national consultations organised by the Commission (CLEP), and we reviewed evalu-

ation studies of access to justice programmes conducted by various NGOs. It was apparent that academic research had delivered many case studies about informal justice systems in developing countries.

In addition to the focus on practice, experience and the variety of outcomes, we propose to consider theory. Although law and development is a recognised research topic (since the 1960s), there is as yet no generally accepted framework our working group could use for analysing access to justice issues. Many strands of research, however, from institutional economics to negotiation theory and from legal anthropology to the analysis of market failure, can yield information about the most promising strategies for providing access to justice. Law and development, operating under the name of legal empowerment, is one particular strand the Commission could usefully build on (Golub and McQuay 2001; Golub 2003), and there are others using bottom-up perspectives (Van Rooij 2007). More generally, bottom-up and empowerment approaches have been part of the development agenda since the late 1990s (Narayan 2005), and they have now become building blocks of programmes such as the World Bank's work in Community Driven Development and, more recently, its Justice for the Poor programme.

In addition to issues of practice and theory, we will consider legal principles. It may be difficult

to achieve access to justice for the poor through a formal justice system, but the ideals of the rule of law are an indispensable part of the vision of the legal empowerment agenda. Legal Empowerment of the Poor requires a society governed by the rule of law. While the 'rule of law' has different meanings in different contexts, US Justice Anthony Kennedy (a Commissioner of the CLEP) has defined the rule of law as requiring fidelity to principles regarding law being superior and binding, non-discriminating, respectful of people, giving people voice and their human rights, and effective (see Textbox 1 for his and other definitions).

Rather than attempting a comprehensive survey or a tailor-made theoretical framework, this chapter focuses on varying aspects of the access to

justice issue. Section 2 addresses a widespread and so far underappreciated problem: many poor people lack any sort of legal identity or formal legal recognition, and as a result they are completely excluded from the formal protections of the state legal system and as beneficiaries of public goods and services. Section 3 turns to the basic challenge for our working group: How can the justness and fairness of what is delivered be improved? How can the costs be reduced? Four strategies to improve access to justice are discussed. We start at the client end of the supply chain with facilitating self-help and education. Then we move on to the provision of legal services, the development of procedures that are better suited to legal needs and resources of the poor, and the potential of informal justice.

### Box 1 Rule of Law and Justice

*The rule of law (...) refers to a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.*

*(...)“justice” is an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large. It is a concept rooted in all national cultures and traditions and, while its administration usually implies formal judicial mechanisms, traditional dispute resolution mechanisms are equally relevant. The international community has worked to articulate collectively the*

*substantive and procedural requirements for the administration of justice for more than half a century (Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies Report of the Secretary-General; S/2004/616 of 23 August 2004).*

*The Law is superior to, and thus binds, the government and all its officials.*

*The Law affirms and protects the equality of all persons. By way of example only, the law may not discriminate against persons by reason of race, color, religion, or gender.*

*The law must respect the dignity and preserve the human rights of all persons.*

*The Law must establish and respect the constitutional structures necessary to secure a free and decent society and to give all citizens a meaningful voice in formulating and enacting the rules that govern them.*

*The Law must devise and maintain systems to advise all persons of their rights and just expectations, and to empower them to seek redress for grievances and fulfilment of just expectations without fear of penalty or retaliation.*

(Kennedy 2007).

Theoretical perspectives that inform this analysis are reducing transaction costs, as well as remedying market failure like imperfect information. Section 4 addresses the related but distinct issue of access to justice in relation to the bureaucracy of public administration. It considers how the poor can get access to the complaint structures of the state and the public administration. Conclusions are drawn in a final fifth section.

## 2. An Access to Justice Cornerstone: Legal Identity<sup>1</sup>

### **The Nature of the Problem**

One important basis of legal empowerment is ‘legal identity’: the formal, legal recognition by the state that a person exists. In developed countries, citizens take this for granted. Whether through a birth certificate, national ID card, or other means, they are empowered to own property, legally work, contract to buy and sell goods, receive government benefits, vote, initiate a complaint through the channels of public administration, bring suit in a court of law, or avail themselves of other legal protections.

But the situation in many developing countries is much different. Weaknesses in the management of birth registries, costly and time-consuming procedures needed to register, and other obstacles can make securing a legal identity a challenge. And a person without legal identity is denied a whole range of benefits essential for overcoming poverty. She may be unable to attend school, obtain medical services, vote in elections, get a driver’s license, or open a bank account. Moreover, those who lack a formal legal identity are often unable to take advantage of anti-poverty programmes specifically designed for them. Those who lack a formal identity may also be especially vulnerable to exploitative practices, including child labour and human trafficking.

The importance of providing all people with formal legal recognition has long been recognised. Indeed, the Universal Declaration of Human Rights announced over 50 years ago that, “Everyone has the right to recognition everywhere as a person before the law” (Art. 6). The Universal Declaration also affirmed the right of all people to ‘nationality,’ meaning the right to be considered a

citizen of some state (Art. 15). Subsequent global and regional human rights treaties have reaffirmed and refined the basic human right to legal recognition and nationality.<sup>2</sup> (It should be noted that legal registration and citizenship, though related, are distinct issues. One can have uncertain citizenship even in the presence of a valid birth registration. The primary focus of the current discussion is the issue of *registration*, though the issue of citizenship is necessarily also part of the discussion, given the close linkages between the issues.)

**D**espite this formal recognition of a fundamental individual right to a formally recognised legal identity, however, the lack of legal identity remains a widespread problem. Although reliable systematic data is limited, the available evidence suggests that the number of people who lack a legal identity number in the tens of millions (UNICEF 2005). Those without legal identity are disproportionately poor, and are often members of disadvantaged indigenous peoples or other ethnic minorities.

In Latin America, for example, some estimates put the number of “functionally undocumented” Bolivian citizens as high as two million or close to one-third of the total population; in some parts of the country, over 90 percent of the population lacks a valid form of identification (Ardaya and Sierra 2002). In Peru, approximately one million Peruvian highlanders have no legal identity and no legal rights (Axworthy 2007). In several Argentine municipalities, some 15 percent of potential beneficiaries of an anti-poverty programme were unable to participate due to the lack of a valid national ID card (IADB 2006). According to UNICEF (2005), roughly 23 million South Asian children — over 60 percent of all children born in the region — are born but not registered each year. In Nepal, about four-fifths of all births are

unregistered, which means that upwards of four-fifths of Nepalese citizens may be denied lawful access to education, employment opportunities, and the political process (Laczo 2003). Things are not much better in sub-Saharan Africa: over half of all children in this part of the world are not registered, meaning that each year approximately 15 million children are born without the means to access either the formal economy or government-provided social services. Worldwide, approximately 40 percent of children in developing countries are not registered by their fifth birthday, and in the least-developed countries, this number climbs to a shocking 71 percent (UNICEF 2005).

It is therefore no exaggeration to describe the current situation as a worldwide governance crisis. Effective remediation of this crisis requires both a diagnosis of its causes and an assessment of different strategies for reform.

### **Addressing the Causes of the Legal Identity Crisis: Incapacity, Exclusion, and Avoidance**

Although no two countries are exactly alike, the legal identity crisis appears to have three primary causes:

- *First*, many countries lack an effective bureaucratic system for providing accessible, reliable, and low-cost registration services for all people who would like to formally register themselves with the state.
- *Second*, in far too many countries the denial of legal identity is the result of a deliberate interest in excluding certain groups from full participation in the economy, polity, and public sphere. Sometimes this exclusivity arises because of reprehensible discriminatory animus. In other cases, such as those involving

long-term migrant or refugee populations, the problem is more complex and delicate, and it may implicate the policies of more than one state. Despite these differences, in all these cases people are deprived of their fundamental entitlement to formal legal recognition because of a political decision to exclude them.

- *Third*, some poor individuals may lack formal legal registration because they choose not to take the steps necessary to acquire it. This avoidance may seem irrational given the adverse consequences of lacking a legal identity. Sometimes this avoidance behaviour may arise because of an ingrained distrust of state authorities. But often avoidance of state authority, and formal registration in particular, may be entirely rational. Formal legal registration may also make one more vulnerable to taxation, conscription, or various forms of undesirable state monitoring. Thus, government policy may lead to the legal exclusion of poor disadvantaged communities not only because of a lack of capacity or a deliberate policy of exclusion, but also because other government policies create excessive disincentives to registration.

These three categories are not mutually exclusive, nor are the boundaries between them always sharp. For instance, the capacity of the bureaucracy to register births may remain weak because powerful political interests have an incentive not to fix the problems. This “passive” discrimination is partly an issue of bureaucratic incapacity and partly an issue of deliberate exclusion. Nonetheless, this crude tripartite scheme is useful because it underscores the fact that the legal identity problem has a diverse set of possible causes, and proposed solutions must therefore be tailored to the particular situation. Proposed reforms to the registration system may be of lim-

ited use when exclusion results from deliberate policy choices. Likewise, high-level political pressure and the entrenchment of non-discrimination norms do not guarantee success when the problem is low bureaucratic capacity. Let us consider the three primary sources of the legal identity crisis and what might be done about them.

### **Strengthening the Capacity of the Registration System**

Many government-run civil registration systems impose particularly onerous burdens on poor people. Registration systems often require registrants to pay a fee; many will not waive this fee even for the indigent. Some registration systems also require that the registrant appear in person at a registration office that may be located a significant distance from a prospective registrant's residence. Both travel costs and the opportunity costs of the prospective registrant's time may weigh heavily against registration, especially for poor people in remote areas with limited disposable income. And, of course, petty corruption may substantially raise the costs of formal registration, as the prospective registrant may have to pay bribes as well as official registration fees. Furthermore, the bureaucratic registration process itself is often complicated and time-consuming, presenting applicants with a labyrinthine array of forms and procedural requirements, and the bureaucratic personnel who run many national registration systems are often insufficient and poorly trained (Barendrecht and van Nispen 2007). Registration offices may also lack the most basic resources. For example, surveys of women in Latin America reveal that approximately 10 percent of women did not register their children because the local registration office lacked the proper stationary (IADB 2006).

A natural first step in redressing the legal iden-

tivity crisis is to reduce the financial and physical barriers to access that disproportionately burden poor and rural communities. With respect to the financial barriers, an obvious reform is the elimination of fees for registration and acquisition of a first copy of the necessary identification documents. The usual arguments for user fees for government services do not apply for legal registration: legal identity is not a scarce resource that a government might legitimately want to ration, nor is registration a service that people have an incentive to “over-consume” if they do not bear the costs of providing the service. Also, most of the cost of a registration programme is the fixed cost of creating and maintaining the necessary bureaucratic infrastructure; the variable cost associated with the number of registration requests is likely to be relatively small. As between eliminating registration fees altogether and providing a waiver for poor individuals, the former approach is generally preferable as it eliminates the administrative costs associated with determining who is eligible for a waiver. The costs of operating registration programmes, in most cases, should be met through lump-sum budget allocations made out of general public revenues rather than through user fees.

In addition to eliminating fees, prospective registrants should, where possible, be given multiple avenues through which they can register their identities, rather than forcing them to rely on a single bureaucratic provider of registration services. This redundancy might admittedly entail some administrative costs, but it would yield two significant benefits. First, this system would allow each individual to select the method that is easiest and cheapest for her. Second, having multiple providers of registration services reduces the opportunities for corruption, abuse, and delay, because prospective registrants will avoid a registra-

tion provider that has a bad reputation (Shleifer and Vishney 1993). As a rough-and-ready rule of thumb, every individual should always have at least two realistic, viable options for registering herself or her child. Of course, right now many people have zero realistic, viable options, so going from zero to one would have to be counted an improvement, but two or more would be better.

**I**n communities that have the requisite information technology infrastructure, it might also be possible for private firms, civil society organisations, governments, or some combination of all three to set up offices where people can register themselves using a simple interactive computer system, perhaps with assistance from on-site technical staff (Barendrecht and van Nispen 2007). This alternative may not be realistic for all poor communities, but where it is feasible, it may be a better alternative to relying on paper forms and in-person interaction with government bureaucrats. Employing such a strategy, where it is feasible, may free up more resources that can then be targeted at other communities.

The difficulty of reaching poor communities, especially dispersed rural communities, remains a challenge. There are several strategies that governments and interested organisations might use to improve the outreach and efficacy of registration efforts. One strategy is to simplify the registration process and to improve training of government officials and others. Another technique that has shown promise involves the wide distribution of semi-portable registration kits. In the Democratic Republic of Congo, for example, UNDP and the United Nations Mission to Congo succeeded in registering approximately 25.7 million Congolese in 2006 in advance of the national elections. They did this by using planes, boats, trucks, canoes, and carts to distribute registration kits, each of which contained a laptop computer, fingerprinting materials, and a

digital camera that could be used to issue photo ID cards on the spot (Paldi 2006). The Cambodian government used an even more aggressive approach to ‘mobile registration’: following changes to the Cambodian Civil Code that made birth registration mandatory, mobile registration teams — run by non-governmental organisations but with the government’s blessing — have been going door-to-door to deliver free birth registrations to people’s homes since 2004. The results have been dramatic: over the course of only a few years, the number of registered Cambodian citizens increased from 5 percent to 85 percent (Damazo 2006). A UNICEF-backed programme in Bangladesh has employed a similar strategy, sending trained registrars house-to-house, with similar results: in the ten years since this programme began, over 12 million births have been formally registered (UNICEF 2006).

Another potentially valuable approach to improving registration efforts is to ‘bundle’ registration with other service delivery programmes. For example, many countries have, or are considering, extensive vaccination programmes for children in poor communities. It may often be relatively easy for the health worker providing the vaccination to register each child she vaccinates (ADB 2005). This approach, used successfully in Bangladesh, is more cost effective than financing a separate registration campaign alongside the vaccination campaign for the same population (UNICEF 2006). In addition, it is conceivable that the mother, and even the extended family members, can be registered at the same time without much extra effort, thus profiting from a fitting chain registration service. Similarly, some poor women — sadly, not nearly enough — receive some form of prenatal care, and some have the assistance of a health care professional at delivery. While women receiving prenatal and delivery care are already more likely to register their children, em-

powering health providers to register newborns might substantially improve registration efforts. For example, a pilot programme in large public hospitals in South Africa was successful in registering large numbers of poor children (UNICEF 2003). Primary school registration at enrolment time is yet another opportunity for registering children who might otherwise lack a legal identity if they had not have been registered at birth.

An alternative strategy that might be effective, provided that incentives are well targeted, is outsourcing the partial or entire registration process to local stores, banks, and other places where people engage in economic activities. Similarly, some poor women — though, sadly, not nearly enough — receive some form of prenatal care, and some have the assistance of a health care professional at delivery. While women who receive prenatal and delivery care are already more likely to register their children, empowering these health providers to register newborns might substantially improve registration efforts.

Another sort of ‘bundling’ strategy might link formal legal registration with traditional cultural practices such as naming ceremonies (ADB 2005). Just as religious leaders are often empowered to officiate at weddings and legally validate marriages, so, too, can religious or community leaders officiating at childbirth rituals be empowered by the state to register children. This approach has the advantage of making registration seem less like an alien formality imposed by the state and more like an integral part of familiar cultural traditions. A related observation is that local chiefs or community leaders can often serve as a valuable liaison between registration authorities and poor communities. The local chief can both provide information to the community and deal with the state authorities.



Thus, reaching out to local cultural and religious leaders, and empowering them to formally register individuals, may be a more viable strategy than attempting to expand the state registration bureaucracy. At the same time, care must be taken not to grant local elites a monopoly on the provision of formal legal identity. A useful rule of thumb regarding registration is that every individual should always have at least two realistic, viable options.

### Reducing Political Opposition to Full Registration

Fee waivers, redundancy, outreach, and bundling may all help redress non-registration that arises because of a lack of bureaucratic capacity, but all too often the denial of a legal identity results from an explicit or tacit political decision to exclude certain segments of the population from full and equal participation. This problem is especially obvious in the case of groups that have been denied citizenship on grounds of their ethnicity or their status as refugees or migrants. Examples of groups that have no formal citizenship rights, or very limited ‘second class’ citizenship rights, include the Russians in Estonia and Latvia, the Kurds in Syria, the Palestinians throughout the Middle East, the Rohingyas in Myanmar and Bangladesh, the Lhotshampas and Bihari in Bangladesh, the Banyarwanda in Congo, and the Nubians in Kenya.<sup>3</sup>

Even in cases that do not involve overt deprivation of citizenship, political considerations may influence government decisions to leave barriers to formal registration in place. For example, in the case of the Peruvian highlanders, formal registration could potentially draw large numbers of poor indigenous Peruvians into the political process, posing a potential threat to the incumbent political elites. Additionally, precisely because the lack of legal identity may

block access to government social services, politicians may recognise that extensive legal registration of the poor may be very expensive, because registration would put greater demands on the public treasury.

When legal exclusion derives from a lack of political interest in providing legal identity — or, worse, from an affirmative political desire to deny legal identity — one strategy that is sometimes effective is to increase the international profile of a problem and to identify those countries that deprive their residents of an adequate legal identity on a discriminatory basis. Such ‘naming and shaming’ approaches may not be effective against countries where the interest in discriminatory exclusion is especially strong or where the interest in international reputation is especially weak, but in some cases greater international attention to the issue may help effect a shift in policy. For example, international pressure appears to have influenced the Thai government’s stance toward the registration of the approximately 2.5 million people living in northern Thailand, most of them members of various Hill Tribes, who lack official registration documents and who consequently are denied citizenship (Lynch 2005, Lin 2006). In addition to country and situation-specific international pressure, it would be useful if an international organisation, such as UNICEF, UNESCO, or some prominent NGO, regularly ranked countries with regard to their policies on registration, citizenship, and legal identity. This sort of publicity-based approach should be carried out in conjunction with more sustained efforts to gather reliable data on the scope of the legal identity problem.

However, any international attempt to address the legal identity issue must be sensitive to legitimate state interests in restricting citizenship rights, regulating immigration, addressing ongoing international disputes, and combating voting

or social services fraud. Thus, although greater international attention and the use of ‘naming and shaming’ approaches may be useful, the international community must take care to develop its evaluations and prescriptions through a dialogue with relevant stakeholders.

Another possible approach to combating politically motivated legal exclusions is to bring legal claims before international human rights tribunals. The track record of this strategy is mixed, however: while international human rights litigation has sometimes succeeded in raising awareness, the tribunal decisions themselves have typically not been enforced effectively. While international human rights litigation may have a place in the broader campaign to address the legal identity crisis, it would be a mistake to presume that politically-motivated exclusion can be cured by litigation. Political problems demand a political solution, and human rights litigation is useful only if it is part of a broader political strategy.

More generally, the crisis of politically-motivated legal exclusion highlights the need to increase the relevance and effectiveness of the various international covenants and declarations that establish the basic human rights to legal identity and nationality. Part of the problem might be attributable to a failure of national and international political will to make the enforcement of these fundamental rights a priority. Another problem might be that most of the existing human rights conventions and protocols discuss general goals or end-states, but do not establish concrete benchmarks or standards by which to judge compliance efforts. It may therefore be worth considering if existing international human rights instruments relating to legal identity should be supplemented with clear international standards establishing markers by which na-

tional actions on legal identity can be evaluated. An alternative or complement to public international action might be greater efforts by the donor, academic, and NGO communities to establish institutes and foundations dedicated to raising the profile of the legal identity issue and monitoring state compliance with the obligation to ensure that all people have proof of nationality and are recognised as people in the eyes of the law.

### **Providing Information and Creating Incentives to Register**

Even when opportunities to register one’s legal identity are available, many of the poor may still fail to take advantage of these opportunities. One reason may be because poor people do not know about formal registration, or they do not understand the benefits of a formal legal identity. Another reason may be that the poor are suspicious of the state and its agents, and this wariness leads them to avoid formal registration even when it would be in their interests. Yet a third possibility is their rational calculation that the expected costs of formal registration outweigh the benefits.

When ignorance or wariness of the state are the major obstacles, one method of redress may be to rely on culturally familiar and reliable intermediaries to convey information about registration and to assist with the registration process. Bundling of registration services together with other government or NGO services or with traditional rituals and practices would be consistent with this approach. More generally, many successful registration efforts have relied on paralegals, NGOs and laypeople to assist poor individuals and communities in completing the formal registration procedure.

For example, the Egyptian Centre for Women’s Rights and other Egyptian civil society organi-

sations, with the cooperation of the Egyptian government and some financial support from the World Bank, have helped thousands of women obtain legal identity cards (World Bank 2007). A UNICEF-backed project in Bangladesh run by local NGOs used a similar approach, with similarly encouraging results (UNICEF 2006). Reliance on NGOs and community-based organisations is particularly valuable in registering groups (such as women and traditionally disadvantaged ethnic minorities), which may be especially wary of the state bureaucracy. In addition, there is some evidence that improvements in women's health and education will also improve birth registration. For example, studies in Latin America have found that the likelihood a child will be registered is positively correlated with the mother's age and education (UNICEF 2005). This and related findings suggest that programmes designed to educate and empower poor women, in addition to their numerous other benefits, may also help redress the legal identity crisis.

Major difficulties arise when poor people avoid formal registration for rational reasons — for example, avoiding taxation, conscription, or vulnerability to a variety of state abuses. Ultimately, expanding access to legal identity in this situation will require either mitigating the adverse consequences of formal registration or increasing the benefits associated with formal registration, both of which might entail extensive changes to substantive law or political institutions. While this barrier to change defies clear general solutions, it is nonetheless important to recognise it as a possibility. Well-meaning observers are sometimes too quick to assume that the poor are either ignorant or irrational when they fail to take advantage of an apparently available government service. It may be that this avoidance is both informed and rational, in

which case, institutional reforms and registration drives may not be helpful; they may even be counter-productive if they coerce or persuade poor people into registration that is ultimately against their own interests.

### 3. Strategies to Create Affordable, Inclusive and Fair Justice

---

#### The Nature of the Problem

##### The Social Realities of Access to Justice

The poor themselves know best when they need justice most. Legal needs surveys and case studies display a recurring pattern of situations in which poor people have needs or grievances that are translated into justifiable claims invoking substantive rights (Michelson 2007; UNDP Indonesia 2007). First, and foremost, they need personal security and guarantees that their physical integrity is not threatened. Worries about personal and physical safety and fear that property or other assets will be taken by force diminish the human resources people have left for seizing opportunities. This also requires legal protection for physical assets (property rights), human capital (labour rights), and the ability to engage in profitable market transactions (entrepreneurial rights). Poor communities also require basic services that cannot be supplied efficiently in the private market, such as essential utilities, a healthy environment, public security, and a social safety net. The legal system must protect access to both private rights and public goods and services if poor people are to be able to escape poverty. Protection of their property not only requires effective registration, transparent and accountable land tenure systems, but also protection against expropriation and procedures and accessible enforcement mechanisms that resolve conflicts (see Chapter 2). Similarly, their interests as employees and as entrepreneurs should be recognised formally, as well as protected against attempts of others to take advantage of their efforts (see Chapters 3 and 4).

Surveys consistently show that the needs of individuals for legal interventions are concentrated around the major transitions or changes in personal status in a lifetime. A likely reason for this is that property and other assets often accrue within a relationship. This is especially true for poor people. Their homes usually belong to families and kinships. They make use of their arable land where the different members are designated different tasks, roles and rights, whilst formal officially recognised ownership is unclear even though a clear informal regime may exist. They work in businesses as employees, but also as spouse, as a nephew, or as business partner. Communities jointly own pastures, share water, and use the same fishing grounds. These close relationships are powerful tools for value creation, but they also build on inter-dependent relations. The partners are tied to each other by specific investments, which will be lost if they leave the relationship (Williamson 1985). And often the poorest person will have more to lose: tenants and employees tend to invest more in this specific piece of land or in the business, than the landlord or the employer invests in their person. Women often invest more time and effort in the family and its assets than their husbands. That makes it difficult to leave the relationship, and makes them vulnerable to exploitation.

The formal (modern) legal system, with its focus on the individual and not on a more or less strongly defined collective entity, which is also mirrored in how ownership is construed, often discriminates against poor people or excludes them *de facto*. In some societies, property that does not clearly belong to an individual will be regarded as state property (see Chapter 2). The assumption that contracts are the only means that allocate residual ownership to one of the partners in the relationship equally works against

the poor. Usually, they do not formally regulate their relationships. Even in developed countries, marriages, land use arrangements, and the relationships around small businesses are often not dealt with in contracts, out of convenience, mutual trust or because it is impossible to foresee every contingency.

Thus, the most serious legal problems that the poor report in legal needs surveys revolve around transitions in these relationships. Death of the head of the family, divorce, termination of land use relationships, termination of employment, leaving a community (selling property), changes in business relationships, and expropriation for property development are the most common transitions. These transitions do not only create problems of division of property, but also do so in a setting that is likely to lead to conflict. This is particularly true in areas with scarce natural resources and high population growth where poor families cannot create sufficient extra value between transitions to the next generation to make up for the growth in numbers of mouths that have to be fed. In post conflict zones, and in areas struck by natural disaster, dislocated persons need to find property where they can rebuild their lives. The claims of those returning home create extra transition problems and thus legal needs.

The paths to justice available to the poor in order to cope with these problems and for accessing their rights often develop spontaneously. Communities tend to organise social structures that deal with conflict. Within days from the setting up of a refugee camp, the inhabitants create social norms and start addressing certain individuals with their grievances. Where a formal registration system is lacking, some person may start collecting information about who owns which piece of land and make these data available to others (see Chapter 2). Sometimes these structures will

mirror structures from their home areas because whole communities have been moved to the same locations. Or such structures are of a more practical nature than reflecting formal or informal principles of justice or customary normative systems. Whether the disadvantaged can use them successfully to deal with their problems is variable and depends on access to resources, power relations and other factors. Another option for the poor is often present in the form of religious norms and faith based dispute resolution mechanisms. The scope of these mechanisms may be limited, however, to family issues and crime. They are less likely to extend to property rights, employment problems, and the issues related to setting up businesses on which the Commission on Legal Empowerment of the Poor focuses.

In some communities, informal dispute resolution mechanisms exist. A recent survey of informal justice systems identified the following common characteristics of these systems (Wojkowska 2006). The problem is viewed as relating to the whole community as a group — there is strong consideration for the collective interests at stake in disputes. Decisions are based on a process of consultation. There is an emphasis on reconciliation and restoring social harmony. Arbitrators are appointed from within the community on the basis of status or lineage. There is often a high degree of public participation. Rules of evidence and procedure are flexible and no professional legal representation is needed. The process is voluntary, although there is frequently a lot of pressure internally in the family or other groups on the ‘victim’ to be part of the process. The decision is based on consensus, providing a high level of acceptance and legitimacy. There are no clear distinctions between criminal and civil cases, and between informal justice systems and local governance structures. Enforcement of decisions

is secured through social pressure or more organised structures invoked to ensure that parties to the conflict abide by the common decision.

**B**ecause these systems have been studied more intensively than the loose spontaneous ordering that has been discussed above, more is known about their weaknesses. These often work against the poor. Informal systems tend to reinforce existing power structures. Because they are based on consensus, women and disadvantaged groups may not be assisted to overcome differences in power levels. Mediated settlements can only reflect “what the stronger is willing to concede and the weaker can successfully demand.” (Wojkowska 2006). And sometimes local norms suggest solutions that are clearly against the interests of the weakest (they are regularly all poor).

For those living on less than \$1 a day, the formal legal system is often out of reach. As we have seen, fees for birth registration can already be unaffordable, and a court action to protect property rights or to enforce a contract with a tenant is out of the question. The only dealings the poor may have with the official justice system may be as defendants in criminal cases, in which they will normally have to cope without legal representation. They may suffer from bureaucratic procedures and red tape (see Chapters 2, 3 and 4), or from police abuse. On the other hand, if the poor live in a country that has a functioning legal system, the influence of formal legal rules and the threat of intervention by neutral courts, even if just a remote possibility, should not be underestimated (Kauffmann 2003).

The actual situation from which processes improving access to justice have to start can be summarised as follows. The poor have legal grievances and are even more likely to have such grievances, because of the scarcity in which they live and

because they are more likely to be dependent on others that are more powerful. They may have some options to access their rights, through spontaneous arrangements, through faith-based systems, through informal justice, or through the formal legal system. But through these options, taken jointly, they are unlikely to obtain fair and just outcomes against reasonable cost.

Starting with the legal needs of the poor is essential in a legal empowerment approach. Such an analysis can clarify which elements of the rule of law are particularly important for the poor and to which neutral interventions they need access. Targeting the most common legal needs can help to make legal institutions more responsive. Attempts to improve access to justice are less likely to succeed if they aim at access to criminal and civil justice in the abstract. Justice is costly to provide and priority setting is essential. Table 1 highlights some likely priorities, and shows in which parts of this chapter these are discussed. It takes the perspective of individuals needing law to protect them and to solve their disputes, rather than the perspective of the lawyer who applies rules. Which norms do poor people need to know and to apply, and which interventions can help them?

Seen from this side, many norms (like the ones protecting property against theft, and life against murder) are self-evident, whilst other norms may yet need to be formed, or interpreted to become easily applicable (such as the ones on division or compensation in property disputes or on termination of an employment contract). Likewise, the needs for interventions may be different. Seen from the perspective of the poor, criminal acts should perhaps primarily be deterred, problems in ongoing relationships should primarily be settled in a fair and just manner, for commercial transactions simple enforcement of debts may be the

**Table 1 Needs for Norms and Interventions**

	<b>Norms</b>	<b>Intervention capacity</b>
<b>Personal security and property protection &gt; Mainly criminal law, not covered in this chapter</b>	Responsibility to protect Respect for others' human rights	General prevention strategies Retributive/restorative/criminal justice for most serious crimes
<b>Identification of person, property, business (registration) &gt; See Section 2 of this chapter</b>	Rules that deal with standard complications efficiently	Registration capacity that serves the entire population
<b>Issues within long term relationships in which the poor invest (entrepreneurial, family, land-use, employment, community) &gt; Section 3</b>	Default rules for fair treatment during relationship Rules of thumb for division of assets at termination	A setting that facilitates settlement, with: A credible threat of a neutral intervention (settlement in the shadow of the law)
<b>Market transactions (debt, credit, consumer) &gt; Section 3</b>	Rules regarding reasonable quality expectations Simplified contractual regimes	Self-enforcement through reputation mechanisms Enforcement of simple contracts
<b>Protection against unfair government interference (police, detention, other) &gt;Section 4</b>	Regulation of government conduct Respect for human rights	Complaint procedures with independent enforcement
<b>Problems arising out of failure of government to perform positive duties &gt; Section 4</b>	Norms relating to positive duties	Responsive government Complaint procedures

priority, and complaints against government may have to be used primarily as a tool for creating more responsive government. But any strategy to improve access to justice should start from a thorough analysis of the particular needs in the local situation, as well as an inquiry into the way the local institutions already fulfil them.

An analysis like this not only shows what the rule of law and access to justice look like from the perspective of the poor. It also makes clear that their demands for justice are not unlimited or unrealistic. The poor need some norms in particular to protect them and to give them opportunities. They do not need a court or lawyers for every problem that they have in relation to other people, but in some situations they are vulnerable.

In relationships in which they are dependent on others, they need a credible threat of an intervention by a neutral and trustworthy person. Similarly, their human rights and their contractual rights should be backed up by the possibility of enforcement. Like other people, the poor tend to settle their problems themselves. But like people who live under a more effective legal system, they need the shadow of law to get access to fair and just settlements of their differences.

### **Increasing Quality and Reducing Transaction Costs**

The observation that poor people have unmet legal needs does not, however, adequately diagnose the problem to be solved, nor does it provide

sufficient guidance as to the best solutions. The reason for this is three-fold. First, access to legal services — and, for that matter, access to justice — is not valuable in and of itself. The legal system is a means for improving social welfare and social justice. Justice services are valuable insofar as they advance those underlying goals. Second, justice services are a scarce and costly resource, and like any scarce resource, they must be produced and allocated efficiently. Third, while poor people consume fewer justice services than is optimal from a social welfare perspective, this is true of most goods and services that the poor want to consume. Poor people have unmet legal needs, but they also have unmet needs for food, clothing, shelter, land, medical care, transportation, credit, leisure time, and virtually every other scarce resource. Everyone who advocates spending social resources on providing justice services to the poor should therefore be required to explain why access to justice should be a priority.

As a thought experiment, it is instructive to consider whether it would not be better simply to take the amount spent on an access to justice programme and give it directly to poor people in the form of a cash transfer. After all, if the poor recipient is most in need of legal services, she can spend the transfer on such services. If she needs something else more, then she can allocate the transfer to that need instead. The point is not that general redistribution in the form of welfare benefits should always be preferred to reforms targeted specifically at justice services. Rather, thinking about the comparison to general redistribution is useful because it forces the analyst to approach the problem of access to justice in terms of what can be improved in the system of delivery of such services rather than in terms of ‘unmet need’.

Applied to access to justice, the challenge can

thus be phrased in the following terms. Start with investigating the legal needs of the poor, then look for strategies that increase the quality of what people get when they try to obtain access to justice, and decrease the costs. Phrased in these terms, the size of this challenge becomes apparent. In order to ensure that legal services reach the poor, quantum jumps in price/quality (Pralhad and Hart 2002) should be achieved. The case study presented in Section 2 regarding access to legal identity shows how difficult this can be in practice. Even a procedure that aims to register simple data and provide citizens with means to prove their identity is difficult to organise in a way that effectively reaches out to the poor. Fortunately, it also shows where strategies to improve access may be located.

**F**irst, *users weigh the costs of access against expected benefits*. If costs are higher than benefits, they are not likely to register. These costs can have many different forms. A mother wanting to register her five-year-old child may have to travel, pay fees, spend time to obtain documents, or consult a specialist in legal services. The benefits of accessing the procedure can be huge. A child obtaining a registration is allowed to go to school or can get health care. Similarly, resolving a dispute about water within a community may lead to better use of land that has to be irrigated and lead to improved, more stable and more productive relationships. However, as the example of access to identity registration shows, there can be hidden disadvantages. Claiming rights may increase one’s visibility as an object of exploitation, or as a citizen that has to pay tax without corresponding benefits. Thus, access to justice will not materialise unless its benefits outweigh its costs.

Next, in order to organise access to registration services, a quite *substantive government infra-*



*structure* is necessary. This is even more so for the complex interventions of the legal system. Establishing the rule of law requires a smooth interaction of many different institutions that cooperate to perform complicated tasks. A functioning legal system has mechanisms for lawmaking in place, but also for facilitating settlement, neutral fact-finding, neutral decisions in disputes, and enforcement of rights. Police, courts, prisons, lawyers, and clients themselves form a very complicated supply chain. This is also true to some extent for informal systems. What its clients get depends on local mechanisms that create social norms, the possibilities to challenge them if necessary, the quality of the forum that deals with their grievances, and the local ways of accepting and implementing decisions.

What helps, is to give people *choice*. Multiple points of access do not only liberate the poor in the sense that they increase the odds that interventions fit their problems. They also trigger an innovation process in which it becomes transparent that the poor prefer some ways of delivering justice services above others. This gives service providers incentives to improve what they deliver. Choices are already part of the realities of access to justice. People have choices between access to informal procedures and formal ones. Choices between different forms of alternative dispute resolution (ADR) and choices between settlement and decision by a neutral party. Although having more choice can initially lead to higher costs in the search for the most appropriate approach, it is a sure way, in the long run, to empower the poor. Finally, choice is a weapon against the new dependencies a legal system creates. Instead of depending on their opponent, disputants become dependent on professionals with a dedicated and protected position: government officials, licensed lawyers, official judges, or the powerful in their community. Increased

choice may be the answer to the monopolies that come with official positions.

The case of registration also shows in which direction to search for *approaches to reduce the costs of legal services*. Interactive computer systems that let people perform some registration tasks themselves, mobile registration units, and bundling registration with other services are but examples of a more general class of opportunities. In the European Middle Ages, kings and nobles travelling the country were offering mobile dispute resolution services. Social workers help people to sort out the problems of life, and may bundle this with valuable pieces of legal advice. Filing grievances online can save travel costs and the costs of intake by professionals. If citizens obtain access to the right information, self-help can not only empower them, but also relieve the supply chain of costly tasks.

A related lesson from the registration example is that it shows how liaisons can be formed. A legal system functions by forging productive links: between formal and informal; between government services and services provided by the market; between settlement negotiations and the shadow of a neutral decision; between clients and professionals. Rule of law is a combination of public goods (laws, information, neutral interventions by police and courts) and services delivered by private suppliers (private safety measures, self help, legal services, neutral interventions from ADR, local justice, religious institutions).

The last lesson is that *politics matters*. Exclusion or limiting access can be profitable for the ones already inside the system, as the examples about ethnic groups that are denied legal identity show. One way or the other inclusion should be made more attractive for insiders. Naming, shaming, or other sanctions can achieve this, and probably

even better, by showing the ones with power the benefits of increased security, or of a larger class of prosperous customers.

This analysis also suggests which theoretical concepts and strands of empirical knowledge can be helpful to improve access to justice:

- Political economy and sociology can help to identify the deals that have to be forged in order to facilitate inclusion.
- The image of delivery of justice through a supply chain, points towards the perspectives of transaction costs economics and logistics (supply chain management).
- Legal anthropology, law and sociology, negotiation theory, conflict resolution theory and game theory can yield valuable information about the construction of environments that help people to settle their differences.
- Removing barriers to justice and the similarities to the delivery of health care or education, suggest remedies that emphasise the efficient correction of market failures (Shavell 1997, Barendrecht and van Nispen 2007). While the 'unmet legal needs' framework typically leads directly to proposals to increase legal aid subsidies or build a better formal legal infrastructure, the market failure framework both offers more guidance on how to allocate scarce legal aid subsidies and suggests other sorts of structural reforms that can improve access to justice.
- Knowing that the supply of justice is not a pure market transaction, but involves public goods as well, and requires a substantial neutral infrastructure invites the perspectives of government failure and of public management.
- Many of the issues discussed above, and the links between access to justice and economic

development, are topics studied by new institutional economics, a body of thought that emphasises the importance of public sector institutions, including the legal system, in generating economic growth, and also focuses on transaction costs (North 1990).

As we proceed with this section, we will discuss four strategies to improve access to justice that have proven their value in practice, or seem to be particularly promising, and link them to these theoretical concepts. Our focus will be on the need to respond to the essential challenge: how can the justness and fairness of what is delivered be improved, and, in particular, how can costs be decreased? For this reason, the reduction of transaction costs figures prominently in our analysis.

We start at the client end of the supply chain, with concerns about facilitating self-help, education, and with the theoretical concept of imperfect information. Then we turn to the provision of legal services, using primarily a market failure perspective. Following this we will review strategies to develop procedures that are better suited to the legal needs and the resources of the poor. The potential of informal justice, and its links to the formal legal system, are discussed at the end of this section.

## **Enabling Self Help with Information and Community Organising**

For a person with limited resources trying to get access to justice, the first (and sometimes the only) option is to decide what she can do herself. Her time may be less scarce than money. If she can find ways to solve the problem without paying legal fees that is what she will tend to prefer. So a first strategy for legal empowerment may be to enhance the possibilities for self-help in the area of access to justice.

The Working Group has noted that this is a topic that has not yet attracted sufficient attention in academic thinking about access to justice. There is a certain tendency to equate access to justice with access to legal services, assuming that the only road to justice leads through lawyers and courts. This is rapidly changing, however, now that even the Western world discovers that many people appear in courts without legal representation and that information about legal rights and dispute resolution is an essential tool for empowerment, as well as for prevention of social strife. The UK government even set up a Public Legal Education and Support (PLEAS) Task Force. At this stage, however, the available information is limited, and this is certainly an issue on which further research is warranted.

### Information about Norms: Legal Education

Within this strategy that encourages self-help, know-how about legal norms is essential. Poor people may not receive the protection or opportunities to which they are legally entitled because they do not know the law or do not know how to go about securing the assistance of someone who can provide the necessary help. This lack of information engenders vulnerability to exploitation and abuse, and impedes legal empowerment (NCLEP Kenya 2007, NCLEP Philippines 2007). In many developing countries, simply finding out what the law is can be a time-consuming and costly endeavour. In Bangladesh, for instance, the government only publishes a small number of copies of the statutes passed by Parliament, and these were available only to those who pay a fee. The few public libraries in Bangladesh suffer from an acute shortage of legal resources (Afroz 2006). In Tajikistan, new statutes are typically published only in the Parliamentary Gazette, which is not widely accessible, and ministerial decrees are not published at all. This makes the simple task

of figuring out what the law is a time-consuming chore even for a trained legal professional (ADB 2002). Furthermore, many countries draft and administer the law only in the national language (often the language of the former colonial government), which many of the poor do not speak. This language barrier creates a significant transaction cost for poor people who might otherwise avail themselves of the legal system.<sup>4</sup>

An obvious way to remedy this is to inform people more broadly about norms and interventions that they may have to rely on. Information technology is arguably the most promising avenue for this, now that the poor will increasingly have access to internet connections close to the places where they live. Preferably, such information must address the practical priorities of specific populations. Street vendors want to know which specific regulations allow them to ply their trade; what specific lawyers, government offices or non-governmental organisations (NGOs) they can go to for help if police harass them; or how to press for reforms of laws that have not yet formalised their status and protected their livelihoods. Conversely, women living in societies in which the laws discriminate against them may be interested in constitutional provisions or international human rights treaties that at least provide a basis for hope, confidence and activism in favour of equal rights. The information should also be geared towards the best practices for solving the problems the poor face. What are the rules and the best ways for solving inheritance problems? A farmer working for years on a plot of land who is confronted by others who show him a deed that seems to prove their property-rights will probably want to know the going rate for settling such a problem, instead of getting abstract information from the civil code about property and leasing contracts (Barendrecht and Van Nispen 2007).

A related option is teaching the poor about their rights. It can show them that the law is on their side, or that it is deficient and should be changed, or that they should be confident in pressing for the reform of bad laws or the implementation of good ones. Non-formal legal education (NLE, as opposed to formal law school education) is geared toward making the disadvantaged more legally self-sufficient by building their legal capacities. It can take place through community training sessions, radio and television broadcasts, theatre plays, and printed and audiovisual materials and, as discussed below, paralegal development. A crucial point about these educational efforts is that they must be pitched at the levels of sophistication of lay people and their particular situation. Effective NLE typically borrows from more general international development pedagogy in that it is interactive and creative. It may feature such techniques as discussions, games, role-playing and quizzes.

Before interventions are considered, however, it is useful to investigate what causes the lack of information, why market forces do not provide a solution for this, and what are the consequences of this lack of information for the provision of justice services to the poor. In an efficient market for justice services, prospective consumers would be able to evaluate their own legal needs and seek out appropriate providers. Furthermore, consumer information about the nature and quality of the legal services offered would ensure that the market price for legal services reflects the value of that service to consumers. Not all prospective consumers need to be perfectly informed, because the prices themselves would convey information (cf. Schwartz and Wilde 1979). Nonetheless, a critical mass of informed potential consumers is necessary for the market to allocate legal services efficiently. If a population of poten-

tial consumers lacks sufficient basic information on what legal services are available, their benefits and costs they involve, and how to evaluate their quality, then the market is unlikely to allocate legal services efficiently even if potential consumers would be willing to pay a price that potential suppliers would accept.

Lack of sufficient information about legal rights and entitlements, and about available legal services, is thus problematic for the poor themselves and also causes justice services to be insufficiently responsive to the needs of the poor. But why does this lack of information arise? In most markets, consumers learn information about service availability and quality from three sources. The first source of information is the suppliers, who typically have an incentive to disseminate information about the services they provide. The second source of consumer information consists of other consumers — either directly or indirectly through the price mechanism. The third source of information is general media coverage. If these three sources of information are sufficient in most consumer markets, why might they not be sufficient to communicate information about rights and legal services to poor communities? Understanding the answer to this question will help reformers design interventions that are appropriately targeted to the underlying problems.

We consider first the question. Why might legal service providers not disseminate the relevant information? There are several likely explanations. First, there may not be providers willing to offer legal services to a given population at the price consumers would be willing or able to pay. If that is the reason, then the lack of legal information is a consequence of some other market failure. This suggests that lack of legal information may sometimes be more symptom than disease. Second, general information about legal rights and

entitlements is a public good. If expected profits from providing legal services to a poor community are relatively low and the costs of disseminating information to that community are relatively high, there may be insufficient incentives for any one justice provider to supply information. Lawyers, courts, or ADR providers may have little reason to inform their possible clients about the rules they need to solve their problems. This problem is likely especially acute with respect to legal information that is not immediately connected to the need to hire a legal professional. Third, some countries impose stringent restrictions on advertising for legal services and on the unauthorised practice of law, and these professional conduct rules. Although these restrictions are sometimes defended as necessary to protect vulnerable consumers from deceptive or misleading information, they may also make it difficult for service providers to disseminate useful information (Rhode 2000, Barton 2001).

These observations suggest that eliminating many of the other market failures discussed later in this chapter may also redress the informational problem, as legal service providers will have an incentive to communicate more about legal entitlements and how to defend them. Thus, while it is often supposed that disseminating more information about legal rights is the first step in promoting access to justice, it may sometimes turn out that improvements on this dimension follow other reforms without the need for substantial additional government or donor spending. Also, an information-dissemination strategy that relies in large measure on private service providers requires a liberal policy toward the advertising of legal services and the solicitation of clients. While many countries have traditionally viewed legal advertising and solicitation as unseemly, overly aggressive prohibitions of these activities may stifle the

effective communication of legal information. In addition to relying on individual service providers to disseminate information, bar associations and other lawyers' organisations are a natural candidate for educating the public about law and legal services. Because these organisations represent the legal profession as a whole, they can assist lawyers in overcoming the collective action problem that reduces the incentives of individual legal service providers to disseminate information about legal rights. Bar associations, however, might have too little incentive to disseminate information about legal services providers other than lawyers, such as paralegals.

With respect to the second source of information, other consumers, when a service is consumed only rarely within a given population, then other potential consumers are unlikely to be a useful source of information. This suggests the possibility of a vicious circle in which a dearth of information about legal rights and legal services leads to limited use of the legal system, and limited use of the legal system perpetuates the lack of information about law and legal services. This problem is likely to be especially acute when social networks for sharing information are relatively small and insular. To address this problem, reformers should strengthen information-sharing networks that allow transmission of information about law and legal information. Building networks of legal service providers, NGOs, and community advocacy groups can go a long way to increasing the informal dissemination of legal information. Additionally, the dissemination of legal information is likely to be more effective when legal services are integrated with other social services provided by an umbrella NGO. Uninformed potential consumers are unlikely to seek out a legal service provider if they do not even know they have a legal problem. But if they seek out

some other trusted service provider and discuss their problem, and that service provider has an adequate knowledge of the legal system, then the potential legal services consumer is more likely to learn that her problem has a legal dimension and that she can seek some form of legal redress. This is yet another argument for ‘bundling’ legal services with other social services (ADB 2001a).

Third, even when all the above strategies have been implemented, there is likely to be a residual need for governments or donor-subsidised dissemination of legal information, especially generalized legal information or information that is not immediately connected to an ongoing or imminent dispute. For this sort of targeted legal information dissemination, governments and NGOs can make use of the mass media or the Internet. Linguistic barriers (including both language barriers and illiteracy), cultural barriers, and a weak communications infrastructure (including limited access to radios and televisions) may limit the effectiveness of mass media. Different national media also differ in their propensity to devote attention to legal issues. Experience suggests that the best approach to mass legal education is to use a mix of print media (both newspapers and pamphlets), posters, radio, and television, along with strategies that integrate legal information into popular entertainment such as comic books, soap operas, popular music, local theatre, and interactive, participatory activities (ADB 2001a, Abdur-Rahman et al. 2006).

However, it should be emphasised that knowledge usually is not enough. Farmers may learn that they are entitled to land. But that knowledge is useless if government personnel, the military, a company or a landlord are powerful enough to ignore the law, sometimes by corrupting or intimidating the police, the courts or land ministry officials. Thus, promoting knowledge of the law

is worthwhile, but as a stand-alone strategy it seldom galvanises legal empowerment. And assuming that knowledge is power can be counter-productive if it confines legal empowerment strategies to simply teaching people their rights.

### Self Help Interventions: Forming of Peer Groups

In the experience of the disadvantaged, it often is more correct to say that “organising is power.” We saw that besides knowledge about the norms that fit their problems, access to justice also implies that there is a credible threat of an intervention. To assert their rights, the disadvantaged often have to organise around mutual interests. A woman may know that it is illegal for her husband to beat her. But she may only be able to make him stop if the women in her community band together to shame him, pressure otherwise indifferent police to take action, persuade male community leaders to intervene or seek the help of lawyers or NGOs. In this way, they can increase the incentives on their partners or their opponents to live up to norms.

Sometimes community organising (or organising groups within a community) can directly target problems such as violence against women, lack of land title or property theft. Under other circumstances, where civil society is too weak or entrenched and opposition too strong, a more indirect approach may be necessary. Group formation around relatively ‘safe’ development issues such as livelihood, micro-credit or reproductive health can pave the way for more assertive action down the line, as the groups and their NGO partners gain more credibility in their communities. Later, once their group has established some credibility, and if they so desire, it is possible to focus on more rights-oriented work. Women in Bangladesh have thereby benefited from integration of legal empowerment into a reproductive health programme

(Asian Development Bank 2001a). In Nepal, they have similarly gained through a multi-faceted empowerment project that included non-formal legal education (Thomas and Shrestha 1998).

Community-based legal education seems to have a great empowering potential. Improving legal literacy may be one goal of legal education. However, if the efforts are additionally targeted at establishing and maintaining peer support networks, legal education can be a powerful participatory strategy that enables people to help themselves and to assist others in current and future situations. Peer support networks can be aimed at the ongoing dissemination of general legal information, provide preventive education, share knowledge, or teach practical skills. Peer groups can also be tailored to specific legal needs or community groups, such as women wanting to start a small business. Moreover, peer groups can be a means to organise people, e.g. to identify, set and promote community priorities, build influence, gain negotiation power, or even develop pilot programmes. Paralegals and other legal educators can accommodate peer networks, e.g. by conjointly developing legal and non-legal strategies that match the needs of the community, or help building partnerships with the local authorities, and the formal legal system.

### **Broadening the Scope of Legal Services for the Poor**

This brings us to the next strategy to improve access to justice. Like other users of the legal system, and even when they become more empowered to solve problems themselves, the poor will often need help. Without assistance, they would likely be incapable of finding the rules that apply to their situation, and would therefore be unable to induce the 'other party' to meet their rightful demands. Where, then, could the poor

find legal services that fit their problems and their resources? Our working group suggests that efforts be focused on following approaches: (1) lower cost delivery models; (2) legal services that contribute to empowerment; (3) alternative dispute resolution; (4) bundling legal services with other services to the poor, and (5) removing artificial constrictions of supply.

The gist of this strategy is that the poor could benefit from an expanded conception of what 'legal services' might involve. There are many functions, beyond legal education and conventional legal representation, which justice services providers like paralegals can usefully perform. These include mediating conflicts, organising collective action, and advocating with both traditional and formal authorities. This breadth of functions makes alternative service providers attractive in their own right, and not merely cheap substitutes for lawyers. It is worth highlighting that legal services have an important role to play in the categories covered within the other three chapters of this volume; namely, in helping people to secure legal identities, to navigate plural legal systems, and to hold the state accountable. Instead of viewing legal services narrowly as lawyers providing access to courts via forensic representation, our working group argues that we should conceive of them more broadly, as follows:

- That they may include non-lawyers like community-based paralegals.
- That they could also function in the areas of advocacy, mediation, education, and organising.

That their aims as legal service providers include empowering poor people, increasing the accountability of public and private institutions, and decreasing impunity for violators of basic rights.

From an economic perspective this strategy aims create an efficient, effective system for delivering legal services. The following analysis will again be informed by a transaction costs and market failure framework. This approach is unconventional: most discussion of access to justice proceeds (1) from the observation that poor people have unmet legal needs, to (2) the assumption that the best way to remedy this problem is to provide subsidised legal services, to (3) the conclusion that governments and donors should increase funding for various forms of legal aid. The usual discussion then focuses on the *form* that legal aid services should take — whether they should be delivered by governments or NGOs, whether they should emphasise lawyers, law students, or paralegals, how they should be funded, and so forth. Our working group suggests that this view of improving access to legal services is too narrow. When one defines the problem not as ‘unmet legal need’, but rather as some specific failure or distortion in the market for legal services, a variety of approaches other than direct subsidisation emerge, and the appropriate scope for subsidised legal aid services becomes more refined and more focused.

### Lower Cost Delivery Models: Paralegals

Paralegals and law students are critically important to improving legal service delivery to poor communities. The term ‘paralegal’ may be somewhat misleading insofar as it suggests an assistant who performs ministerial legal tasks. Paralegals in many developing country programmes are better thought of as community activists who not only have a basic training not in legal principles, but also a familiarity with local community norms and practices and an ability to offer advice and advocacy services that go beyond narrow legal advice. Many paralegal programmes have proven efficient and effective in expanding legal assist-

ance in poor communities (McClymont and Golub 2000, McQuoid-Mason 2000, and Maru 2006). A particularly notable example is the *Timap for Justice Initiative* in Sierra Leone, which has helped poor individuals deal with problems like corruption in government service delivery, domestic violence and child support, and some criminal matters (Maru 2006).

Law students are another relatively cost-effective way to invest scarce legal aid resources. Legal aid clinics staffed by law students or recent law school graduates in Russia, Ukraine, South Africa, India, and elsewhere have demonstrated remarkable competence in delivering valuable legal aid services to poor communities at low cost (Golub 2004, USAID 2002). Therefore, governments and donors who have to allocate a limited legal aid budget might do well to place more emphasis on supporting the activities of paralegals and law student clinics.

Strengthening the national bar association and developing an effective working relationship with the bar is important in developing effective targeted legal aid programmes, especially when the services of attorneys are required. Although one-to-one lawyer-client relationships would normally not be affordable by the poor, nor perhaps by governments or donors who might subsidise legal aid, there could be a role here to be played by bar associations. They could help to gather and disseminate information in the legal community about access to justice issues, and provide useful formal or informal oversights. They could, moreover, offer political support for access to justice reform and increased funding for necessary legal aid services, help to determine the most worthy candidates for targeted legal aid subsidies, and possibly sponsor continuing legal education programmes concerned with meeting the legal needs of the poor. It is, of course, possible that some



bar associations might be wary of certain approaches to legal services reform (such as those that call for increasing competition in the provision of legal services or reducing the demand for legal services); or, they might be excessively enthusiastic about other approaches (those, for example, that call for large government or donor subsidies to lawyers who offer legal aid services). Access to justice reformers cannot ignore the bar, even where those structures are weak and disorganised, because the long-term sustainability of subsidised legal aid programmes will also have to depend on the support and collaboration of a strong and motivated lawyers' association.

### **Legal Services that Empower the Clients**

Quality of legal services matters as much as cost, however. In fact, the conventional approach to legal services envisions experts providing technical assistance to needy clients. This approach is not concerned with clients' agency or empowerment outside the pursuit of redress for any given legal claim. Some legal services efforts do consciously seek to empower the people with whom they work. Empowerment techniques include incorporating education into every aspect of service delivery, working with and strengthening community organisations, organising collective action to address justice problems, and engaging in community education and community dialogue on justice issues. Paralegal approaches may be attractive, then, not simply for cost advantages but also because paralegals may be better positioned to engage in a broader, empowerment-oriented method of legal service delivery. In the end, however, this is a matter of philosophy and attitude, rather than the professional status of the legal service provider.

This creates a need for appropriate training. Working with the poor involves a set of skills that

is quite different from what most law schools teach and what most lawyers practice. Mechanisms for inculcating these development-oriented skills and perspectives are NGO internships for law students and young lawyers and law school clinical legal education programmes. The result is 'development lawyering', as it is sometimes called, which can involve a willingness to trek out to the remote rural areas or into crowded slums. It can equally involve viewing litigation as a last resort and administrative advocacy, alternative dispute resolution and building of the poor legal capacities as preferred options. Such lawyering frequently requires skills suitable for carrying out nonformal legal education — interactive techniques rather than lectures. It involves an awareness of how the law can relate to other development fields. This includes viewing the disadvantaged as partners with whom to strategise on law reform and implementation. Similarly, it includes listening rather than dictating to clients — the hallmark of any good lawyer, but particularly challenging in helping impoverished people who usually defer to more educated and affluent individuals.

This type of service may be desirable, but it is not yet clear whether they form a sustainable business model and this may be one of the reasons that there is little spontaneous supply of these empowering legal services. Suppliers may be hesitant to empower their clients to solve problems by themselves, because they may fear this leads to loss of future business.

### **Alternative Dispute Resolution**

Another form of broadening legal services is to expand the use of various forms of alternative dispute resolution (ADR), including small claims courts, as well as arbitration, mediation, and conciliation (Lopez-de-Silanes 2002, Hammergren

2007). Such mechanisms prove preferable for the poor because they are more accessible than courts, affordable, comprehensible and (often) effective. They can include government administrative tribunals, where paralegals can sometimes provide representation, such as for agrarian reform and labour disputes in the Philippines. Third party arbitration courts have been set up in many countries of the former Soviet Union where, in connection with livelihood projects, the parties select arbitrators for land, agrarian or property disputes.

This is not to say that ADR is always preferable to, or mutually exclusive with, litigation. It can be severely hampered by gender biases or other power imbalances between disputants (as can the courts, however). It is often inappropriate for handling criminal conduct, particularly violent conduct (though non-state systems are often still used for that purpose). And there are many contexts, such as with public interest litigation in South Africa, where going to court is an effective legal implementation strategy.

From an economic perspective, ADR is most appropriate when the primary objective is to resolve individual disputes over private rights and benefits (Landes and Posner 1979). For those sorts of disputes, the case for substantial public subsidisation of judicial dispute resolution is much less compelling — though the state may still need to supply courts as a backstop to make sure the ADR processes comport with basic principles of fairness. Reformers should attempt, when possible, to steer private disputes into appropriate forms of ADR, and to husband scarce judicial resources for disputes that involve public goods (including the articulation of norms and principles) and fundamental public values.

In addition to the arbitration, mediation, and con-

ciliation programmes traditionally associated with ADR, reformers might also address the demand for judicial services by encouraging or requiring the resolution of more disputes (at least in the first instance) in the administrative bureaucracy rather than the courts. For example, the claims of injured workers could be resolved by workers' compensation boards rather than in lawsuits against employers. Consumer issues could be brought before easy accessible, low-cost consumer committees. A similar strategy for reducing demand for expensive judicial services is to adopt reforms that allow for the resolution of certain types of disputes according to customary law or other traditional practices of the non-state sector. These approaches raise a host of additional concerns related to the equity and efficiency of the bureaucratic justice system and the non-state justice system, which subsequent sections of this chapter will discuss in more detail. For purposes of the present discussion, bureaucratic and customary dispute resolution can be considered as special types of ADR.

The design of just and effective ADR systems is itself an enormous topic. It is also a subject where it is difficult to make general recommendations, because the optimal design of ADR systems depends very much on the unique circumstances of each country. Three concerns about ADR programmes are especially prominent. The first is that these programmes are often biased in favour of powerful interests and lack adequate safeguards to protect less sophisticated parties (UNDP 2005).

The second concern is that ADR programmes tend to become increasingly 'proceduralised' over time — that is, they begin to look more like quasi-courts, and they lose the cost and speed advantages that justified their creation in the first place. The third concern has to do with the final-

ity of ADR decisions. If it is too easy to challenge an ADR ruling in court, then parties do not have a sufficient incentive to take ADR seriously (Shavell 1995). On the other hand, the harder it is to contest ADR decisions, the greater the concern that important individual rights and entitlements are being decided outside of the judicial system by non-state actors.

While all of these problems are serious and legitimate concerns, a number of countries have had considerable success crafting ADR programmes that reduce the burden on the judicial system and increase access at a relatively low cost. In Bangladesh, for example, local mediation councils resolve 60 -70 percent of local disputes (USAID 2002). In Argentina, the Ministry of Justice and USAID supported the creation of legal service centres in Buenos Aires to provide mediation services, and these centres appear to have been effective (USAID 2002). Again, while the design of appropriate ADR programmes is challenging and context-dependent, most available evidence indicates that developing cost-effective ADR programmes is an important though imperfect means of providing an alternative to using an overcrowded court system.

### **Bundling with Other Services**

Legal aid programmes are most effective when they are bundled with other social services rather than offered as stand-alone programmes. For example, the South African Legal Aid Board, which experimented with a variety of models for providing civil legal aid, found that the most effective model is a 'justice centre' model — a 'one stop legal shop' that provides comprehensive legal services through a combination of lawyers, advocates, paralegals, and administrative staff (MacQuoid-Mason 2000). Similarly, many Latin American countries have had success with 'Casas

de Justicia' (Houses of Justice) that provide assistance with both legal and non-legal aspects of common problems, such as child support and custody issues, property disputes, domestic violence, and administrative matters (USAID 2002). This model may be more effective than state subsidisation of private lawyers and advocates who provide legal services to the poor.

A related point is that international donors have had more success funding local NGOs that provide a variety of services, including legal services, than in funding NGOs that provide exclusively legal services. More encompassing organisations tend to be more effective in reaching the target population, and they also tend to be more sustainable in the long term (ADB 2001a). Thus, adding legal services capacity to existing community-based organisations is a more promising strategy than supporting or establishing new organisations that focus exclusively on providing legal aid. One possible 'bundling' strategy that holds particular promise is the integration of legal aid services with microfinance institutions (MFIs). MFIs have regular access to poor communities and a group-based service delivery model well-suited to legal aid services, especially when collective action is necessary. Reformers have already begun to experiment with incorporating health and education services within existing MFIs, and early indications suggest this integration has been effective (Dunford 2002). Adding legal aid services seems like a reasonable next step

Many of the generic and actual examples cited in this paper reflect how legal implementation can build on or integrate with other development activities and fields. In fact, legal empowerment often is most effective when this takes place. The integration with community organising and group formation represents this phenomenon. Another example is the use of the media, which

can play an important role in mobilising the poor to assert their rights or the public to support their advocacy. In a more substantive vein, the urban poor and tenant farmers who receive land titles may need multi-faceted assistance to make best use of their new property. This can include advice on and availability of credit programmes for the former and agricultural technologies for the latter.

### Removing Constrictions of the Supply of Legal Services to the Poor

Another reason why poor individuals may not have adequate access to legal services is the artificial constriction of the supply of legal service providers. In an efficient market, if potential consumers are willing to pay more than it would cost a potential supplier to provide a service, the provider should enter the market to provide the service. Collectively, this dynamic should drive the price of the service down to an efficient level. However, if barriers to entry prevent potential suppliers from entering the market, the market price will be artificially high and certain consumers will not be able to acquire services they would like to purchase. The excluded consumers are often the poor, since they are less able to pay a higher market price.

Many observers believe that this sort of market failure is common — perhaps pervasive — in the market for legal services. There are two primary reasons why the supply of legal service providers might be artificially constricted. The first has to do with the nature of legal education, and the second has to do with the regulation of the legal profession.

With respect to education, the formal legal system in many countries is the province of the elite, and this legal elitism extends to the way in which lawyers are trained. Many law schools prepare their students to practice the sort of law that is

most relevant to the affluent or to the international business community, and the population of law students is often drawn disproportionately from the more well-to-do segment of society. On top of this, in many countries the number of slots at law schools is very limited: often there are only one or two major public law schools with a limited number of spaces, and it is difficult for private law schools to enter the market.

The end result is a supply problem: Developing country law schools train few lawyers overall; the lawyers that are trained are disproportionately interested in the legal problems of the elite; and those lawyers who might consider focusing on the legal problems of the poor face substantial entry barriers because they have not received much early training in the relevant fields and skills (NCLEP Ethiopia 2007). Even if representation of poor clients could prove financially or personally rewarding for larger numbers of potential lawyers, distortions in the legal education system may entrench distortions in the supply of such lawyers relative to what one would observe in a hypothetical efficient market.

One step that might redress this problem is to make it easier to enter the market for providing legal education, for example by relaxing accreditation requirements or encouraging distance learning. Elite lawyers might sneer at ‘night school’ or ‘trade school’ lawyers, but expanding the opportunities for legal education will help increase the supply of lawyers, especially lawyers who come from non-elite backgrounds. Additionally, it may be advisable to create and fund more training programmes for paralegals or other non-lawyer service providers (McLymont and Golub 2000), as well as training programmes for practicing lawyers who want to move into practice areas that emphasise the provision of legal services to poor or otherwise disadvantaged

clients. The organised bar or other associations of legal professionals may be especially helpful in pursuing these goals, especially in the contest of continuing legal education.

Of course, one must guard against the dangers of ‘diploma mills’ that give students a law degree but not any real skills or training, especially when these fly-by-night operations exploit less educated prospective students. This danger should not be exaggerated, especially when compared with the significant costs associated with overly limited opportunities for legal education. Nevertheless, in some developing countries, the poor may suffer as much from an ‘oversupply’ of poorly-trained, dishonest ‘lawyers’ as they do from an under-supply of competent lawyers interested in representing poor clients. The solution to the quality control problem, however, cannot be sharp restrictions on access to legal education. Rather, it must be a combination of sensible regulation, market competition, and information dissemination.

In addition to expanding opportunities for legal education and training, reforming the nature of legal education at the elite law schools could make it easier for young lawyers to pursue careers that include a substantial amount of public service work or compensated representation of poor clients. There is no one right way to do this, and different law schools will necessarily take different approaches to curricular reform. With that caveat, possible reforms might include expanding course offerings on subjects of particular relevance to poor clients (such as landlord-tenant law, labour law, land law, natural resources law, customary law, mass torts, and criminal defence); providing more opportunities for clinical legal education; and using incentives or requirements to encourage law students to spend a period of time after graduation doing public interest work or providing

legal aid. Additionally, elite law schools should explore ways to increase enrolment of students from disadvantaged backgrounds, and to provide special classes to such students so that they can compete with their classmates from elite backgrounds (Menon 2007). While there is no guarantee that students from disadvantaged backgrounds will end up providing legal services to the poor, they are probably more likely to do so as a statistical matter, and they may also serve as role models for other members of their communities.

The risk of an approach that emphasises drawing more talented young people — especially talented young people from disadvantaged backgrounds — into the legal profession is that their talents might be better deployed in some other field (Murphy, Shleifer and Vishny 1991). Many who think and write about legal education and legal aid have an unfortunate tendency to neglect the opportunity costs associated with a greater allocation of talent to the legal sector. Nevertheless, in most developing countries the supply of legal service providers in poor communities is so constricted, and existing law school training is so distorted in the direction of preparing young lawyers for elite practice, that the benefits of expanding the opportunities for legal education are likely to exceed whatever costs arise from diverting some number of talented youths from alternative careers in business, medicine, science, public service, or some other calling.

Distortion in the legal education system is one source of the supply problem in the market for legal services. Another potential problem may arise when countries adopt stringent ‘unauthorised practice of law’ rules — that is, when countries mandate that certain legal services can only be offered by a certain legal professionals, such as licensed attorneys, barristers, or notaries. While these restrictions may arise from the purest of

motives — such as the desire to maintain minimum quality standards and to protect consumers from exploitation — they often have the effect of conferring a monopoly on a particular set of legal service providers. This drives up the price of legal services to the disadvantage of consumers in general and poor consumers in particular (Rhode 2009, 2004, Spaulding 2004). This phenomenon has led to calls in some quarters for complete elimination of prohibitions on the unauthorised practice of law, and in other quarters for more modest changes that would allow paralegals and lay people to perform a larger proportion of the activities that are currently restricted to legal professionals (Cantrell 2004, Kritzer 1997, Rhode 2004, NCLEP Philippines 2007).

Though some bar associations have shown an appreciation of the problem and indicated a desire to work with reformers to liberalise the market for legal services, other legal professional associations have fiercely opposed any reforms that might threaten their monopoly on legal services (Hammergren 2007, Messick 1999). The arguments against loosening restrictions on who can provide legal services typically emphasise the need to protect consumers from incompetent or unscrupulous service providers. Of course, many service markets function effectively without strict *ex ante* licensing schemes and entry barriers, so the case for this sort of regulation in the legal services context is hardly self-evident. Moreover, there is a small but growing body of empirical research — most of it, admittedly, conducted in rich countries — that indicates non-lawyers (especially paralegals) and lay people can perform a variety of ‘legal’ services as effectively as lawyers, and that market mechanisms and less intrusive regulation can be effective in protecting consumers from exploitation (Cantrell 2004, Kritzer 1997, Domberger and Sherr 1989). This evidence, though suggestive

rather than conclusive, indicates that liberalisation of the market for legal services — in the form of weakening restrictions on who can provide particular legal services — is likely to improve access to justice for the poor substantially, while imposing relatively few costs on society so long as alternative quality-control institutions are in place.

A major attraction of a reform strategy that emphasises the liberalisation of the market for legal services is that, compared to many other legal reform strategies, liberalisation may require fewer government or donor expenditures, at least in the medium- to long-term. Instead of compensating for a market distortion through continuous payments to the individuals, the liberalisation strategy focuses on curing a market distortion through a change in the regulatory scheme. The major obstacle to the liberalisation strategy, however, is likely to be political: As noted above, many (though not all) associations of legal professionals strongly oppose this sort of liberalisation. Organised legal professionals are indispensable partners in achieving the objectives of expanding access to justice and promoting legal empowerment (Grajzl and Murrell 2006), and it would be a serious mistake to alienate the bar by adopting an overly confrontational posture with respect to the liberalisation in the market for legal services. Though the appropriate implementation strategy will depend on the specific circumstances of each individual case, as a rule of thumb it is probably advisable for reformers to work with the bar to find points of agreement and opportunities for collaboration; to begin the process of liberalising the legal services market with those legal services where the most powerful lawyers and lawyers’ associations are least threatened; and to emphasise forms of liberalisation that increase the participation of non-lawyers in contexts where few lawyers currently offer services.

For example, reformers could support special ex-

ceptions to ‘unauthorised practice’ restrictions for paralegals that want to offer legal services in poor rural communities that are not currently served by many lawyers. Or, reformers could encourage arrangements where non-lawyers provide services under the nominal supervision of a licensed legal professional (cf. Maru 2006). These gradual first steps may build political support for broader liberalisation of the legal services market while at the same time reassuring the legal establishment that doing so will not threaten their livelihood or undermine the reputation and integrity of the profession. A further advantage to this gradualist approach is that it allows for regular feedback and adjustments to make sure that consumer interests are adequately protected in the liberalised market. A badly designed and overly aggressive liberalisation strategy is likely to backfire if large numbers of consumers find themselves victimised by dishonest or incompetent service providers.

The fundamental point here is that the legal services market will not operate efficiently for the benefit of the poor if the supply of individuals who can supply legal services to poor people is artificially constricted by the nature of the legal education system or by a regulatory regime that restricts entry excessively. Therefore, reformers should adopt measures, appropriate to the particular circumstances, to eliminate both distortions in the system of legal education and restrictions on the market for legal services, when these distortions and restrictions artificially restrict the supply of legal service providers for poor communities.

### **Financing of Claims: Legal Insurance and Targeted Legal Aid**

The costs of justice services are likely to remain considerable, even if the broadening suggested in the preceding paragraphs would take place. But individuals do not need expensive legal services

frequently. These events are likely to occur once or a few times in their lifetime. Even then the costs can be limited, unless it is necessary to take the issue up to a court for litigation and enforcement. So it is interesting to consider whether the costs of litigation can be insured by private or public arrangements, or whether governments should invest in subsidising these services.

- Insofar as legal services confer private benefits on individuals, one might expect that these services would be efficiently supplied in well-structured private markets. If people would benefit from hiring a lawyer to help with a problem or dispute, they will hire one. If the cost of securing legal representation exceeds the expected value of the services, then it would be inefficient to hire a lawyer. But in the real world, serious market failures complicate this facile characterisation of the legal services market. One set of problems, discussed below, is that the costs of pursuing a legal claim may deter even those with positive expected value claims from retaining the necessary legal services. Even if we put that problem aside, we would still have to consider two other market failures that can leave litigants who ought to retain a lawyer unable to do so: *First*, private mechanisms for providing optimal insurance against legal risks are often unavailable or inadequate.
- *Second*, many poor people lack access to a well-functioning private market for financing the pursuit of their legal claims. Both of these problems share a common root: poor people have limited assets, but litigation typically requires a relatively large up-front transfer of resources to a legal services provider.

The inadequate insurance problem arises primarily in cases where a poor individual is the target

of some legal action brought by the government or another party. For example, a poor person may suddenly find herself the target of an eviction proceeding, a private lawsuit, or — most terrifying of all — a criminal prosecution. When this sort of disaster occurs, the individual may suddenly find herself in need of expensive legal services, but she may not have sufficient assets on hand to pay these costs herself. One might reasonably suppose that the private value to the potential target of having access to such services in case of a legal emergency exceeds the probability-discounted cost to potential providers of promising to make such services available. In other contexts where this is the case, private first-party insurance markets emerge: The potentially needy individual pays some regular fee to the insurer, and in the event of emergency the insurer pays the majority of the cost of providing the emergency service. But although efficient private insurance markets for legal services have developed in some parts of Europe (Killian 2003, Regan 2003), they are generally rare elsewhere in the world. The lack of effective insurance against legal risk burdens the poor much more than the affluent, because the affluent are better able to self-insure — for example, by having large ‘rainy day funds’ available to cover unforeseen emergency expenditures.

One reason for the dearth of effective private legal insurance arrangements may be the generic problem that very poor individuals devote all their assets to short-term subsistence; they would not be willing or able to buy legal insurance even if it were available. Insofar as that is the main cause, the most obvious solution is straightforward redistribution of wealth rather than any reform targeted at legal services specifically. Another reason may be that poor people lack sufficient access to information about the benefits of legal

insurance. This consideration is a variant on the general concern about the lack of adequate legal information, considered in a later section.

Other reasons for a failure in the market for legal insurance involve problems with insurance markets generally. The first problem is ‘moral hazard’: those with insurance are less likely to take care to avoid taking actions that are likely to trigger the need for insurance coverage. The second problem is ‘adverse selection’: those at greater risk are more likely to purchase insurance, which leads to a vicious cycle in which price increases deter purchases by relatively lower-risk individuals, and the increasing concentration of high-risk individuals in the insurance pool drives the price up further (Bolton and Dewatripont 2005). In other private insurance markets, providers and regulators try to deal with the moral hazard and adverse selection problems through devices like deductibles and co-payments, price discrimination on the basis of risk factors, and mandatory group insurance plans. These mechanisms may not be adequate to address the problem in the context of legal insurance, however. The result, then, is that many people of modest means may not be able to purchase private insurance against legal risks, even if they are willing and able to do so.

One straightforward solution to pervasive failures in the market for legal insurance is for the state or the international donor community to step in to provide universal insurance against certain types of legal risks. The most obvious and widespread form of government-administered legal insurance is the provision of public defenders for indigent criminal defendants. Governments and NGOs that offer free or subsidised legal assistance to individuals fighting eviction, defending against civil lawsuits, or contesting fines levied by government agencies are also essentially providing subsidised legal insurance.



The case for government or donor-funded legal insurance is powerful in the presence of the market failures described above, but it is important to recognise that such insurance is very expensive. It also involves significant redistribution of social resources — not only from the well-off to the poor, but among different sub-groups of the poor. Subsidised legal insurance does nothing to mitigate the moral hazard problem, and it may erode individual's incentives to take precautions to avoid being subject to legal action. Subsidised insurance also reduces the incentives of marginally indigent individuals to self-insure even when they could do so (cf. Hoffman, Rubin and Shepherd 2005). Moreover, although there is no adverse selection problem under a universal insurance scheme — because opting out is impossible — the scheme transfers resources from people who rarely make use of emergency legal services to those who use these services more frequently. Often this resource transfer takes the near-invisible form of the opportunity costs of the resources spent on emergency legal services for high-risk individuals and groups. Those resources might otherwise have been spent on other legal or non-legal services that would benefit different populations of poor individuals.

This is not to say that state or donor provision of emergency legal insurance is a bad idea. Indeed, in some cases — such as the provision of competent criminal defence counsel free of charge to indigent defendants — state-funded legal insurance may be a moral and legal obligation. But because the operation of a universal legal insurance scheme is so costly, it is worth considering other techniques that reformers might employ to redress the failures in the market for emergency legal insurance. One such approach is to expand the use of local community-based organisations that allow individuals to pool their risk. For example, labour unions can — and

often do — provide legal services on behalf of their members, especially to contest termination decisions and adverse employment conditions. Tenants' associations can provide emergency legal assistance to contest evictions; similarly, while landlords' associations can offer emergency legal assistance to take action against unruly or destructive tenants. The advantage of relying on small community-based representative groups to provide emergency legal insurance is that these groups may be better able to monitor and police their members and to apportion insurance costs in rough proportion to risk.

The financing problem typically involves poor individuals who have some legal claim — either a positive legal entitlement or an injury to a legally protected interest — that has a positive monetisable value that is greater than the cost of the legal services necessary to pursue the claim. In an efficient market, because this claim has a positive net expected value, the individual should be able to retain representation and receive an award (perhaps through litigation, but more likely in a settlement) that exceeds the cost of the legal services. But in many cases poor individuals do not have the assets on-hand to pay the up-front fees necessary to retain legal services in the private market (Yeazell 2006). Moreover, their disputes usually unfold with other poor people as defendants, and are mostly about division of property rather than damages. It is unlikely that there is a 'deep pocket' around that can be the target of a claim. For these reasons, the solution that their claim is financed by others — by their lawyer for instance — is usually not available. That being said, there may be situations where financing of claims is an option, such as in the case of personal injury arising from road traffic accidents, and this will increasingly be the case at higher stages of development. To that end gov-

ernments may consider to remove artificial barriers to the market for financing of claims, for instance by changing the rules against contingency fee arrangements (Kritzer 2004, Yeazell 2006), although this may prove to be a controversial issue.

Another alternative, which combines elements of the contingency fee system with a more traditional civil legal aid system, is the 'contingency legal aid fund' (CLAF) (Capper 2003). In a CLAF system, the government establishes a fund to subsidise litigation by indigent civil plaintiffs. Lawyers who represent such plaintiffs are reimbursed for a portion of their costs if they lose. If they win, on the other hand, they are required to contribute a portion of the damage award to replenish the fund. A CLAF system would place more burden on the public treasury than a system that relied on contingency fees, but it would be less expensive than a traditional civil legal aid system. Similarly, while a CLAF system would have less powerful incentive effects than a contingency fee system: cases with a low probability of winning look more attractive, and cases with a high probability of winning look less attractive, under a CLAF system as compared to a contingency fee system. Whether that is a good thing or a bad thing depends on the social value we attach to expanding the opportunities for individuals with facially weak claims to have access to a lawyer. CLAF may also be an attractive 'middle way' for countries that have traditionally rejected contingency fees, but are interested in experimenting with market- or incentive-based alternatives to traditional civil legal aid. It is also possible to use the same basic approach suggested above for emergency legal insurance: greater reliance on relatively small, community-based representative organisations. In addition to providing support for members who are facing a legal emergency, these organisations could also

provide financial support for members who need to hire a legal professional to pursue a legal claim for damages against some other party; the claimant, if victorious, could then pay back the organisation for fronting the money. Alternatively organisations large enough to retain their own legal services could 'loan' their legal representatives to members in need without charge.

The preceding discussion has focused primarily on cases in which an individual's ability to access legal services confers benefits primarily on that individual. However, the private benefits that an individual may derive from effective access to the legal system may not always be equal to the social interest in providing such access (Shavell 1997). In some cases, the social resources — in terms of both time and money — that result from an individual's pursuit of a legal claim may be very high, even though the costs to the individual are relatively low. In those cases, individuals will have an incentive to 'over-consume' legal and judicial resources. In other cases, and that is far more likely to be a problem in relation to the rights of the poor, individual pursuit of legal claims may confer more general benefits on a larger class of people, or on society generally. In those cases, individuals may have too little incentive to press their legal claims. There are three primary reasons why this might occur.

First, each individual legal claim brought by an injured victim against an injurer contributes to the general deterrence of unlawful conduct. The individual claimant, however, does not internalise the full value of this deterrence benefit (Shavell 1997).

Second, where an individual seeks a remedy that involves the reform of an institution or the elimination of a harmful unlawful practice, that remedy, like general deterrence, will typically benefit

a much larger class of people. As a result, each individual's incentive to pursue that systemic relief may be too small.

Third, each individual who pursues a legal claim may influence the development of the underlying substantive law. Comparative studies have found that this is true even in countries where, as a matter of official legal ideology, judges merely apply pre-existing law to new disputes (MacCormick and Summers 1991, 1997). Even though an individual litigant internalises some of the benefit of a favourable change in the law, she typically will not internalise the full social benefits of such changes. Thus, individuals have insufficiently strong incentives to press for beneficial legal reform (Landes and Posner 1979). Furthermore, litigants who have only occasional contact with the legal system will be at a disadvantage to entities that are 'repeat players', because the latter will generally have a stronger incentive to influence the development of the law. This may put poor individuals at a systematic disadvantage relative to entrenched institutions and elites (Galanter 1974).

For these and other reasons, the pursuit of legal claims — and the investment in capable legal service providers to advance these claims — may benefit many besides those directly involved. Where disputes have such 'public goods' characteristics, individual demand for legal services will be too low from a social perspective. In these situations, reforms that provide an incentive to secure legal services specifically (as opposed to efforts to redistribute income generally) may be appropriate.

One approach to redressing this type of market failure would be for governments, NGOs, or international donors to provide targeted legal assistance in cases where the individual pursuit of a legal claim is most likely to confer a public good

as well as a private benefit (Shavell 1997). A second approach to addressing this sort of market failure would be to empower local community advocacy groups and other representative civil society organisations (including, for example, public interest advocacy groups, labour unions, renters' or landlords' associations, and coalitions of small business interests) to pursue legal claims on behalf of their members. While these organisations may not be perfect representatives of collective or public interests, they may have a stronger incentive to pursue legal relief that has broad public benefits than does any one individual. An established community organisation is also more likely to be a repeat player in the legal system, which means that it typically will have a stronger incentive to pursue a long-term strategy of legal change. Furthermore, community-based organisations, while hardly perfect, are likely to have better judgment than national governments, international donors, or other NGOs about what allocation of scarce legal aid resources will achieve the greatest collective benefit.

These observations suggest three approaches to strengthening the role of local civil society organisations. First, it is important to create an institutional environment in which such groups are relatively easy to form and sustain (NCLEP Philippines 2007). Second, it may often be a wise to empower organisations to pursue legal remedies on behalf of their members or the general public. Relaxing rules on who can bring a suit for example, by liberalising standing requirements and expanding the availability of representative actions, two reforms that the Indian Supreme Court has pioneered, may enable community organisations to pursue public interest litigation even when no individual would have a sufficient incentive to do so (Dembowski 2000). Third, because local community organi-

sations may make better decisions about how to target scarce legal aid resources, it is often advisable for governments and international donors to provide funding to these local organisations and allow them to decide how to allocate these resources. That suggestion must be tempered, however, with the recognition that corruption and abuse by these local organisations may be serious concerns. Thus, effective monitoring is essential. Finally, and more controversially, the incentives of claimants or legal service providers to pursue claims that serve the public good may be strengthened through the use of special damage awards and fee-shifting arrangements.

The preceding discussion leads to the following general recommendations:

- First, in the context of legal entitlements with a high private value, governments and donors should target their subsidies at those cases where individuals find themselves in legal emergencies and self-insurance or private insurance are not viable options. Providing free legal representation for indigent criminal defendants is the most obvious example, but there are other cases in this category as well.
- Second, when legal aid resources are scarce, it makes sense to ration these resources so that legal aid is targeted primarily at cases where the pursuit of the individual legal claim is more likely to benefit a larger class of disempowered individuals: 1) disputes where deterrence of future wrongdoing is particularly important; 2) ‘impact’ litigation that seeks broad institutional reform remedies or changes in the substantive law.
- Third, governments and donors should encourage and facilitate the organisation of local groups that can provide legal representation (or funding for legal representation) to their

members. In many cases, governments and donors should funnel their legal insurance funding through these groups rather than trying to reach individuals directly. Local, community-based representative groups, much like the rotating credit associations celebrated in the literature on micro-finance, allow individuals to pool their risk and provide them with a source of financing in times of need. These organisations also provide more effective monitoring and allocate resources more efficiently than states or donor organisations.

### **Reducing Transaction Costs: Wholesale Reforms**

The preceding section concluded with an analysis of the situation where one lawsuit creates benefits for a large number of poor people. This is an example of a more general strategy to look for approaches that lead to economies of scale. Like the benefits of access to justice can spread over many people, there are also approaches that reduce the costs of access to justice for many people at the same time. A typical example is the costs that result from complex and archaic procedures that serve little or no useful function. It is often cheaper to eliminate the source of such costs ‘wholesale’ than it would be to provide ‘retail’ assistance to individuals who want to use the system. Thus, when the diagnosis of the problem is high transaction costs of using the legal system, reformers should consider wholesale solutions as an alternative, or complement, to subsidised provision of individual-level legal services. Such solutions include: 1) making the laws simpler, focusing access to justice efforts on common problems the poor; 2) creating small claims courts with simplified procedures that do not require a lawyer’s assistance; and 3) allowing those with similar complaints to bring their cases up as a group or class. A fourth and more general strategy would be to find econo-

mies of scale in the legal system.

Consider as a simple example, access to basic information about the law. As we saw in many developing countries simply finding out what the law is can be a time-consuming and costly endeavour, because the laws are not available in print, or only in a language not understood by the poor. One way to ameliorate these transaction cost barriers would be to provide or subsidise legal service providers who are fluent in both the national language and the local vernacular. This approach, however, would be extraordinarily expensive. A more sensible solution would be to translate the law into all significant local languages, to provide user-friendly terminology or explanatory notes for likely incomprehensible terms and jargon, to disseminate it widely, to ensure that law is administered (to the extent possible) in the language of the relevant region, and to provide centralised translation services where this is not possible (e.g. NCLEP Pakistan 2007, NCLEP Tanzania 2007, NCLEP Uganda 2007). While this set of approaches is not cost-free, it is a much cheaper way of reducing linguistic barriers to access than providing individual-level legal assistance.<sup>5</sup>

### Standard Routes for the Most Urgent Legal Needs

One of the values instilled in law students all over the world is that solutions to legal problems should be highly contextual, taking into account every aspect of the situation. This ideal is also reflected in the way law firms and courts tend to be organised. A case is assigned to a lawyer, or to a judge, who spends as many hours on the case as the case needs. Although other billing methods exist, most lawyers are paid by the hour, so that they have fewer incentives than other similar service providers to look for standardised solutions to similar problems. Standardisation does

occur in bigger law firms, but these are not very likely to serve the poor.

Compare this to doctors and other healthcare providers, who increasingly work from protocols that reflect the best treatment practices for common ailments. These protocols are informed by research and make implied trade-offs between quality (risk) and costs. The protocols are available on the Internet, so that clients can check them, and hold their doctors accountable if necessary. Like people come to doctors with more or less standard problems, many legal problems of individuals are rather similar. Termination of employment, changes in land use or rented housing arrangements, splitting up of families, death of parents, termination of cooperation between business partners and expropriation for property development are the most common transitions in a life time. They tend to lead to similar problems with division of property and redefining relationships in such a way that social capital is preserved. Issues between husband and wife, between landlord and tenant, between users of the same source of water, or between employer and employee follow certain common patterns as well.

This creates possibilities for economies of scale. Standard information leaflets for clients can save the costs of intake and leave clients better informed. Best practices for the settlement process can be designed. Rules of thumb for division of property can be defined, if necessary with standard exceptions when common reasons for derogation from the more general rule occur. Trade unions can specialise in employment issues, and leave family issues to other specialists.

However, policy makers should also investigate why this standardisation does not happen spontaneously. One possible reason is that providers of justice services have little means to influ-

ence others in the supply chain to accept more efficient settlement and litigation procedures. Their clients, often opponents in a conflict, are not very likely to cooperate in order to find the most efficient process. The incentives on lawyers, who are in a unique position as professionals because they can directly create work for each other, are very different from those in a normal supply chain. There, producers, distributors and clients all have the same incentives to cut the transaction costs, because there is an exposure to outside competition. The incentives on judges and other neutrals may also work against standardisation. They have no duty to the disputants to make a trade-off between costs and quality when they organise the process through their decisions on procedure, and in some legal systems they are supposed to leave the management of the procedure to the parties.

These issues regarding the management of the justice supply chain have, as far as the Working Group could establish, not yet been studied in depth (Hadfield 2000 is one of the exceptions). An open question is, for instance, why legal services to individuals tend to be performed by individual lawyers, or small partnerships, and not by bigger companies that offer standard services for common problems, such as is the case for banking and insurance. Another issue is where the responsibility for the design and improvement of procedures should be located: Is this primarily the task of the legislator, of the judiciary, or is there a role here for bottom up processes as well? We now turn to this topic of improving the design of procedures Simplifying Procedures

An attractive approach to reducing legal transaction costs wholesale, rather than attempting to subsidise these costs on a retail basis, would be to simplify the substantive and procedural law. One essential step could be to allow individu-

als to advance their legal claims without representation in small claims courts or other more informal tribunals (Lopez-de-Silanes 2002, Buscaglia and Ulen 1997). Adopting this approach is probably not without costs: Simplifying laws so that they can be understood and invoked by uneducated lay people may require making laws cruder, less nuanced, and less efficient, although some may argue that targeting laws better to the problems of the poor may have the opposite effect. If the legislator has sufficient information and background analysis regarding what constitute the most common concerns and grievances of poor people and other disadvantaged groups, the substantive legislation may be tailored to be receptive to such grievances.

There may be several layers within pieces of legislation that aim at different target groups ensuring that principles of equality and non-discrimination are adhered to, whilst on another level the legislation is drafted in a sufficiently sophisticated manner to cater for the needs for nuances and detail. Administering laws in small claims courts or informal tribunals entails dispensing with some of the procedural safeguards that attend more formal legal proceedings, and the adjudicators in such forums may be less competent. However, many of the legal issues of poor people are reasonably simple in legal terms the problem is that they are met with overtly and unnecessary completed procedures that only work to exclude the poor from justice settlement mechanisms.

One way of dealing with this is to provide people with 'simple' and 'sophisticated' procedures next to each other. Poor plaintiffs will then be able to choose the procedure they find is most appropriate to their problem and circumstances. However, this requires clear consumer information, and necessitates designing 'simple' procedures that

at least meet certain quality thresholds.

Nonetheless, legal and adjudicative simplification may drastically reduce the transaction costs of access to justice for a very large number of potential consumers of justice services (NCLEP Tanzania 2007, NCLEP Uganda 2007). The net social welfare gains associated with this strategy may be much larger than the net gains associated with trying to provide every needy individual with sufficient legal aid to navigate the complexities of a more 'sophisticated' legal and judicial system (Galanter 1976, Hay, Shleifer and Vishny 1996, Posner 1998).

General formalistic court procedures may also be altered to accommodate poor people or people who have had little contact with formal state structures before appearing in court. Archaic regulations regarding dress-codes, how to sit or stand, the set up of the court where the judges and the officials of the court sit on a higher plateau than the audience and the parties to the suit, use of official language without necessary interpretation into local languages are all features that can easily be removed and interpretation can be organised with little extra resources.

A potential political difficulty with these sorts of wholesale institutional reforms is that many of them reduce the demand for the services offered by attorneys or other legal professionals; indeed, that is part of the point of such reforms. Thus, even when wholesale transaction-cost reducing strategies are efficient, they may provoke political opposition. For example, Brazil recently established small claims courts in which individuals can appear without having to retain counsel. The Brazilian Bar Association opposed the provision and is contesting the legality of this aspect of the small claims court system (Hammergren 2007). Similarly, the bar association in Uruguay

strenuously objected to transaction-cost reducing reforms that streamlined and expedited civil and criminal trials (Messick 1999). And when Peru wanted to liberalise its property registration system to make it more accessible to low-income Peruvians, lawyers and notaries objected because the reforms eliminated the monopoly that the legal profession previously had on verifying and registering property ownership (World Bank 1997). In other cases, though, organised bar associations have recognised the value of reforms to reduce aggregate transaction costs, and have been a powerful ally of pro-poor reformers. It is therefore important to cultivate the support of the legal profession when pursuing these sorts of reforms.

### **Bundling Claims: Class Actions**

Another important situation in which the transaction costs associated with individual-level legal services may lead to failures in the legal services market involves situations in which many individuals suffer a relatively small injury from a common or similar source. In such cases the aggregate injury to social welfare may be large, but no individual has sufficient incentives to incur the costs of securing the legal services necessary to seek redress of the injury. While it would be possible to address this problem by providing subsidised legal services to every individual who might have a valid legal claim, this approach is extremely inefficient. An alternative approach is to authorise some form of aggregate multi-party or representative litigation, so that a small number of legal service providers can represent a large group of similarly situated individual.

One model for such litigation is the class action mechanism widely used in the United States. While class actions have their flaws, the class action device has been a powerful tool in expand-

ing access to justice for disadvantaged groups in the United States (Bloom 2006). In the developing world, class action suits have also produced notable successes for poor people in India, South Africa, and elsewhere. Although class action suits are less common in civil law jurisdictions, recently some civil law countries, including Brazil and Indonesia, have begun to experiment with authors class action suits for certain types of issues (Gidi 2003). While these reforms have their problems and detractors, there is some evidence that the class action mechanism has improved access to justice for the poor. In Brazil, for example, class actions against municipal governments have successfully challenged illegal taxes and illegal fare increases for public busses. Brazilian plaintiffs have also successfully deployed class action litigation against private companies to redress mass wrongs such as product defects, environmental damage, and abusive or deceptive marketing practices (Gidi 2003).

This is not to say that U.S., Indian, or Brazilian approach to class action litigation is the right model. Rather, the point is that when large numbers of poor people are victims of the same or similar legal injury, it is prudent to design some sort of mechanism through which they can pursue their claims collectively, rather than requiring each potential claimant to pursue her own claim separately. That latter approach entails either a wholesale denial of access to justice (if few or no potential claimants are able to afford adequate legal representation) or massive costs (if large numbers of claimants pursue their individual claims separately). One attractive political feature of expanding access to multi-party representative litigation is that, in contrast to transaction-cost reduction strategies that reduce demand for legal services, expanding the availability of collective litigation devices tends to increase the demand

for legal services and therefore should appeal to the legal profession (at least its more entrepreneurial members). Political opposition to this sort of reform is more likely to come from potential targets of class suits, including government agencies, municipalities, and large corporations.

An alternative bundling mechanism to class actions that also supports a controlled handling of large numbers of similar (tort) claims is the establishment of a compensation fund. Compensation funds usually provide fixed amounts of compensation to injured parties in cases where the rules of (tort) law and/or the institutional legal infrastructure function inadequately or function not at all, e.g. in post-war and post-disaster situations. Simple, user-friendly application procedures, for instance run by NGO's in collaboration with the local community and authorities, could facilitate people in need of basic subsistence to rebuild their lives with monetary and non-monetary means at relatively low transaction costs.

### **Other Ways to Reduce Costs of Access Wholesale**

Standardisation of settlement and negotiation processes, improving procedures, and bundling claims are but examples of ways to reduce transaction costs wholesale and to raise the quality of procedures and outcomes. A substantial proportion of the costs of access to justice comes from the process of finding, establishing and substantiating the facts. How extensive fact-finding should be, however, is a design issue for procedures, that is seldom addressed explicitly. There is an obvious trade-off between the costs of the registration procedures and processes to settle disputes or to enforce rights and the costs of error if the wrong facts are established. Requiring unnecessary documents or evidence can be a serious barrier to access.

The issue of fact-finding is again related to the applicable legal criteria and the way they are pro-



duced. In most legal systems, the rules of private law that determine the outcome of the most common disputes of the poor are rather open ended. Both in common law and in civil law countries case law is supposed to generate more guidance over time, but deciding and publishing cases one by one is not the only — and often not the most efficient — way to procedure criteria that can help people to settle disputes. Neutral institutions like government commissions, committees of judges, or academics can play a useful role here. An example is damage scheduling, which guides the disputants and the judge when they have to establish the value of a personal injury claim without binding them. This is very common in European legal systems that have to deal with personal injury claims. Such criteria may reduce the costs of fact-finding substantially, can increase transparency of the outcomes, and make settlement easier to achieve (Bovbjerg et al.). One of the key issues here is that these rules act as a presumption, without sacrificing the possibility to tailor the result to the specific circumstances, thus saving decision costs without a corresponding increase in the costs of error (Schauer 1991, Kaplow 1992).

Another example in which wholesale reform makes more sense than subsidising individual legal transactions involves the legal documentation of common transactions — such as sale, rental, and employment contracts — as well as common legal documents like wills, title registrations, and government claim applications. Securing the assistance necessary to draft legally valid versions of these and other formal documents can be expensive. As a result, poor people may simply forego the activity in question (which is inefficient), may forego legal documentation (which is risky), or, in the case of transactions with a more sophisticated party, may rely on documents provided by

that party (which might lead to exploitation).

One solution to this problem is to provide retail legal aid services, provided either by lawyers or paralegals. The advantage of this approach is that the legal service can be tailored to the individual client's needs. The disadvantage, however, is that this client-by-client approach is extremely expensive. Another drawback of one-on-one services especially in commonly occurring legal needs is the non-profitability of the service for the larger community. An alternative strategy might be for local lawyers, in collaboration with civil society groups and other community-based organisations like local councils, chambers of commerce, banks, among others, among others, to draft and disseminate standard-form documents for common legal transactions and provide education and outreach explaining the significance of the documents. This approach sacrifices individual tailoring in the interests of exploiting economies of scale. However, it facilitates sharing the benefits of legal services amongst groups of citizens in comparable situations at lower costs.

The bottom-line message is: The inability of poor people to access the legal system is frequently the result of the transaction costs associated with the pursuit of valid legal claims. It is often the case that many individuals face similar transaction costs arising from a common source, or would have to pay similar transaction costs to seek redress of a common legal injury or problem. In the presence of such aggregate or redundant legal transaction costs, reformers should try to address the problem at the wholesale level, rather than focusing exclusively on the provision of retail-level legal aid services or neutral dispute resolution to individuals. Wholesale reform strategies include both reforms that eliminate the source of significant legal transaction costs for large numbers of individuals (e.g., legal stand-

ardisation and simplification) and also reforms that enable large numbers of potential claimants to pool their resources to pursue their common legal interests rather than forcing them all to pursue their individual claims separately (e.g., class action mechanisms).

## Improving Informal and Customary Dispute Resolution<sup>6</sup>

Most poor people — especially the poorest of the poor — have little or no contact with the formal legal system, and are not likely to do so even if all aspects of the legal empowerment agenda are implemented. They instead seek justice from customary law (which may be highly formalised and is sometimes officially recognised by the state system) and from informal norms, practices, religions and institutions. For example, in sub-Saharan Africa, customary land tenure law covers roughly 75 percent of land and in some countries, such as Mozambique and Ghana, over 90 percent of land transactions are governed by customary law (Wojkowska 2006). In urban shantytowns in Columbia, squatters who cannot rely on the formal system because of their illegal status have established informal urban justice systems to deal with disputes and provide basic services (Faundez 2006). Traditional and modern civil society institutions continue to play an important role in local dispute settlement in Afghanistan. Traditional decision making assemblies are estimated to account for more than 80 percent of cases settled throughout Afghanistan (Afghanistan HDR 2007). These examples are merely isolated illustrations of a much more pervasive phenomenon: the predominance of non-state justice systems as the primary mode of dispute resolution in the lived experience of the overwhelming majority of the world's poor.

One element of the Legal Empowerment's agen-

da, of course, is to enable more poor people to make the transition from the informal sector to the formal, while at the same time integrating useful norms and practices from informal or customary systems. These approaches are discussed in detail in the chapters prepared by the Commission's working groups on property rights, labour, and business, and we will, therefore, not focus on the formalization of the informal sector or on facilitating the transition from the informal sector to the formal. Formalization is not always possible, however, and indeed, not always desirable, as the other working groups discuss in detail in their chapters within this volume. Informal justice systems may be more culturally familiar, more easily accessible, cheaper, and better tailored to local circumstances than the state-run legal system. Poor people may also be more willing to use non-state justice systems because of a general distrust or fear of formal state institutions, including the formal justice system (NCLEP Uganda 2007).

For these and other reasons, many countries have opted to formally recognise, or tacitly accept, the legitimacy of customary law in certain geographic regions or substantive areas. And some systems are formally integrated in the formal legal system and reflected in substantive legislation and the structure of the judiciary. Regulations have also been enacted to provide formal procedures for what legal system to choose and for how far the customary system may reach in the formal judiciary and justice system. Informal or customary systems, of course, have serious problems, and it would be a mistake to romanticize or glamorize them. Informal and customary law can be oppressive to women. They are almost totally excluded from participating in the decision making of *jirgas/shuras* resulting in serious consequences for their status and the protection of their rights (Afghanistan HDR 2007). Informal systems may

also exclude other disadvantaged social groups, may perpetuate the power of local elites and stifle dissent, and may be unsuited to rapid economic development (NCLEP Uganda 2007). Just as poor communities may find it difficult to access formal justice institutions, marginalized members of poor communities may find it difficult to achieve equal access to the institutions of customary or informal justice (NCLEP India 2007, NCLEP Philippines 2007). Nonetheless, despite these problems, reformers must acknowledge that in many situations replacing informal or customary justice systems with the formal legal or bureaucratic institutions of the state is either impossible or would do more harm than good. Therefore, alongside programmes to improve the state justice systems, reformers should seek out opportunities for strategic interventions that improve the operation of informal or customary justice systems and facilitate the efficient integration of the formal and informal systems.

Ultimately, reforms and improvements to the non-state justice system must emerge ‘bottom-up’ from the participants in that system. While a government’s role in facilitating reform of non-state justice systems is necessarily limited, it can (perhaps in collaboration with international donors working through government) take actions to influence the development of non-state justice systems. We may group them under four categories: education and awareness campaigns; tailored legal aid services; targeted constraints, and structuring institutional relationships.

### Education and Awareness Campaigns

Empowering the poor to demand changes in the customary system is the first approach. Reformers can encourage transformation from within simply by providing information about individuals’ legal rights under the constitution and about the norms

of the formal legal system. In Bangladesh, for example, the Constitution forbids the practice of oral divorce, but in poor rural communities, the practice is still widespread. A Bangladeshi NGO found that simply informing the members of local customary courts that oral divorce was forbidden by the constitution substantially reduced the practice. More generally, this NGO found that it was possible to introduce norms from national law into community deliberations and mediation practices otherwise based on customary law and traditional norms (Golub 2000).

Although this may be an exceptional case, education and awareness-raising campaigns may have long term effects on the evolution of customary law systems. This effect may be particularly powerful if educational efforts are coupled with improved access to the state system as an alternative to the customary system. Customary legal officials who want to retain their authority may then feel some competitive pressure to modify the norms of the customary system to align them more closely with those of the formal system. Education efforts are not likely to reap visible short-term benefits, but in the longer term they may effect significant change in cultural practices.

A variant of the education-oriented approach is to provide information on how other customary courts have resolved similar disputes. Implementing schemes that let customary officials and disputants in customary systems know how other customary courts have resolved similar issues may encourage consistency, limit abuse, and allow for the gradual evolution of the customary system. This is not to say that customary legal systems should be converted into common law style courts with binding precedent. Rather, the suggestion is that information sharing not only about the norms of the formal legal system, but also about the norms adopted by other custom-

ary or informal systems, may improve the overall functioning of the system and empower poor people to challenge customary practices that seem like arbitrary abuses of power.

### Tailored Legal Aid Services

Most government and donor sponsored efforts to provide more legal services to the poor emphasise access to the formal legal system. Hence, a significant fraction of legal aid resources are targeted at subsidising lawyers or reducing costs associated with using the formal court system. But as it turns out, many poor people tend to rely on informal or customary justice systems. In theory, these alternatives may be more familiar and accessible; but in practice, many poor people — particularly women, young people, and members of other disadvantaged groups — may also find it difficult and intimidating to navigate the customary system. These vulnerable individuals may also be subject to abuses by the local elites who administer traditional justice systems.

Reformers should, therefore, consider targeting legal aid resources and legal service providers who can help poor people deal with both the customary and the formal state system. The paralegal programme in Sierra Leone discussed earlier is exemplary in this regard (Maru 2006). These paralegals have a basic training in formal law, but they are also drawn from the local community and are familiar with local traditions and customary law. They can therefore assist clients with the non-state justice system. They can also monitor abuses, and are better positioned to advise clients on when they should threaten to take a dispute to the formal state system. Particularly in light of the fact that markets for representation services for non-state justice institutions are typically thin or non-existent, legal aid resources may be especially productive when focused on subsidi-

ng this sort of representation.

### Targeted Constraints on Informal Justice

The most straightforward strategy for trying to reap the benefits of non-state justice while avoiding its flaws is to accept (formally or tacitly) the legitimacy of non-state justice systems within certain limits, but to strategically and aggressively intervene to require the non-state system to respect certain fundamental norms that might otherwise conflict with traditional practices. That is, instead of attempting to displace or formalize the informal system entirely, government reformers might selectively impose a relatively small number of especially important norms on the customary system.

This approach is appealing because it seems to reflect a reasonable compromise between the interest in preserving and promoting non-state dispute resolution and the interest in respecting fundamental constitutional principles and human rights norms. This proposed compromise, however, immediately raises the question of exactly which norms are so fundamental that they must take precedence over informal or customary practices. Because this question implicates the appropriate design of formal laws on topics including property, labour, and business activity, our chapter does not cover this aspect of the problem in detail. It is worth emphasising, however, that the most prominent and difficult set of questions concerning the degree to which formal law should trump informal law concerns the status of women and domestic relations.

Despite the fact that many customary systems claim that the subordination of women is consistent with traditional cultural practices, this is one area where the state should be more aggressive in limiting their authority. Taking a strong stand against gender discrimination in customary sys-

tems is important both for intrinsic moral reasons — reflected in the human rights principles laid out in the Convention for the Elimination of All Forms of Discrimination Against Women — and for pragmatic economic reasons. This is in light of the growing body of research that gender equality and women's empowerment fosters sustainable economic growth and promotes health and education.

South Africa and Tanzania both offer powerful recent examples of cases where the state has recognised the legitimacy of customary law up to a point, but has required that customary systems change to respect the equal rights and status of women. In South Africa, NGOs successfully lobbied for the passage of a 'Recognition of Customary Marriages Act' that formally recognised marriages concluded in accordance of customary law, but only if customary law provided for equality of husband and wife in terms of status, decision-making authority, property ownership, and child custody (Centre for Applied Legal Studies 2002).

Tanzania has enacted two Land Acts that confer formal recognition on customary title, but also mandate the elimination of customary practices that discriminate against women with respect to land ownership (Ik Dahl et al. 2005, Tsikata 2003). Neither the South African nor the Tanzanian laws have been implemented perfectly, and customary gender discrimination is still a pervasive problem in both countries, but these experiments nonetheless suggest that it is possible to enact reform built around a political compromise: formal recognition of customary law in exchange for the rejection of certain customary norms that are repugnant to principles of non-discrimination and gender equality.

Another lesson of both the South African and Tanzanian experiences is that these sorts of re-

form strategies cannot be imposed immediately from the top down. Where cultural practices and discriminatory attitudes are deeply entrenched, successful legislative reform requires sustained consultation, lobbying, and political organising efforts. Also, in some cases the pursuit of gender equity goals might need to be tempered by pragmatic considerations, and it might be better to pursue a gradual reform strategy that starts by targeting only the most extreme forms of gender discrimination, and then progressively expanding the scope of this anti-discrimination principle. As the example in Box 2 shows, a complex legal universe governs the legal position of poor women in many developing countries. This example further illuminates the effect of legal regimes in the field of inheritance and property rights of women and its effects on the prevalence of and societal situation with regard to HIV/AIDS.

While the implementation strategy will vary by country, targeted interventions to eliminate discriminatory practices — particularly gender-based discrimination — should be a prerequisite to widespread recognition or acceptance of customary dispute resolution systems.

### Structuring Institutional Relationships

The government can also influence access to justice in non-state institutions by structuring the institutional relationship between the state and non-state justice systems. One basic issue the government must consider is whether to give one justice system exclusive jurisdiction over a particular class of disputes, or whether disputants have the option of choosing between different systems. (The absence of choice may be *de jure* — as when the formal law gives customary courts in a particular area have exclusive jurisdiction over family relations or property disputes — or *de facto* — as when the formal court system is so

## Box 2 Coping with Legal Pluralism in Relation to Women's Rights in Ethiopia

In the Amhara region in Ethiopia, photographs of both husband and wife are required on the land title. The provision also restricts one spouse from selling or in any other way transfer the property without the knowledge of the other. This also reduces confusion that may occur at the death of one spouse. Although Ethiopia is quite advanced from a formal legal perspective, the issue of women's inheritance and property rights is still complex. This is demonstrated for instance through the inter-relationship between the HIV/AIDS epidemic and women's property and inheritance rights. Comparatively, a ten-country study on women's inheritance rights in sub-Saharan Africa suggests that unequal housing, property and inheritance rights increase women's vulnerability to HIV, because it is, in part, why women remain in abusive marriages. Moreover women are often blamed for the deaths of their husbands and subsequently forced from the household and left destitute. If they remain in the household, they are treated as servants or are married off to the father, uncle, brother or another close male relative — a practice known as “wife inheritance.”

To address the issue of HIV and women's inheritance and property rights an initiative was launched. The aim was to build the capacity of the formal and informal justice systems, to generate individual and collective action and to empower women in gaining equal treatment in owning and inheriting property. A comprehensive analysis of the legal framework was carried out which included a review of the statutory, civil and customary laws. The study provided a solid empirical

foundation and underlined the strength of Ethiopian law. However, the substantive laws are not being applied or enforced. This is a result of a number of factors, including lack of awareness, lack of enforcement and ineffectiveness of the court system. Additional challenges include a lengthy and costly legal process, which most Ethiopians cannot afford, cultural barriers, free legal services are not yet readily available; the fear of being shunned and stigmatised by both family and society; and conflicting laws which cause confusion or discrimination against women.

The conflict between religious law and constitutional law has also come to the fore. It stems from a clause in the constitution which recognises the adjudication of personal and family matters under religious or customary law, if both parties agree. Article 34(5) of the constitution states [on Marital, Personal and Family Rights], ‘This Constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute.’ The conflict arises out of provisions in the Shari‘a law that contradict the terms set forth in the constitution. In reality, women are sometimes coerced into ‘consenting’ by pressure from family or society. Although these challenges exist, Ethiopia is surpassing neighbouring countries in the sense that they do not need to create new laws or reform archaic ones. Initiatives and campaigns have been set in motion to counteract some of the problems and to respond to the challenges that are demonstrating encouraging signs.

expensive and inaccessible that customary law is the only affordable option.) Some have argued that integrating the customary system of dispute resolution into the mainstream legal system may be an effective way to import desirable features of the formal system — including norms of gender equality and regularity — into the more accessible customary system (NCLEP Uganda 2007).

Others praise NGO efforts that have not focused on a formal integration of the formal and informal systems (Golub 2007), such as the Bangladeshi programmes that have taken up the issue of legal empowerment for women (UNDP 2002). Rather, some of these efforts have used the threat or reality of litigation (that is, the formal system) as an incentive for resistant or recalcitrant parties to

participate in the informal system and for such parties to honour agreements they have made. The *de facto* impact has been to increase women's power and well-being in informal systems that are very gradually becoming less gender-biased.

When there is overlapping jurisdiction between legal systems, a second issue arises: What should the rules be for choosing a forum and selecting the appropriate law to apply? Although one must be cautious in offering conclusive answers to these general questions, a useful general presumption is that individuals should always be able to opt into the state system in the early stages of a dispute, and they should be able to challenge decisions of the non-state system that are repugnant to fundamental human rights principles. However, disputants who have elected to have a dispute resolved through the customary system should not be able to seek to undo an adverse judgment by re-litigating the dispute in the formal court system. These are basic principles typically applied to ADR systems, and while they may not be universally applicable, they tend to promote efficiency, fairness, and healthy institutional competition.

## 4. Improving Access to Justice in the Government Bureaucracy

---

### The Nature of the Problem

The preceding section focused on access to the formal (adjudicative) legal system and to informal justice mechanisms. But courts and out-of-court facilities are not the only institutions that enforce individual rights and resolve disputes. A great deal of such work is done by public bureaucracies, especially in the context of government regulation and service delivery, do a great deal of such work. Often the first (and sometimes the only) line of defence individuals have against government abuses and threatening or already encountered injustices from neighbours, the wider community or companies is through the bureaucratic system. If that system is not adequately accessible for and responsive to the needs and interests of poor individuals, then it will not be possible to legally empower the poor through bureaucratic means. Therefore, it is important to consider the problem of access to *bureaucratic* justice.

One of the most important public bureaucracies, and the one which has great impact on the lives of many poor communities, is the police force. Public order and security are essential public goods, and a well-functioning law enforcement apparatus is necessary to provide individuals with a stable and orderly living environment and to protect them from violence and exploitation. Yet all too often the police not only do not provide adequate protection to vulnerable communities, but are themselves perpetrators of violence and exploitation (Anderson 2003).

In addition to law enforcement, state bureaucra-

cies (including local authorities) are also responsible for providing a variety of other services, including clean water, health care, education, transportation, infrastructure, and social insurance. The degree to which these and other services should be supplied by the state rather than the market is a subject of considerable controversy, and not a matter on which a position is taken here. Even when these services are supplied in a competitive market, it is almost always a market that is regulated by some public bureaucracy. Indeed, in most countries the provision of access to a competitive market is — perhaps paradoxically — the responsibility of government regulatory agencies.

Yet all of these public bureaucracies may be vulnerable to a variety of ‘government failures’, analogous in some respects to the ‘market failures’ discussed earlier. The great variety of government failures can be grouped into three major categories: malfeasance, underperformance, and incompetence.

‘Malfeasance’ is the tendency of bureaucrats, or bureaucratic organisations, to abuse their power to pursue illegitimate goals. The most well-known and comprehensively studied form of bureaucratic malfeasance in poor countries is, of course, corruption (Shleifer and Vishny 1993). Public officials may demand bribes, may show favouritism to family or friends, or may use their power vindictively against personal enemies. Powerful incumbent politicians may also view the bureaucracy as a tool for entrenching their own power rather than a means for improving public welfare. Whatever the form of malfeasance, the results for the poor are fairly similar: deprivation of services, of (avenues to) shared power, and of security. These problems are pervasive and much discussed throughout the developing world. Malfeasance may also take more

subtle forms. For example, even well-meaning bureaucrats may be prone to subconscious prejudices resulting in a continuous neglect of certain interests or measures with unintended discriminatory effects for certain groups. Also, when certain groups are more effective at mobilising resources to influence bureaucratic decision-making, public decisions may be distorted in favour of these groups, even if the bureaucratic decision-makers are not consciously biased, and even if these interest groups are acting legally and in good faith.

The second category of bureaucratic failure, ‘underperformance’, refers to the tendency of even well-meaning bureaucrats to pursue their missions with a socially insufficient level of effort (Bueno de Mesquita and Stephenson 2007). The basic problem is that the rewards a bureaucrat receives are imperfectly correlated to how hard she works or how well she performs. As a result, bureaucrats may be slow to complete tasks or respond to inquiries, and may have weak incentives to figure out how to improve the overall efficiency of the system, preferring to rely on pre-existing approaches to new problems rather than putting in the time and effort to come up with better ones. Another form of underperformance that derives from the same basic incentive problem is insufficient bureaucratic responsiveness to consumer input or consumer complaints. Even hard-working, public-spirited bureaucrats may become demoralized and give up if they feel like most members of their organisation are more interested in leisure than in innovation.

Third, bureaucratic organisations may simply lack the competence or capacity to achieve their assigned tasks, even when the bureaucrats themselves are well-motivated (Huber and McCarty 2004). Bureaucratic competence depends on a variety of factors, including the talent level of



the individual bureaucrats, budgetary resources, the design of bureaucratic institutions and procedures, and appropriate feedback and accountability mechanisms. Where some or all of these are deficient, government bureaucracies will not be successful.

Where the government bureaucracies that are supposed to deliver services and protections to the poor suffer from malfeasance, underperformance, or incompetence problems, and the poor are powerless to change this. Remedying this situation requires reform along two related dimensions:

- The first dimension is *public administration*: How can we design bureaucracies that perform their assigned functions with integrity, effort, and responsiveness to their clients? How can we structure service processes, bureaucratic grievance and dispute resolution procedures that are fair, efficient and user-focused?
- The second dimension of bureaucratic justice reform involves *administrative law*: What set of legal rules and procedures will empower the bureaucracy to achieve its goals while simultaneously constraining potential abuses of power? What is the proper degree of judicial and political oversight of government agencies?

## Public Administration Reform

To improve access to bureaucratic justice through reform of public administration, reformers should work to strengthen external monitoring and to implement structural reforms that will improve bureaucratic incentives and capabilities. The right mix of reform strategies will vary depending on the political and institutional circumstances in different countries, and will also have to take into account the specific social and cultural context. Nonetheless, experience in a variety of countries

suggests that there are some general lessons to be drawn about the types of public administration reform that may be appropriate.

## External Monitoring

Effective and responsive public administration often requires monitoring by entities outside the bureaucracy, including the intended recipients of bureaucratic services, the general public, and other government agencies.

One institutional reform that many countries have implemented to improve monitoring is the establishment of an independent ombudsman's office to respond to complaints and investigate allegations of malfeasance. In Peru, for example, the ombudsman was able to resolve a dispute involving allegations that an agency had overcharged consumers for electricity and telephone services: After the ombudsman investigated, issued a report, and credibly threatened litigation, the agency took action to address the consumer complaints. The effectiveness of an ombudsman may, as this case illustrates, depend on background institutions such as an effective court system that give other agencies an incentive to take the ombudsman's recommendations seriously.

The effectiveness of ombudsman offices may also depend on their resources. The Philippines, for example, has an ombudsman's office that is constitutionally very powerful, but chronic underfunding has rendered it less effective in practice. Similarly, although the Pakistani ombudsman has secured relief for some victims of maladministration and has been hailed as one of the most successful instruments of the Pakistani government in serving the people, the number of complaints lodged has increased dramatically making the office greatly overburdened. It has also been unable to address systematic bureaucratic failures that go beyond the resolution of individual disputes

(ADB 2001b). These and other examples suggest that while an ombudsman or and similar institutional device may be helpful, it is not a panacea.

Other legal and institutional reforms may improve access to bureaucratic justice by aiding the efforts of private individuals and organisations to monitor the bureaucracy. Educating poor communities about their rights and means of redress *vis-à-vis* the bureaucracy is an important first step in ensuring bureaucratic accountability. Providing legal or quasi-legal assistance is another. Both of these issues are versions of the more general issue of how to provide access to legal information and legal services, discussed earlier in this chapter. However, particularly in cases where legal service providers support the public against state behaviour, attention must be paid to institutional arrangements which protect the independence of justice services providers, because such services will inevitably be more threatening to the state than, say, health or education.

Government agencies can and should take additional steps to facilitate monitoring of bureaucratic performance. For example, bureaucracies should employ an accessible case tracking system, which individuals and organisations can use to monitor the progress of disputes through the bureaucratic system. USAID helped develop a case tracking system in Bosnia-Herzegovina that allows civil society organisations to monitor cases at various stages in the administrative process and to draw the attention of responsible authorities to cases that have been ignored or seem to be languishing in the system without a resolution (USAID 2006). Another approach that can contribute to increased public accountability is the introduction of citizen charters, which are preferably developed in collaboration with the community. Citizen's charters should contain clear standards for performance that are fit to be

measured and benchmarked by the bureaucracy, independent agencies and the community itself. In this way the public has a yardstick for assessing public service delivery. An illustrative bottom up example of the citizenry measuring public performance are the efforts of citizens' groups in Bangalore, India — these groups conducted consumer surveys regarding the performance of local government agencies and published the results in order to create pressure for reform. This 'naming and shaming' approach spread to other states in India as well (Narayan 2002). Where feasible, modern information technology (e.g. Internet, cell phones, etc.) could be used to disseminate information on bureaucratic performance more broadly, which would facilitate external monitoring.

### Structural Reforms

As useful as it may be to improve external monitoring mechanisms, significant progress toward improving access to bureaucratic justice may require more systematic reforms of the bureaucratic institutions themselves. A starting point is the improvement of each agency's internal adjudicative procedures, monitoring mechanisms, appeals processes, and grievance procedures. The administrative dispute resolution system and the public interventions aimed at facilitating the resolution of disputes between private parties do not always receive as much attention from governments and the donor community as the judicial system, but more people — and a larger proportion of poor people — are more likely to come into contact with the bureaucratic system than the court system. (This would certainly be true of non-criminal matters.) Government bureaucracies responsible for delivering essential services and for interventions in relationships between citizens should have a well-functioning system for providing enforcement and mediation services, addressing complaints, resolving disputes, and providing

redress. These systems should be cost-efficient, transparent, user-friendly and swift.

A second strategy for making public bureaucracies more responsive to the needs of poor communities is increasing the participation of poor communities, or the public generally, in bureaucratic decision making. Participatory methods such as interest-based dialogs, consensus building, and public collaboration aim to actively engage people in decision-making processes that concern their lives (Vidoga, 2002). The possibilities to have input, to voice concerns, to make recommendations and to co-produce outcomes are likely to improve the quality of public decisions. Participation further increases the public's understanding and acceptance of decisions, and advances a sound partnership between the bureaucracy and the citizenry. An interesting example of participatory regulatory decision making is the system of municipal water regulation in Porto Alegre, Brazil. The municipality wholly owns the Porto Alegre Municipal Department of Water and Sewage, but it is a separate legal entity with financial and operational autonomy. The mayor appoints the Department's general director, but its management board includes representatives from a wide range of civil society organisations. Porto Alegre also uses a participatory budgeting process in which citizens register their vote on budget priorities after hearing presentations from the directors of different service departments. Overall, this arrangement appears to have succeeded in creating incentives for high-quality service delivery (UNDP 2006).

Other countries have also experimented with participatory regulatory decision-making. Vietnam, for example, recently established a legal framework for consultative relations between local-level administrators and the people they serve. This framework allows citizens to provide input and

oversight in selected areas of local planning and decision-making (ADB 2001c).

Direct public participation in regulatory policymaking does have its drawbacks, however. Bureaucracies desiring to introduce participation should not underestimate the efforts it will possibly take. Issues that need attention are, among others, the design of the procedure for participation, the role and authority citizens will have, and decisions about representation. For example, expectations on both sides should be made clear from the beginning on. Decision-making processes may need to be adjusted to the abilities of the non-professional participants, who may be illiterate, inexperienced, or perhaps distrustful. The provision of supportive facilities could be necessary, or the involvement of neutrals and experts who can help to process information, assess options and facilitate negotiations. And even so, not all issues might be equally suited for participatory decision-making. Sometimes, an agency needs to be able to credibly commit not to change its policy in response to short-term public pressure. It might be difficult, for example, to encourage long-term investment in telecommunications infrastructure if investors know that rates will be set in participatory fashion by consumers: even if consumers initially want to encourage investment by promising a high rate of return, it may be difficult for them to make that promise credible if investors know that future rates will be set by an agency that is dominated by consumer interests (Levy and Spiller 1996, Henisz and Zelner 2001).

A third strategy for improving access to bureaucratic justice would emphasise reforms that institutionalise standards of good governance and promote public services morale. By giving bureaucratic managers sufficient means to offer their subordinates incentives for good performance, to discipline bad performance, and to reorganise outdated practices, bureaucratic organisations could

be restructured in a way that reduces inefficiency and waste and avoids inertia. This strategy may be politically sensitive, however. Civil service unions are very powerful in many developing countries, and for decades they and their members have enjoyed almost complete tenure and salary protections, little oversight, and few serious demands. It may therefore be risky for the government to take on the civil service unions by proposing reforms that would threaten the power or livelihoods of these unions and their members. Therefore, measures enhancing bureaucratic justice and service quality need to take into account the interests of both the civil servants and their representing organisations. Reorganisations might be more acceptable if they are built on trust rather than disapproval, motivate good practices rather than punish incompetence, stimulate learning from feedback rather than reprimand underperformance, and provide safeguards for justified concerns regarding job security, wage guarantees and status. Approaching this delicate issue therefore requires skilful politicians to enter into a consensus-building process with stakeholders and put together 'package deals' in which the existing civil service establishment is given benefits in exchange for accepting reforms that promote greater bureaucratic productivity and efficiency. As an alternative or complementary strategy, reformers could try to build a countervailing coalition that would push for bureaucratic reform.

A fourth type of strategy might promote decentralisation, bureaucratic redundancy, or some degree of privatisation in service delivery, at least for certain types of service. The advantages of decentralisation are that it brings bureaucracy 'closer to the people', may increase accountability and responsiveness to local needs, and may promote healthy competition between regions if local governments have input into bureaucratic

governance within their jurisdictions (Girishankar et al. 2002). Decentralization, however, may increase risks of corruption if it weakens centralized oversight and depends on local individuals to make impartial decisions on matters affecting their family, friends, and enemies (UNDP 2006). Decentralization may also reduce competence if powerful central bureaucracies are more likely to attract talented individuals.

Bureaucratic redundancy — that is, having two or more separate agencies or offices provide the same service to the same target population — has three main advantages. First, it reduces the likelihood of incompetence or corruption by giving consumers with a choice of provider (Shleifer and Vishny 1993). Second, if bureaucrats are rewarded at least partially on the basis of demand for their services, redundancy may lead to healthy competition between providers. Third, redundancy may facilitate experimentation and innovation. Bureaucratic redundancy also has costs, however. The first and most obvious is the extra budgetary cost of staffing two or more offices to provide essentially the same service. The second concern is that the existence of multiple providers may blur lines of accountability and, if incentives are improperly aligned, may encourage bureaucrats to 'let the other guy do the hard work' (Ting 2003).

Privatisation of service delivery functions holds the promise of more efficient service delivery. Consumer choice, value for money, proximity to the client and hands-on mentality are some appealing elements of this basic change towards governance (Rhodes, 1997). The remix of bureaucracies and markets containing the use of business principles and incentive structures is believed to motivate both the publicly and privately organised service providers to adjust the service delivery to the specific customers' needs, resulting in an increase in effectiveness, respon-

siveness and transparency (Lane, 2000). However, privatisation also risks undermining public accountability and creating more opportunities for corruption. Some high-profile scandals have done serious damage to the image of privatisation as a reform strategy. While these cautionary tales illustrate the dangers of ill conceived or badly managed privatisation efforts, they should not obscure the fact that some privatisation schemes can substantially increase the access of poor communities to vital government services. For example, water provision in Chile is heavily privatised, but subject to a strong regulatory system and coupled with a subsidy programme to address equity concerns. The scheme is widely viewed as effective in providing clean water to poor communities efficiently and equitably (UNDP 2006).

## Administrative Law Reform

In addition to general public administration reforms, there are a number of strategies for improving access to bureaucratic justice that emphasise a more direct role for the legal and judicial system. Administrative law may affect bureaucratic performance in two distinct ways. First, legal rules enforced by courts may facilitate or enforce the public administration reform strategies discussed above. Second, courts and litigants may take a more active role in overseeing the activities of the public bureaucracy. While administrative litigation is only a small component of a much larger set of governance institutions, and poor people are unlikely ever to be involved directly in a lawsuit against a bureaucratic agency, administrative law and litigation may nonetheless have an important role to play in expanding access to bureaucratic justice for the poor. Thus, in this area of administrative law reform, the issues of access to bureaucratic justice and access to legal justice overlap.

## Legal Mechanisms to Facilitate Participation and Monitoring

Three major types of administrative law reform may enhance the efficacy of external monitoring mechanisms: freedom of information (FOI) laws, 'impact statement' requirements, and whistleblower protections.

FOI laws are meant to increase the transparency by giving citizens entitlement to information about bureaucratic rules, decisions, and practices. Traditionally, many governments resisted FOI legislation on grounds of privacy or secrecy, and certain private interests may oppose FOI legislation if these interests benefit from the ability to manipulate a relatively opaque administrative process for their own benefit. Despite this, recognition of the benefits of FOI legislation seems to be on the rise: 65 countries currently have some form of FOI legislation, with most of those laws enacted since 1990 (Kocaoglu and Figari 2006).

FOI laws do have some important costs. Firstly, the traditional objections based on privacy or secrecy concerns may have merit in some contexts. Therefore, certain exemptions to FOI laws related to issues like national security, ongoing court proceedings, and personal or commercial privacy may be appropriate, though these exemptions should be narrowly drafted and construed. Secondly, in poor countries with weak bureaucratic capacity, compliance with FOI requirements and responding to FOI requests can be extremely costly, and could end up paralysing the bureaucracy (Russell-Einhorn et al. 2002). This suggests that reformers should be careful not to simply lift FOI laws 'off the shelf' from wealthy countries; rather, FOI laws must be carefully tailored to the needs and capacities of particular countries.

'Impact statement' legislation requires a government agency to provide a public report on the

impact of a proposed action on some important public value before the agency takes action. The most common legislation of this type is the 'environmental impact statement' requirement pioneered by the U.S. National Environmental Policy Act of 1970 and adopted by numerous other countries and some international organisations. Though the specifics of these laws vary, they all require that agencies prepare a report on the impact of major proposed actions on environmental quality. Other types of impact statement requirements have also been proposed, and a few have been implemented, though the environmental impact statement is still by far the most common version of this strategy. One approach that might be worth considering is the use of a 'poverty impact statement' that would require agencies, after consulting the poor community, to produce a report on how their initiatives are likely to affect the poor. The main advantages of impact statement laws are, first, that they increase public accountability and the efficacy of external oversight by disclosing potential adverse effects of agency action, and, second, that they may alter the agency's own internal decision-making process by drawing attention to issues that might otherwise be ignored or neglected. However, impact statement requirements, like FOI legislation, can be burdensome, especially for under-funded or low-capacity agencies. Saddling bureaucracies with too many impact statement requirements may induce 'paralysis by analysis'. The appropriate balance between these competing interests cannot be resolved in abstract or general terms.

Whistleblower protection statutes are a third form of administrative law reform that seeks to improve transparency and political accountability. Without credible protections, individuals within a bureaucratic organisation who learn about corruption or other forms of malfeasance will be re-

luctant to come forward because they fear retaliation. Effective whistleblower protection statutes typically enable individuals to make complaints anonymously or confidentially, imposing serious civil and criminal penalties on those who retaliate against whistleblowers, and (sometimes) giving potential whistleblowers a financial incentive to come forward either by offering them a set 'bounty' for useful information or by offering them a percentage of any money the government recovers from wrongdoers as a result of the whistleblower's report. Whistleblower protection statutes may not be effective in redressing endemic or high-level corruption, especially when the enforcement of the laws is unreliable, but these statutes may nonetheless be effective and important elements of a broader anti-corruption strategy.

### Judicial Review of Administrative Decisions

FOI legislation, impact statement laws, and whistleblower protection statutes are all legal mechanisms through which courts enforce rules that enable other actors — NGOs, politicians, and the media — to monitor bureaucratic performance more effectively. Thus, increasing the ability of individuals and groups to make sure these laws are enforced may improve poor people's access to bureaucratic justice.

Litigation and judicial institutions may also play a more direct role in ensuring bureaucratic accountability. Such litigation can take two main forms. First, some litigants pursue what might be termed 'oversight' litigation. Individuals who believe that a government agency has taken, or is about to take, some illegal action that adversely affects their interests may file a legal challenge. The judiciary then assumes the role of public monitor, ensuring that the agency has acted lawfully.

The second form of litigation is so-called 'public interest litigation' (PIL). Citizen groups typically

bring PIL suits to effect broader legal change or institutional reform. PIL has played a significant role in the strategy of social reform movements in South Asia and South Africa in particular, and it is increasingly common in other parts of the world as well (NCLEP India 2007, Dembrowski 2000, Gloppen 2005, Hershkoff and McCrutchon 2000). The distinction between oversight litigation and PIL is more a matter of degree than a difference in kind. Oversight litigation more closely resembles a traditional lawsuit alleging a private injury to a legally protected interest, while PIL seeks to involve the judiciary in a more overtly law-making or reformist role, but in practice many oversight suits seek institutional changes, and much PIL is directed toward the redress of widely-shared private grievances against bureaucratic institutions.

Litigation is not the most desirable form of improving administrative accountability and bureaucratic justice. In the first place, any strategy that relies on litigation and judicial review is likely to be expensive and time-consuming. 'Retail' administrative lawsuits may also put an enormous burden on the court system. For example, in many Latin American countries citizens who believe they have been wrongly denied a government benefit can file an *amparo* claim directly in the civil courts, thereby circumventing the administrative review process. These *amparo* claims clog the courts, and because they are focused only on the individual claim they tend not to address the root cause of bureaucratic failure.

Secondly, courts may lack the expertise needed to understand the complex, technical issues that often arise in administrative law or institutional reform cases. Judges, however, may overestimate their own competence in such matters. Some countries have attempted to address this problem by establishing specialised administrative courts,

but even in these cases judges are at a comparative disadvantage compared to other institutions when considering issues of bureaucratic institutional design.

Finally, some observers have raised the concern that well-intentioned reformers, especially those with elite legal backgrounds, may be seduced by the appeal of litigation as a vehicle of social change and pursue this strategy at the expense of more valuable — but less visible and exciting — political organisation, lobbying, and education.

The three concerns cited are all valid, and litigation should generally not be the first line of defence (or offence) in dealing with an abusive, unaccountable, or underperforming bureaucracy. Nevertheless, having available litigation as a weapon of last resort may be vital in making the other mechanisms of bureaucratic justice function effectively. The principles that should apply to both to administrative oversight litigation and to PIL are the same as those discussed in the context of access to legal justice generally: reformers should work to eliminate failures in the market for legal services and litigation, and establish institutions that allocate scarce judicial resources to the cases where judicial intervention is most necessary and appropriate. Thus, desirable approaches may include broadening rules of standing, adopting one-way fee-shifting rules, facilitating representative or collective lawsuits, and targeting scarce legal aid resources at cases that affect large numbers of people, while at the same time reformer should provide more options and resources for non-judicial relief of administrative disputes, and should require exhaustion of administrative remedies as a precondition for judicial review.

## 5. Conclusions and Recommendations

In order to escape the poverty trap, poor people need a legal system that enables them to realise the full value of their physical and human capital. The three substantive cornerstones of the legal empowerment agenda are property law, labour law, and law for small business. Reform of the substantive law, however necessary, would not be sufficient to achieve true legal empowerment. For the legal system to play a role in empowering the poor to lift themselves out of poverty, they need more than laws conferring the appropriate mix of rights, powers, privileges, and immunities; they also need a legal and judicial system that can make these legal entitlements practical and meaningful. Empowering the poor and disadvantaged to seek remedies for injustice requires efforts to develop and/or strengthen linkages between formal and informal structures and to counter biases inherent in both systems. Our working group has examined the issues involved and has developed guidelines to provide ways of improving access to justice.

Summarising our main conclusions, we stress that access to justice requires granting all people an individual identity (see Section 2 of this chapter), and that realising this goal requires:

- Addressing the lack of bureaucratic capacity in states' identity registration systems by eliminating user fees, supporting outreach, working through non-governmental organisations, and bundling registration services with other social services or traditional practices and creating one stop shops.
- Counteracting politically-motivated legal exclusion by a combination of facilitation of political dialogue, legislative reform, international attention, engaging national human rights machineries, stakeholder consultations, and community involvement.
- Creating incentives to register one's legal identity with the state by providing information, working through trustworthy local intermediaries, and minimising the adverse consequences of formal registration.

In Section 3 of this chapter, we identified four strategies to improve access to justice, taking the justifiable problems of the poor as starting points. They build on the options poor people have available to address these problems and to enforce their rights: spontaneous ordering mechanisms, informal, faith-based and customary justice, as well as the formal legal system. The common aim of these strategies is to **lower costs** that may be involved and **increase justness and fairness** of the outcomes poor people may obtain. These strategies have proven their value in practice, or seem particularly promising in the light of a theoretical framework that emphasises **reduction of transaction costs** and **remedying market failure**:

- Empowering the poor through improved dissemination of legal information and formation of peer groups (self-help strategies). This can be done by strengthening information-sharing networks across consumer groups and organisations, by using information technology, non-formal legal education and media campaigns, tailored to the target population and their problems.
- Broadening the scope of legal services for the poor, in several directions: an orientation towards empowerment, coaching and learning; lower cost delivery-models (through paralegals, or otherwise); bundling with other services (health care, banking, insurance) and intro-



ducing the concept of one stop shop; use of the methods and skills of alternative dispute resolution, mediation and arbitration; and legal aid services that are capable of assistance with the informal system as well as the state system. Moreover, the market for legal services should gradually be liberalised by reducing regulatory entry barriers (such as ‘unauthorised practice of law’ restriction) for service providers, including non-lawyers, who are interested in offering legal services to the poor. Scarce legal aid resources should be targeted to cases where the legal claim produces public goods (such as general deterrence or legal reform) and to situations with very high stakes for the individual (such as criminal defence).

- Reducing aggregate legal transaction costs by adopting a combination of legal simplification and standardisation reforms, expanded opportunities for representative or aggregate legal claims, and improving the climate for fair settlements in the shadow of law, by ensuring a credible threat of a neutral intervention.
- Combining formal or tacit recognition of the informal justice system with education and awareness campaigns that promote evolution of the informal state system, targeted constraints on the informal system (in particular limits on practices that perpetuate the subordination of women), and appropriately structuring the relationship between state and non-state systems so that the informal system can provide an efficient means of resolving private disputes, but people are able to use the formal system when crime and fundamental public values are implicated.

Because many poor people have to rely on access to the (local) government hierarchy rather than the adjudicative system to resolve their disputes

and obtain necessary services, access to justice reform may require not only improving access to adjudicative justice, but also improving **access to bureaucratic justice** (discussed in Section 4). Addressing the failures of the bureaucratic system may entail:

- Public administration reforms, including reforms that improve external monitoring and also structural reforms (such as improving bureaucratic adjudication and grievance procedures, expanding public participation in administrative decision-making, pursuing civil service reform to expand opportunities for performance incentives in government administration, and increasing decentralisation and redundancy in bureaucratic service provision to improve efficiency and combat corruption.
- Administrative law reforms, including appropriately-tailored expansions of freedom of information laws, impact statement requirements, and whistleblower protections, as well as appropriate but limited judicial review of administrative action.

## Chapter 1 Endnotes

1 Excellent recent reports prepared by the Asian Development Bank (ADB) (2004, 2005, 2007), UNICEF (2002, 2005), and the Inter-American Development Bank (IADB) (2006) form the basis of much of the material in this section. These organisations have taken an important leadership role by bringing this problem to the attention of the international community - gathering vital information on the nature and scope of the problem and developing possible strategies for reform.

2 For example, the International Covenant on Civil and Political Rights, Arts. 16 and 24; International Covenant on Economic, Social, and Cultural Rights, Arts. 6 and 13; Convention on the Rights of the Child, Arts. 7—8; International Convention on the Protection of the Rights of All Migrant Workers, Art. 9; Convention on the Elimination of All Forms of Discrimination Against Women, Arts. 7—9; American Convention on Human Rights, Art. 20; European Convention on Nationality, Art. 6; African Charter on the Rights and Welfare of the Child, Arts. 6 and 11.

3 Sources discussing these and other groups include Lynch and Ali (2006), Lynch (2005), Amnesty International (2005), Sokoloff (2006), Refugees International (2006), Kalvaitis (1998), and Adam (2006).

4 Describing this barrier as a 'transaction cost' is not meant to trivialise the feelings of cultural and social exclusion this linguistic barrier may also engender. This phenomenon may create a type of psychological cost to using the legal system that is as significant, in practical terms, as the economic cost.

5 It is worth noting, however, that the issue of linguistic barriers to access, like the issue of legal identity discussed earlier, may implicate serious political conflicts. Sometimes linguistic barriers to access arise because of government policies designed specifically to disadvantage particular ethnic groups, or to advantage the wealthy relative to the poor. Thus, even if the financial costs of dealing with this particular obstacle may be relatively low, the political costs may be greater.

6 Much of this discussion is based on an excellent recent report prepared by Ewa Wojkowska (2006) of the UNDP's Oslo Governance Centre.

## Chapter 1 Bibliography

- Adam, A.H. 2006. *The Nubians and Statelessness: History in Defining Modern Lives*, available at [http://www.justiceinitiative.org/statelessness\\_meeting](http://www.justiceinitiative.org/statelessness_meeting).
- Afroz, T. 2006. 'Access to Law: The Bangladesh Perspective.' available at <http://www.adb.org/Documents/Books/Strengthening-Criminal-Justice-system/chap04>.
- Anderson, M.2003. *Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in LDCs* (IDS Working Paper 178, Feb. 2003).
- Ardaya, G. and G. Sierra.2002. *Toward an Inclusive Elections Process: Final Report of Pro-Citizens' Participation Consortium*.UK Department for International Development. La Paz, Bolivia.
- Amnesty International.2005. *Myanmar: The Rohingya Minority: Fundamental Rights Denied*. available at: [http://www.justiceinitiative.org/statelessness\\_meeting](http://www.justiceinitiative.org/statelessness_meeting).
- Asian Development Bank (ADB). 2001a. *Law and Policy Reform at the Asian Development Bank 2000. vol. 2*, available at <http://www.asianlii.org/asia/other/ADBLPRes/2001/2.pdf>.
- \_\_\_\_\_. 2001b. *Report and Recommendation of the President to the Board of Directors on Proposed and Technical Assistance Grant to the Islamic Republic of Pakistan for the Access to Justice Programme*, available at [http://www.adb.org/Documents/RRPS/PAK/rpp\\_32023.pdf](http://www.adb.org/Documents/RRPS/PAK/rpp_32023.pdf).
- \_\_\_\_\_. (ADB) 2001c. *Legal Empowerment: Advancing Good Governance and Poverty Reduction, 2000*, available at [http://www.adb.org/Documents/Others/Law\\_ADB/lpr\\_2001\\_Part\\_2.pdf](http://www.adb.org/Documents/Others/Law_ADB/lpr_2001_Part_2.pdf).
- \_\_\_\_\_. 2002. *Technical Assistance Completion Report — Disseminating Laws and Strengthening the Legal Information System*, TA 3238-TAJ, available at [http://www.adb.org/Documents/TACRs/TAJ/tacr\\_taj\\_3238.pdf](http://www.adb.org/Documents/TACRs/TAJ/tacr_taj_3238.pdf).
- \_\_\_\_\_. 2004., *Technical Assistance for Establishing Legal Identity for Social Inclusion*, R188-04 (Oct. 4, 2004).
- \_\_\_\_\_. 2005. *Inception Report: Establishing Legal Identity for Social Inclusion*, RETA No. 6188 Aug.10, 2005).
- \_\_\_\_\_. 2007. *Legal Identity for Inclusive Development* (Caroline Vandabeele and Christine V. Lao, eds.).
- Axworthy, L. 2007. Quoted in 'Toward Consensus.' *Legal Empowerment Quarterly*. July 2007.p. 2.
- Barendrecht, M. and P. van Nispen, *Micro-justice* (International Legal Alliances), available at <http://www.intall.org/documents/PaperMicrojustice0704.pdf>.
- Barton, B. 2001. 'Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation.' *Arizona State Law Journal* 33:429-490.
- Bloom, A.2006. 'The Economics of Civil Justice: From Justice to Global Peace: A (Brief) Genealogy of the Class Action Crisis.' *Loyola of Los Angeles Law Review*. 39:719.
- Bolton, P. and M. Dewatripont.2005. *Contract Theory*. Cambridge and London: MIT Press.
- Bueno de Mesquita, E. and M. Stephenson. 2007. 'Regulatory Quality Under Imperfect Oversight.' *American Political Science Review*. 101(3):605-620.

- Buscaglia, E. and T. Ulen. 1997. 'A Quantitative Assessment of the Efficiency of the Judicial Sector in Latin America.' *International Review of Law and Economics*. 17:275.
- Cantrell, D. 2004. 'Deborah L. Rhode's Access to Justice: The Obligation of Legal Aid Lawyers To Champion Practice by Nonlawyers.' *Fordham Law Review*. 73:883.
- Capper, D. 2003. 'The Contingency Legal Aid Fund: A Third Way to Finance Personal Injury Litigation.' *Journal of Law and Society*. 30(1):66-83.
- Carothers, T. 2003. 'Promoting the Rule of Law Abroad: The Problem of Knowledge.' Carnegie Endowment Working Paper No. 34. Washington, D.C. January 2003
- Centre for Applied Legal Studies.2002. *Final Report on Gender, Citizenship and Governance Project*.
- Damazo, J. 2006. *Registering a New Sense of Identity*, available at <http://www.adb.org/media/Articles/2006/11077-Cambodia-legal-identity/>.
- Dembowski, H. 2000. *Taking the State to Court: Public Interest Litigation and the Public Sphere in India*.
- Domberger, S. and A. Sherr.1989. 'The Impact of Competition on Pricing and Quality of Legal Services.' *International Review of Law and Economics*. 9:41-56.
- Dunford, C. 2002. 'Building Better Lives: Sustainable Integration of Micro-finance with Education in Child Survival, Reproductive Health, and HIV/AIDS Prevention for the Poorest Entrepreneurs.' In: Daley-Harris, S. ed., *Pathways Out of Poverty*. Bloomfield, Conn: Kumarian Press, Inc.
- Faundez, J. 2006. 'Should Justice Reform Projects Take Non-State Justice Systems Seriously? Perspectives from Latin America.' in *The World Bank Legal Review: Law, Equity, and Development*.
- Galanter, M. 1976., 'Delivering Legality: Some Proposals for the Direction of Research.' *Law and Society Review*. 11:225-246.
- \_\_\_\_\_. M. 1974. 'Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change.' *Law and Society Review*. 9:95-160.
- Gidi, A. 2003. 'Class Actions in Brazil — A Model for Civil Law Countries.' *American Journal of Comparative Law*. 51:311-.
- Girishankar, N. et al. 2002. 'Governance,' in Klugman, J., ed., *A Sourcebook for Poverty Reduction Strategies*, available at [http://poverty2.forumone.com/files/4105\\_cahp8.pdf](http://poverty2.forumone.com/files/4105_cahp8.pdf).
- Gloppen, S. 2005., *Public Interest Litigation, Social Rights and Social Policy*, available at <http://siteresources.worldbank.org/INTRANETSOCIALDEVELOPMENT/Resources/Gloppen.rev.3.pdf>.
- Golub, S. 2000. 'Beyond the Rule of Law Orthodoxy: The Legal Empowerment Alternative.' Carnegie Endowment Working Paper No. 41. Washington, D.C. October 2003.
- \_\_\_\_\_. 2003. *The Legal Empowerment Alternative*, in T. Carothers ed., *Promoting the Rule of Law Abroad, In Search of Knowledge*.
- \_\_\_\_\_. 2004., *Forging the Future: Engaging Law Students and Young Lawyers in Public Service, Human Rights, and Poverty Alleviation* (Open Society Justice Initiative Issues Paper), available at [http://www.justiceinitiative.org/db/resource2?res\\_id=101449](http://www.justiceinitiative.org/db/resource2?res_id=101449).
- \_\_\_\_\_. 'Combating Corruption in Non-judicial Justice Systems.' in *Global Corruption Report 2007*. Transparency International (London: Pluto Press, 2007).
- Grajzl, P. and P. Murrell. 2006. 'Lawyers and Politicians: The Impact of Organised Legal Professions on Institutional Reforms.' *Constitutional Political Economy*.17(4):251-276.
- Hammergren, L. 2007. *Access to Justice: Legal Assistance, Special Courts, ADR, and Beyond*.
- Hay, J., A. Shleifer and R. Vishny.1996. 'Toward a Theory of Legal Reform.' *European Economic Review*. 40:559-567.
- Henisz, W. and B. Zelner.2001. 'The Institutional Environment for Telecommunications Investment.' *Journal of Economics and Management Strategy* 10(1):123-147.
- Hershkoff, H. and A. McCutcheon.2000. 'Public Interest Litigation: An International Perspective,' in *Many Roads to Justice: The Law-Related Work of Foundation Grantees Around the World*. McClymont, M. and S. Golub, eds. New York: Ford Foundation.
- Hoffman, M., P. Rubin and J. Shepherd.2005. 'An Empirical Study of Public Defender Effectiveness: Self-Selection by the 'Marginally Indigent'.' *Ohio State Journal of Criminal Law* 3:223-255.
- Huber, J. and N. McCarty. 2004. 'Bureaucratic Capacity, Delegation, and Political Reform.' *American Political Science Review*. 98(3):481-494.
- Inter-American Development Bank (IADB).2006. *Hidden in Plain Sight: Undocumented Citizens in Latin America*. Ideas for Development in the Americas 1 (Jan.-Apr. 2006).
- Kalvaitis, R. 1998. 'Citizenship and National Identity in the Baltic States.' *Boston University International Law Journal*. 16:231.
- Kennedy, A.2007. *Rule of Law* (LEP Commission Discussion Paper).
- Killian, M. 2003. 'Alternatives to Public Provision: The Role of Legal Expenses Insurance in Broadening Access to Justice: The German Experience.' *Journal of Law and Society*. 30(1):31-48.
- Kocaoglu, N. and A. Figari. 2006. *Using the Right to Information as an Anti-Corruption Tool*. (Transparency International), available at [http://www.transparentnost.org.yu/aktivnosti/slobodan\\_pristup\\_inf/TI2006\\_europe\\_access\\_information.pdf](http://www.transparentnost.org.yu/aktivnosti/slobodan_pristup_inf/TI2006_europe_access_information.pdf).
- Kritzer, H. 1997. 'Rethinking Barriers to Legal Practice.' *Judicature* 81(3):100-103.
- \_\_\_\_\_. 2004. *Risks, Reputations, and Rewards: Contingency Fee Legal Practice in the United States*.
- Laczo, M. 2003. 'Deprived of an Individual Identity: Citizenship and Women in Nepal.' *Gender and Development*. 11(3):76-82.
- Landes, W. and R. Posner. 1979. 'Adjudication as a Private Good.' *Journal of Legal Studies* 8:235-284.
- Lane, Jan-Erik. 2000. *New Public Management*. New York: Routledge.
- Levy, B. and P. Spiller. 1996. *Regulations, Institutions, and Commitment: A Comparative Analysis of Telecommunications Regulation*. Cambridge: Cambridge University Press.
- Lin, Zixin. 2006. *Thailand: Faster Citizenship for Hilltribes Pushed*, available at [http://www.newsmekong.org/thailand\\_faster\\_citizenship\\_for\\_hilltribes\\_pushed](http://www.newsmekong.org/thailand_faster_citizenship_for_hilltribes_pushed).

- Lopez-de-Silanes, F. 2002. *The Politics of Legal Reform* (U.N. Conference on Trade and Development. G-24 Discussion Paper Series No. 17), available at <http://www.unctad.org/en/docs/pogdsmdpbg24d17.en.pdf>.
- Lynch, M. 2005. 'Lives on Hold: The Human Cost of Statelessness.' *Refugees International* 23.
- Lynch, M. and P. Ali. 2006. Buried Alive: The Kurds in Syria, *Refugees International*. Jan. 2006.
- MacCormack, D.N. and R. Summers eds. 1991. *Interpreting Statutes: A Comparative Study*.
- \_\_\_\_\_. 1997. *Interpreting Precedent: A Comparative Study*.
- Maru, V. 2006. 'Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide.' *Yale Journal of International Law*. 31:427-476.
- McClymont, M. and S. Golub, eds . 2000. *Many Roads to Justice: The Law-Related Work of Ford Foundation: Grantees Around the World*. Ford Foundation. 2000.
- McQuoid-Mason, D.2000. "The Delivery of Civil Legal Aid Services in South Africa." *Fordham International Law Journal*. 24: S111-S142.
- Menon, N.R.M. 2007..'Legal Education and Training in Bangladesh.'In: *Strengthening the Criminal Justice System* . Asian Development Bank.
- Messick, R. 1999. *Judicial 'Reform and Economic Development: A Survey of the Issues.'* *The World Bank Research Observer*.14(1):117-136.
- Michelson, E. 2007. 'Climbing the Dispute Pagoda: Grievances and Appeals to the Official Justice System in Rural China.' *American Sociological Review*. 72,2:459—485, 2007.
- Millennium Promise. 2007. 'Millennium Villages: A Revolution Is Possible.' available at [http://www.millenniumpromise.org/site/PageServer?pagename=mv\\_main](http://www.millenniumpromise.org/site/PageServer?pagename=mv_main).
- Murphy, K., A. Shleifer and R. Vishny.1991.'The Allocation of Talent: Implications for Growth.' *Quarterly Journal of Economics*. 106(2):503-530.
- Narayan, D. 2002. *Empowerment and Poverty Reduction: A Sourcebook*.
- \_\_\_\_\_. 2005. *Measuring Empowerment; Cross Disciplinary Perspectives*, IBRD/World Bank.
- National Consultations on Legal Empowerment of the Poor (NCLEP) Ethiopia, Paper prepared on Access to Justice.2007.
- \_\_\_\_\_. India, Paper prepared on Access to Justice. 2007.
- \_\_\_\_\_. Indonesia, Paper prepared on Access to Justice.2007.
- \_\_\_\_\_. Kenya, Paper prepared on Access to Justice.2007.
- \_\_\_\_\_. Pakistan, Paper prepared on Access to Justice.2007.
- \_\_\_\_\_. Philippines, Paper prepared on Access to Justice.2007.
- \_\_\_\_\_. Tanzania, Paper prepared on Access to Justice. 2007.
- \_\_\_\_\_. Uganda, Paper prepared on Access to Justice.2007.
- Open Society Institute . 2004. 'Justice Initiatives: Legal Aid Reform and Access to Justice.' Feb. 2004, available at [http://www.soros.org/resources/articles\\_publications/publications/justice\\_20040225/justice\\_initiatives\\_20040225\\_2.pdf](http://www.soros.org/resources/articles_publications/publications/justice_20040225/justice_initiatives_20040225_2.pdf)
- Paldi, B. 2006. 'A Step Towards Peace.' ACE Electoral Knowledge Network, available at <http://aceproject.org/today/feature-articles/a-step-towards-peace>.
- Posner, R. 1998. *Creating a Legal Framework for Economic Development*. World Bank Research Observer 13:1-11.
- Refugees International, *Stateless Biharis in Bangladesh: A Humanitarian Nightmare*, available at <http://www.refugeesinternational.org/content/article/detail/4666/>.
- Regan, F. 2003. 'The Swedish Legal Services Policy Remix: The Shift from Public Legal Aid to Private Legal Expense Insurance.' *Journal of Law and Society*. 30(1):49-65.
- Rhode, D. 2000. *In the Interest of Justice: Reforming the legal profession*. New York: Oxford University Press.
- \_\_\_\_\_. 2004. *Access to Justice*. New York: Oxford University Press.
- \_\_\_\_\_. Rhodes, R.A.W. 1997. *Understanding Governance; Policy Networks, Governance, Reflexivity and Accountability*. Buckingham, Philadelphia: Open University Press.
- Russell-Einhorn, M. et al. 2002. 'Strengthening Access to Information and Public Participation in Transition Countries — Latvia as a Case Study in Administrative Law Reform.' *Administrative Law Review*. 54:459-.
- Schwartz, A., and L. Wilde.1979. 'Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis.' *University of Pennsylvania Law Review*. 127:630-.
- Shavell, S. 1995. 'Alternative Dispute Resolution: An Economic Analysis.' *Journal of Legal Studies*. 24:1-28.
- \_\_\_\_\_. 1997. 'The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System.' *Journal of Legal Studies*. 26:575-612.
- \_\_\_\_\_. 1982. 'Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs.' *Journal of Legal Studies*. 11(1):55-81.
- Shleifer, A., and R. Vishny.1993. 'Corruption.' *Quarterly Journal of Economics* 108(3):599-617.
- Sokoloff, C. 2006. *Denial of Citizenship: A Challenge to Human Security*.
- Spaulding, N.2004. 'The Luxury of the Law: The Codification Movement and the Right to Counsel.' *Fordham Law Review* 73:983-.
- Thomas, G. and A. Shrestha. 1998. *Breaking New Ground: A Case Study of Women's Empowerment in Nepal*, Women's Empowerment Programme (USAID/Nepal)
- Ting, M.2003. 'A Strategic Theory of Bureaucratic Redundancy.' *American Journal of Political Science*. 47(2):274-292.
- Tsikata, D. 2003. 'Securing Women's Interests Within Land Tenure Reforms: Recent Debates in Tanzania.' *Journal of Agrarian Change*. 3:149-183.
- UNICEF. 2006. *Birth Registration in Bangladesh*, available at [http://www.unicef.org/bangladesh/Birth\\_Registration\\_in\\_Bangladesh.pdf](http://www.unicef.org/bangladesh/Birth_Registration_in_Bangladesh.pdf).
- \_\_\_\_\_. 2005. *The 'Rights' Start to Life: A Statistical Analysis of Birth Registration*, available at <http://www.childinfo.org/areas/birthregistration/docs/Full%20text%20English.pdf>.
- \_\_\_\_\_. 2003. *Birth Registration*, available at [http://www.unicef.org/southafrica/protection\\_761.html](http://www.unicef.org/southafrica/protection_761.html).
- \_\_\_\_\_. 2002. 'Birth Registration: Right from the Start.' *Innocenti Digest* 9:1.

United Nations Development Programme (UNDP). 2005. *Programming for Justice: Access for All; A Human Rights-Based Approach to Access to Justice*, available at <http://regionalcenter-bangkok.undp.or.th/practices/governance/a2j/tools/index1.htm>.

\_\_\_\_\_. 2006. *U.N. Human Development Report 2006 — Beyond Scarcity: Power, Poverty, and the Global Water Crisis*.

\_\_\_\_\_. 2007. *Human Security in Bangladesh: In Search of Justice and Dignity*.

\_\_\_\_\_. (UNDP Indonesia.) 2007 *Justice For All? — An Assessment of Access to Justice in Five Provinces of Indonesia*.

United States Agency for International Development (USAID). 2002. *Achievements in Building and Maintaining the Rule of Law: MSI's Studies in LAC, EandE, AFR, and ANE*. Occasional Paper Series by USAID. Nov. 2002, available at [http://www.usaid.gov/our\\_work/democracy\\_and\\_governance/publications/pdfs/pnacr220.pdf](http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacr220.pdf).

\_\_\_\_\_. 2006. *Administrative Law and Procedural Systems (ALPS) Reform in Bosnia and Herzegovina, 3rd Annual Report*, available at [http://www.usaid.ba/Assessments/Admin%20Law%20Assessments/IRIS\\_ALPS%202005%20Annual%20Report.doc](http://www.usaid.ba/Assessments/Admin%20Law%20Assessments/IRIS_ALPS%202005%20Annual%20Report.doc).

Van Rooij, B. 2007. *Bringing Justice to the Poor: Bottom-up Legal Development Cooperation*, Working paper available at <http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/VanRooijBringingJusticetothePoor.pdf>

Vigoda, E. 2002. 'From Responsiveness to Collaboration: Governance, Citizens, and the Next Generation of Public Administration.' *Public Administration Review*. 62: 527-538.

Wojkowska, E. 2006. *Doing Justice: How Informal Justice Systems Can Contribute* (UNDP, Oslo Governance Centre), available at <http://www.undp.org/oslocentre/docs07/DoingJusticeEwa-Wojkowska130307.pdf>.

World Bank. 2007. 'Promoting the Right of Egyptian Woman To Claim Their Identity and Their Futures.' Development Marketplace Project Stories. Available at <http://go.worldbank.org/3DKFL6QT90>.

\_\_\_\_\_. 1997. 'Restraining Arbitrary State Action and Corruption.' In: *World Development Report*. Washington, D.C.: Oxford University Press.

Yeazell, S. 2006, 'Socializing Law, Privatizing Law, Monopolizing Law, Accessing Law.' *Loyola of Los Angeles Law Review*. 39(2):691-717.

