

legal empowerment - a way out of poverty

december 2006 – issue 2

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The views expressed in this anthology are those of the authors and do not necessarily represent the views of the Norwegian Ministry of Foreign Affairs.

Dear reader

Now, more than a decade since the end of the Cold War, we still have a long way to go before we can declare the end of the war against poverty. Social and economic disparities are increasing rather than diminishing. We must raise awareness of the responsibility of all countries to fight unjust systems, and we must attack poverty bottom-up. People should be their own entrepreneurs and enjoy the protection afforded by the rule of law.



Most of the world's poor are outside the formal economy. Unless they find ways of inclusion and formalised participation in their own country's economy, billions of people will still be excluded from participating in global economic growth.

This is why Norway, together with other partner countries, set up the independent Commission on Legal Empowerment of the Poor in 2005. Since then, we have been working actively to shape its mandate and have given input both to consultation processes and to the possible outcome itself.

Norway shares the vision of the Commission:

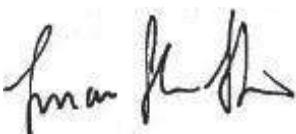
- to build on lessons learned from development and foreign policy
- to advance this work by focusing its efforts on the poor in the informal economy
- to enable more people to move out of poverty by giving them access to secure property rights, enforceable labour rights and an equitable justice system.

I am also concerned about the links between health and sustainable global development. Informality is a danger in itself, and adds to the obstacles poor people have to overcome in their pursuit of better lives. Access to legal services is also an important part of this agenda.

We are also facing one of the biggest challenges in the history of mankind: global climate change. Sustainable development must be at the top of our foreign policy agenda. The formalisation agenda will address people's ability to protect the environment in their own economic performance. Thus, it links up to some of our most central foreign policy aims.

In this volume of the anthology series that will be published during the course of the Commission's mandate, you will find an article on nation-building by Co-chair Madeleine Albright and one on why globalisation creates new opportunities for poor people, given the right conditions, by Michael Moore. Anna Tibaijuka, Executive Director of UN-HABITAT, explores the issue of the urban poor and formalisation. The volume touches upon the complicated reality of indigenous people as to an integrated approach to property rights, as well as women's access to property rights. Finally, there is an article on simple arbitration mechanisms that can be set up to assist poor people in extending their property rights, with examples from former Soviet republics. The importance of networking and seamless interaction with civil society in order to create real results is also explored.

My aim is to set in motion a process and encourage reflection and action by providing inputs both to the Commission itself and to the broader international community. Foreign policy is entering into new areas – those areas I have now mentioned. We need to take a fresh look at how we shape foreign policy. The scope, the content of foreign policy is evolving, and we must find ways to respond more resolutely than ever before on how to fight poverty.

A handwritten signature in black ink, appearing to read "Jonas Gahr Støre".

Jonas Gahr Støre
Minister of Foreign Affairs of Norway

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Norwegian Minister of Foreign Affairs

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*Dr. Madeleine Albright,
Co-chair of the Commission on Legal Empowerment of the Poor*

It's Time for Empowerment

In a world where terror and the proliferation of nuclear weapons threaten our daily lives, we are likely to forget the axis of evil – poverty, ignorance and disease. Make no mistake, extreme poverty is a jail in which all too many of our fellow human beings are sentenced for life.

Extreme poverty threatens the lives of three billion people who are entrapped by poverty. The coming twelve months will not produce a miracle solution to a problem as old as history. We must work, however, to build momentum for a sustained and multi-faceted international effort. In recent times, the anti-poverty struggle has edged its way up the global policymaking agenda. Gains were made both in 2000 and in 2005 on debt relief for the poorest countries. The G-8 countries have issued ambitious statements and pledged to increase aid dollars, euros and yen.

As we have learned in decades past, however, reducing poverty requires more than declarations of resolve and an incremental increase in resources; it also demands better ideas. Here, too, there is progress. Policymakers are increasingly open to newer concepts, designed not only to alleviate the symptoms of poverty, but also to attack root causes. One

such idea is being explored by the Commission on Legal Empowerment of the Poor¹, a UN-affiliated initiative. I co-chair the Commission in partnership with Peruvian economist Hernando de Soto, who champions the idea that the poor remain poor in part because they do not have legal rights.

As Mr. de Soto points out, over three billion people live outside the protections of law – in some countries, the percentage is as high as eighty percent of the population. These citizens do not own the houses or apartments in which they live, have no title to the land they till, cannot prove that the livestock they feed and care for are their own, do not qualify for credit, and have no legal license to sell what they produce. Many do not possess any legal documents, even a birth certificate or proof of identity. Constantly vulnerable, they may be exploited by all who wield power, including criminals, predatory government officials, unscrupulous employers, and single-minded developers who may want to move the poor out of the way.

Many of the people without legal rights derive only temporary benefits from conventional anti-poverty effort. Some programs, which remain necessary, may help the poor to become less hungry, less ill or less desperate, but not necessarily more independent. Education is an indispensable part of this, but independence also requires the empowerment of individuals, families and groups within a legal system that is not skewed unfairly to benefit the rich at the expense of the poor. There is evidence to support this principle in Argentina, where a twenty year study recently demonstrated that squatters who were given legal rights to their property decreased the size of their households, improved their housing and increased schooling for their children.

Empowering the poor to improve their own lives is an ambitious undertaking, and there is no silver bullet at hand. The Commission on Legal Empowerment of the Poor has organized working groups around some of the critical areas for reform: establishing secure rights to land, prop-

1 <http://legalempowerment.undp.org>

erty and other assets, expanding access to credit and other financial services, strengthening the rule of law through independent and transparent institutions, simplifying government bureaucracy at all levels to create a better environment for business, and fostering participatory democracy through non-governmental organizations. Each provides a piece to the solution of the poverty puzzle. Taken together, they can surely help to solve it.

Legal empowerment will only be recognized as a useful approach to poverty reduction if it offers political leaders a viable path for implementing large-scale reforms. By design, the Commission is made up of policymakers with a first-hand understanding of how laws get made and how public policy is brokered. In addition to sharing their practical experience, they are well-positioned to advocate among their peers and, in some cases, to act as a catalyst for change in their own nations. Commission member and former President Benjamin Mkapa, who is leading a campaign in support of legal reforms in Tanzania, points out that while the macroeconomic situation in Tanzania has improved dramatically over the last decade, there has been little impact on poverty. In a country where over 90% of all businesses operate outside the legal system, he describes a disconnect between government efforts and the vast majority of Tanzanians who are excluded from participating in a market economy.

Over the coming year, the Commission will be organizing activities in Tanzania, as well as in Indonesia, Egypt, India and Brazil. In Mexico, where a new administration is taking office, there is interest across the political spectrum in property and legal reforms – the Commission will be on the ground there too. The importance of legal empowerment now also figures prominently in the strategies of organizations that have become partners of the Commission, including the World Bank, the UN Development Programme, the International Labor Organization, UN-Habitat and the Inter-American Development Bank.

The goal of ending extreme poverty is vital not solely as a matter of compassion – in fact, the world economy will benefit enormously from the

contributions of those who are able to move from a state of dependency to full participation. Accordingly, the Commission on Legal Empowerment will devote 2007 to formulating specific recommendations for making progress toward this objective. We expect to meet resistance from those content with the status quo, and close questioning from those who are skeptical or who have other ideas about how best to fight poverty. Our plan is to overcome the obstacles, shake up the complacent and study thoroughly any legitimate questions that are raised. The Commission's mandate is daunting but also vital, for legal empowerment can add much to the world's arsenal in its ongoing struggle to save and enrich human lives.



Madeleine K. Albright served as the 64th secretary of state of the United States. In 1997, she was named the first woman secretary of state and became, to that time, the highest ranking woman in the history of the US government. From 1993 to 1997, Dr. Albright was the United States permanent representative to the United Nations. Dr. Albright is also the founder of The Albright Group LLC, a global strategy firm, and is the first Michael and Virginia Mortara Endowed Professor in the Practice of Diplomacy at the Georgetown School of Foreign Service. She is the Chairman of The National Democratic Institute for International Affairs, Chair of The Pew Global Attitudes Project, President of the Truman Scholarship Foundation and serves on the board of directors of the Council on Foreign Relations and the Aspen Institute.

*Michael Moore,
former Director-General of WTO*

Globalisation Can Empower

I agreed to become a member of the Commission on Legal Empowerment of the Poor, not only because I admire the co chairs, Madeleine Albright and Hernando de Soto personally, but because I believe that their core arguments about the value of democracy and property rights are principles, joined at the hip, and can and have made enormous contribution to poverty reduction and growth. This, linked to globalisation and the need to integrate into the global economy, has provided the “stair case” out of extreme poverty for hundreds of millions.

Democracy is basically empowering people to choose their leaders. It was true to say that before parliamentary democracy other legal rights like property rights, the right to a trial by jury or peers, independent courts, professional merit-based public service were established in successful countries.

Few words excite such passion as “globalisation”. It’s a process not a policy, it should not be demonised or idealised, but this process has seen millions lifted from extreme poverty.

Is globalisation new? Of course not. In fact, there are those who argue there is less trade now, as a percentage of GNP, than there was a hundred years ago. In the main, I think it's been a good thing, and occasionally we should celebrate the great advances of the last 50 years. There has never been a period in the history of our species where we've seen freedoms and living standards rise so consistently for most people. Those countries that have done best are those that have adopted pillars of good behaviour, good clean governance, accountable leaders, property and civil rights, a free media, an active civil society and religious tolerance; freedom of and from religion.

In the last 50 years, life expectancy has increased by 20 years, infant mortality rates have dropped by two-thirds. Thirty years ago, Ghana's income equalled South Korea. Now, South Korea's income equals Portugal's. And look how Portugal's income has lifted since she joined the European Union. South Korea's GDP per capita did not reach \$ 100 until 1963. Since then, life expectancy has risen from 54 years to 73 years. Infant mortality has dropped from 8 percent to 0,8 percent. Malaysia and Haiti were equal in 1950. Burma and Thailand had equal incomes in 1945. Thailand is now 25 times richer than Burma. Examine Chile and the Argentine, North and South Korea. So much for those who argue globalisation means governments don't matter. Thirty years ago Japan was a developing country, the Baltic States and the Czech Republic had living standards closer to France and Denmark before the Soviet experience. Their income per person was just half that of their previous equals by the time the Soviet Empire imploded.

The more open the society and the more open the economy, the better the results. The stronger "property rights" that empower enterprises, the better the results. Some still choose to ignore economic reality and reject good governance principles saying we are not ready – give us more time, which is a bit like the overweight chain smoker says, "I'll give up, go on a diet in 5 years". We need to remind Governments why our parents created an open world rule-based trading system. Immanuel Kant, in his essay in "Perpetual Peace", suggested "Durable peace could be built upon the tripod of representative democracy, international organisations

and economic dependence". By "dependence" he meant economic integration. President Wilson gave the same speech when the world failed to create a durable international architecture after the First World War. It should never be forgotten that one reason the multilateral system was established was the fear of the rise of rival competitive trading blocks which did so much damage in the 1930's.

In the old days, they said if trade did not move, armies would. Now it is armies of desperate migrants who will move from oppressive, closed economies to the magnets of success, those economies that are free, open and growing.

This heightened awareness is good. In our grandparents' day, men and women of conscience were outraged that poverty and squalor lived side by side in our great cities. They saw what was happening the other side of town, now everyone is each other's neighbour.

This is healthy, the powerful no longer have the monopoly of information, and it is out of their control. Many people are empowered in ways our parents never could have imagined.

It is a profound, new reality, NGO's will spring up, web pages explode, it is not the brave, new world as Orwell predicted but a better, more transparent, therefore accountable, world.

It will be, and is, good business to be a good citizen. The public will insist that investment funds, business and leaders adopt a more ethical behaviour. This blowtorch of transparency is a cleansing agent for the business and political world.

Poor people are smart; they have to be to survive. They know there are costs to being in the system and sometimes advantages to being outside the system. That is why most new jobs in poor countries are in the informal, black economy. Every time you apply for a taxi licence or to own land, you can be robbed again. They cannot realise and borrow against their hidden wealth because it is outside the system. That's why

small business in poor countries often cannot break out of their local street. Using these new technologies can create a transparent benefit to stay inside the system, not work around it. In the smaller kingdoms in the Middle East leaders are working on some creative ways of ensuring individuals control of their own health, education, and social security by using smart card technology to access services. This gives control, ownership, independence and dignity to citizens. Corrupt and bad governance threatens the legitimacy of taxation and citizenship, even the state itself and E-Government can be the best friend of those who fight corruption, inefficiencies, and seek empowerment of the people.

Those nations that do not understand this will be punished. The future will not be kind. New ideas and technology wait for no-one, they do not say, “Excuse me”, they crash through making redundant irrelevant, old industries, procedures and ideas. It took me a while to understand this.

In the 1980's I went to Saudi Arabia and met a fantastically rich, old man. He asked me questions about New Zealand, where was it, what was our political system, and then what was our telephone system? I thought this a strange question and asked him why did he ask that question. This was before faxes, web pages and the internet. He said he made judgements about countries in which to invest based on their telephone systems. It took me a couple of years to realise how smart that was.

This has relevance for rich countries as they face mounting health and education costs. The tragedy of many modern welfare states is that process always trumps outcomes. Public, private systems does not mean the privatisation of Government's social responsibility, it does mean a change of ownership of the process – from institutions to citizens.

This is the revolution of the future. For those of us who have fought for equality and opportunity and who see themselves as from the left, this is our opportunity to save the welfare state and public goods on public health. We must not let process or ownership confuse us, we need to focus on the needs of the people not the demands of institutions. This revolu-

tion of technology gives us the opportunity to give power to the people over their lives and it will be at the expense of bureaucracy which is no longer acceptable or necessary.

My next point is this. Would the Reformation, the enlightenment, have been successful without the push like that of the printing press?

I have spent much of my life thinking of how we can produce more wealth, jobs, eliminate poverty and inequality. Thinking back, I have changed my thinking but hopefully not my principles or objectives. It is hard in public life to change your mind. It is seen as unprincipled, opportunistic, and typical of politicians who say one thing and do another. But a mind that cannot change is a mind that is brain-dead, oblivious to a world that changes anyway. I am still furious when the rich are rich because an economic system of subsidies, protectionism and privilege makes them rich. The condescending conservatives talk of the “deserving poor” (those whom they think deserve help) and the undeserving poor (those whom they think deserve to be poor because of social decisions). Perhaps I now accept there is a deserving rich, those who make money in a free and competitive market, as opposed to those who, with privileges, licenses and monopolies, can hardly fail. I used to tease the right wing in the New Zealand parliament that they believed in private enterprise not free enterprise, and there is a world of difference.

Lord Keynes was once accused of changing his mind. “Yes”, he replied, “I have, when the evidence proves I’m wrong, I change my mind. What do you do?” he sweetly challenged his questioner. I studied New Zealand’s plan to create a free trade agreement with Australia in the later 1970’s with a view to attacking it as selling out New Zealand’s workers and businesses. I was wrong and went on as New Zealand’s Trade Minister a few years later to accelerate the deal. I read George Orwell’s dark masterpiece, “1984”, and thought that technology, big business, and big government, the thought police and “Big Brother” would control us. The opposite has happened. The internet, the world-wide web, faxes, mobile phones are a force of liberation.

Governments do matter, especially the quality and professionalism of the civil service. Hernando de Soto's work on why capitalism works in some countries and not others, offers a profound insight. Poor countries have enormous assets but lack capital. Those assets cannot be unlocked because of poor legal titles, assets cannot be bought, sold or borrowed against. Mexico, De Soto claims, has \$300 billion of trapped resources, and to work within the existing system in places like Egypt where to purchase land you have to go to over 30 agencies and navigate 70 procedures, means people are smarter to work in the black economy, which produces two-thirds of the jobs in poor countries.

Then there is the well-known micro loans system that successfully funds women with tiny amounts of capital, the Grameen Bank has 2 1/2 million customers and a default rate of less than 1,5%. Recently, I have discovered a third big idea which should be on every politician's and bureaucrat's desk. C.K. Prahalad has published a remarkable book entitled "The Fortune At The Bottom of The Pyramid", of how to eradicate poverty. He looks at purchasing power parity – and finds India, China, Brazil, Mexico, Russia, Indonesia, Turkey, South Africa combined have a GDP of over \$12 trillion, larger than Japan, Germany, Italy, U.K. and France. Then he studies companies that are tapping the bottom of this market, lifting living standards and providing jobs and consumers with a better deal. The poor are price-sensitive, ambitious, canny, and welcome technology. Cell phones are growing at 1.5 million a month in India, Brazil already has 35-40 million. New low cost PC kiosks are liberating villagers in many countries. Internet connectivity increases poor farmers' and fishermen's incomes by 5-10%.

If policy-makers live by the evidence of what works and not by slogans that get promoted to the level of ideology, which becomes theology, then people's lives will improve.



Michael Moore is a former Prime Minister of New Zealand. In a long and distinguished career in politics, he held portfolios in a wide range of areas and served in a number of senior political positions including Trade Minister, Foreign Minister, Minister of Tourism, and Deputy Minister of Finance. He is a past Director-General of the World Trade Organisation (WTO). He is well-known internationally as an articulate proponent of the advantages of a free and fair global trading system. He also initiated significant changes to the way the WTO operates and important organisational changes within the Secretariat by introducing a range of strategic management techniques. Mr. Moore is an Adjunct Professor at Adelaide University, Australia, and La Trobe University, Australia, is Honorary Professor at the Chinese University for Political Science & International Law in Beijing.

*Anna Tibaijuka,
Under-Secretary-General and Executive Director UN-HABITAT*

UN-HABITAT's Contribution to Security of Tenure

The urban challenge

Today, there are approximately 1 billion people, almost one-third of the world's urban population, living in slums. UN-HABITAT estimates that, if current trends continue, the slum population will reach 1.4 billion by 2020. The vast majority of slums – more than 90 percent – are located in cities of the developing world, which are also absorbing most of the world's urban growth.² Annual slum and urban growth rates are highest in sub-Saharan Africa, 4.53 percent and 4.58 percent respectively, nearly twice those of Southern Asia, where slum and urban growth rates are 2.2 percent and 2.89 percent, respectively. In Western Asia, slums and cities are growing at similar rates. Northern Africa is

² UN-HABITAT Global Urban Observatory, State of the world's cities 2006/7, Nairobi, 2006

the only sub-region where slum growth rates are declining, largely due to positive measures taken by individual countries to address the plight of slum dwellers.

Regions	% slum 1990	Slum Population (thousand) 1990	% slum 2001	Slum Population (thousand) 2001	% slum 2005	Slum Population (thousand) 2005	Slum annual growth rate (%)
WORLD	31.3	714,972	31.2	912,918	31.2	997,767	2.22
Developed regions	6.0	41,750	6.0	45,191	6.0	46,511	0.72
EURASIA (Countries in CIS)	10.3	18,929	10.3	18,714	10.3	18,637	-0.10
European countries in CIS	6.0	9,208	6.0	8,878	6.0	8,761	-0.33
Asian countries in CIS	30.3	9,721	29.4	9,836	29.0	9,879	0.11
Developing regions	46.5	654,294	42.7	849,013	41.4	933,376	2.37
Northern Africa	37.7	21,719	28.2	21,355	25.4	21,224	-0.15
Sub-Saharan Africa	72.3	100,973	71.9	166,208	71.8	199,231	4.53
Latin America and the Caribbean	35.4	110,837	31.9	127,566	30.8	134,257	1.28
Eastern Asia	41.1	150,761	36.4	193,824	34.8	212,368	2.28
Eastern Asia excluding China	25.3	12,831	25.4	15,568	25.4	16,702	1.76
Southern Asia	63.7	198,663	59.0	253,122	57.4	276,432	2.20
South-Eastern Asia	36.8	48,986	28.0	56,781	25.3	59,913	1.34
Western Asia	26.4	22,006	25.7	29,658	25.5	33,057	2.71
Oceania	24.5	350	24.1	499	24.0	568	3.24

Source: UN-HABITAT 2005, *Global Urban Observatory: Urban Indicators Programme, Phase III*.
Note: % slum indicates the proportion of the urban population living in slums; 2005 figures are projections

Sub-Saharan Africa has the highest prevalence of slums in the world – 71.8 percent of its urban population lives in slums – and in the last 15 years, the number of slum dwellers in the region has almost doubled, from 101 million in 1990 to 199 million, in 2005. Given the high slum growth rates in the sub-region, the number of slum dwellers is projected to double by 2020, reaching nearly 400 million, and overtaking the slum populations of both Southern Asia and Eastern Asia, where slum populations are projected to rise to 385 million and 299 million, respectively. In terms of absolute numbers, Asia still has the largest share of the world's slum population; in 2005, the region housed more than half the world's slum dwellers, or 581 million people.

Urban and slum growth rates by region

Regions	Urban growth rate	Slum growth rate
Urban growth significantly higher than slum growth		
Latin America and the Caribbean	2.21	1.28
Northern Africa	2.48	-0.15
Eastern Asia	3.39	2.28
South-Eastern Asia	3.82	1.34
Urban and slum growth similar		
Western Asia	2.96	2.71
Southern Asia	2.89	2.20
Sub-Saharan Africa	4.58	4.53
Developed world	0.75	0.72
World	2.24	2.22

Source: UN-HABITAT 2005, *Global Urban Observatory*

Access to land is one of the key determinants of slum formation. Addressing the slum issue therefore implies taking the land issue seriously. Given that experience has shown that it takes 15 to 25 years to change a country's land administration system, we cannot afford to wait if we wish to improve the lives of slum dwellers now and to meet the Millennium Development Goals in a timely manner.

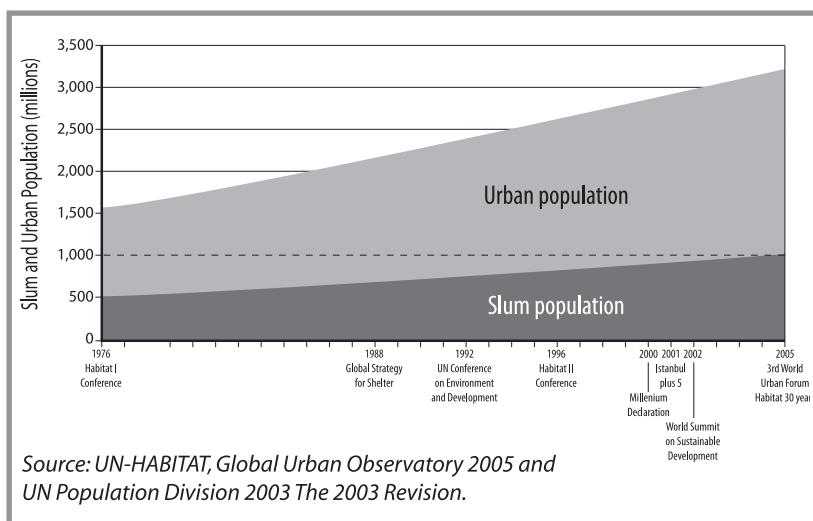
UN-HABITAT's land mandate

UN-HABITAT is the urban land focal point in the United Nations system. Land has been a central focus of UN-HABITAT since it was established after the first UN Conference on Human Settlements in Vancouver in 1976. The importance of land was re-emphasized in Istanbul in 1996 with the adoption of the Habitat Agenda and its twin goals of "shelter for all" and "sustainable human settlements development".

The next milestone was Istanbul + 5, and the adoption of the Declaration on Cities and Other Human Settlements in the New Millennium in 2001. More recently in 2004, the General Assembly adopted a resolution that encourages governments to support the Global Campaigns for Secure Tenure and Urban Governance, as important tools for promoting

the administration of land and property rights.³ Furthermore the 2005 World Summit Outcome⁴ recognized the urgent need for increased resources prioritizing slum prevention and slum upgrading.

Finally, UN-HABITAT was designated as the focal point for the Millennium Development Goal 7 Target 11 (MDG 7/11), which aims to significantly improve the lives of at least 100 million slum dwellers by the year 2020. **Given the enormous scale of predicted growth in the number of people living in slums, the Millennium Development target on slums should be considered as a bare minimum that the international community should aim for.**



3 Resolution A/59/484

4 GA 60/1, Paragraph 56(m)

Measuring security of tenure

Mass evictions of slum and squatter settlements in various cities in recent years suggest that security of tenure is becoming increasingly precarious, particularly in cities of sub-Saharan Africa and Asia, where evictions are often carried out to make room for large-scale infrastructure or city “beautification” programmes. Under international law, ‘forced eviction’ is defined as “the permanent or temporary removal against the will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.” A global survey in 60 countries found that 6.7 million people had been evicted from their homes between 2000 and 2002, compared with 4.2 million in the previous two years. Many of these evictions were carried out without legal notice or without following due process. Evictions can to some extent be prevented by improving the land tenure of urban households. However, experiences tell us that operationalising security of tenure for the purpose of global monitoring remains difficult. At present, it is neither possible to obtain household-level data on secure tenure in most countries, nor to produce global comparative data on various institutional aspects of secure tenure, as data on secure tenure is not regularly collected by censuses or household surveys.

One of the key indicators to measure the achievements in attaining MDG 7/11 is the ‘Proportion of households with secure tenure.’ As agreed during an Expert Group Meeting facilitated by UN-HABITAT on Urban Indicators in 2002, tenure security is: “the right of all individuals and groups to effective protection by the state against forced evictions.” Under international human rights law, secure tenure is one of the seven components of the right to adequate housing, which again is linked to the right to land. The other six components are: (1) availability of services, materials, facilities and infrastructure; (2) affordability; (3) habitability; (4) accessibility; (5) location; and (6) cultural adequacy. All human rights apply equally to women and men, and women’s equal right to adequate housing, land and property is firmly entrenched in international law.

UN-HABITAT and its partners are currently working on the preparations of a global monitoring system that could in the future provide a framework to assist governments at local and national levels to produce estimates at household level on how many people have secure tenure, using an agreed-upon methodology in terms of definitions, indicators and variables. While indicators for security of tenure linked to land titling exist, to date there are no sufficiently robust global indicators for security of tenure not associated with “titling”. The majority of people in the developing world do not have land titles, and the costs and procedures involved make titling a long term undertaking at best.

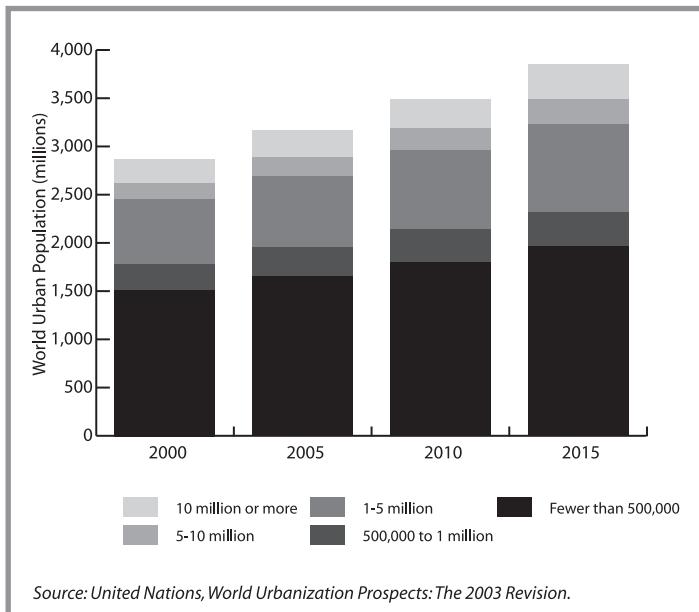
Finding means of making people and institutions feel secure enough to invest in pro-poor housing and slum upgrading will therefore require other solutions. Experiences from developing countries around the world tell us that land tenure and property rights are much more complicated than the legal/illegal or formal/informal dichotomy may suggest. Most urban areas contain a range of semi-legal categories and maybe even more than one legal system, as in countries where statutory, customary or religious tenure systems coexist. For this reason it is important to consider tenure and property rights as a continuum to enable us to break the deadlock that prevents people, local authorities and service providers from improving the living conditions of the urban poor. Land tenure issues reflect cultural, historical and political realities that need to inform public policy so that customs and traditions in land tenure systems can be respected, while ensuring that these customs are not discriminatory, particularly with regard to women, and do not violate other human rights.

Global experiences of land titling

The global experience of land titling is that it is too slow, expensive and cumbersome to meet the needs of the poor, posing a serious equity and governance issue. For example, it is estimated that 70 percent of land occupation remains undocumented in Latin America, and that less than 10 percent of all land in developing countries has been surveyed, with this proportion dropping to less than 1 percent in sub-Saharan Africa. Under

these circumstances, conventional land titling approaches have become part of the problem and not part of the solution. This is especially the case for the urban poor who often lose their land, their homes and their livelihoods to real estate development, despite having lived in a particular place or neighbourhood for decades. Land titling and registration systems, in many instances, are still based on colonial laws and procedures which were, by intent, discriminatory rather than inclusive. Land titling is based on individual rights and does not easily accommodate group and/or family rights. Finally, conventional land titling systems are neither transparent nor user friendly and thus present a formidable obstacle and challenge to the poor.

Improving security of tenure and property rights for millions of the urban poor is a massive challenge. Tenure issues are complex and no single tenure option can be applied across the board. To reach the MDG 7/11 will require innovative approaches to security of tenure that are not based on land titling alone. UN-HABITAT has been facilitating the creation of a Global Land Tool Network (GLTN) for the development of pro-poor and gendered land tools. The Norwegian government has been instrumental in raising the land agenda globally as well as providing funds for this initiative. The GLTN and its partners have identified some of the key obstacles to meeting the needs of the poor. These include inadequate land records and regulatory frameworks, the lack of gender considerations in land governance and land use planning and management, and inequitable land taxation systems. The GLTN aims at developing specific tools to address these blockages. Some of the innovations that can potentially benefit millions of the urban poor include alternative tenure systems such as occupancy rights, anti-eviction rights and adverse possession rights. Experience has shown that these alternative approaches are key to stimulating improvements and investments, including the provision of basic infrastructure and services, and access to credit and finance. They can be applied to a wide range of social and cultural contexts and can be improved over time.



When preparing or revising urban management and tenure policies, it is important to consider the following:

- Urbanisation is a wealth creating process. Stopping it is not an option, but managing it is vital to achieving social equity and sustainable economic development.
- Private land ownership puts land to the most economically efficient use, but too often at the cost of excluding the poor and limits other land management options that are necessary for the public good.
- Security of tenure is a precondition for local investment. Nobody invests if they feel insecure, and international experience shows that the poor are the first to invest what they can when reasonable security is ensured.

How to immediately stabilise the urban land situation

The following steps can help to stabilise the existing situation and provide a foundation for longer-term options.

1. Provide basic short-term security for all households in slums and unauthorised settlements. This can best be achieved through land proclamations or moratoriums. A simple statement by the relevant Minister is often sufficient to reduce uncertainty and stabilise situations.
2. Survey all extra-legal settlements and identify any that are in areas subject to environmental hazards, (e.g. floods, landslides, etc) or required for strategic public purposes. These should be subject to independent review.
3. Offer residents of all such settlements priority for relocation to sites that offer close access to existing livelihood opportunities (e.g. street trading) and services (i.e. not out of the city). Temporary Occupation Licences or Permits can be provided for a limited period, depending on how long it takes to agree with the local community on moving to alternative sites.
4. Designate all other extra-legal settlements as entitled to medium term forms of tenure with progressive increase in rights. Where possible, the precise form of such tenure and rights should be based on tenure systems already familiar to local communities. Customary or communal tenure options, such as communal leases and land trusts, can reduce costs and the administrative burden on land management agencies. They allow low-income groups to receive services and environmental improvements through a participatory process of physical improvement and local economic development. They also increase security while mitigating rapid increases in land prices which typically attract downward raiding by higher income groups and the displacement of the poor. For unauthorised settlements on private land, options include land sharing, under which settlers may be provided long term tenure on part of their site and the land-owner develops the remainder. Local authorities can assist this

approach if they permit relaxation on planning or building restrictions to help landowners realise higher rates of return. Temporary land rental is another way of reconciling conflicting interests.

These measures can provide a sustainable, practical and socially progressive way of improving the tenure security and rights for millions of the urban poor. They can also improve the functioning of urban land and housing markets, stimulate economic development and improve the effectiveness of urban governance and management.

As highlighted in the 2005 World Summit Outcome, improving tenure for the existing urban populations will not be enough unless measures are also taken to reduce the formation of *new* slums and informal settlements. This requires a parallel approach to increase the supply of planned, legal and affordable land on a scale equal to present and future demand. This can be achieved by:

- Revising planning regulations, standards and administrative procedures to reduce entry costs and accelerate the supply of new legal development. Options may include reducing the proportion of land allocated to roads and public open space, relaxing restrictions on plot use and simplifying administrative procedures.
- Collecting property taxes on all urban land, especially undeveloped land to stimulate investment and the overall supply of land.
- Permitting incremental development of land construction and services provision.
- De-linking the provision of basic services, such as water, sanitation and electricity, on the basis of willing provider/willing buyer, irrespective of tenure status.

Discrimination against women in respect of property and inheritance rights

Millennium Development Goal 3 on Gender Empowerment has been further elaborated to include equal access to resources, including land.⁵ The UN Millennium Project Task Force on Education and Gender Equality in its 2005 report identifies strategic priorities and practical actions for achieving women's empowerment by 2015. These include: strengthening opportunities for post-primary education for girls; investing in infrastructure to reduce women's and girls' time burdens; guaranteeing women's and girls' property and inheritance rights; increasing women's share of seats in national parliaments and local governmental bodies; and combating violence against women and girls. Various countries, communities and institutions have implemented different combinations of these actions and shown good results.

Women own only an estimated 1 to 2 percent of all titled land worldwide which is often cited as an indication of low levels of inheritance rights to property.⁶ Inheritance is not only key to enhancing women's access to land, but also a key to avoiding total dependency, homelessness and destitution. Even though various innovative approaches, such as women cooperatives, have increased women's access to property, equal inheritance rights would go a long way in improving women's rights in control over land and housing. A range of cultural, social, political, and legal factors contribute to women's lack of property and inheritance rights though the obstacles to security of tenure vary widely.⁷ Pursuit of gender equality in inheritance rights has been one of the most difficult challenges in rights-based approaches owing to the complexity as well as entrenched socio-economic and cultural practices. Such situations are further exacerbated

5 UN Millennium Project Task Force on Education and Gender Equality (2005) Equality and Empowering Women (Earthscan, London).

6 USAID (2003) Women's Property and Inheritance Rights: Improving Lives in Changing Times: Final Synthesis and Conference Proceedings Paper (Washington DC: USAID).

7 Wanyeki L.M (2003) *Women and Land in Africa—Culture, Religion and Realizing Women's Rights* (London: Zed Books)

in post-conflict situations⁸ or as a result of HIV/AIDS.⁹

Implementation of women's land, property and housing rights is generally frustrated by the lack of effective gendered land tools. One of the Global Land Tool Network's values and priorities is that every tool should be gendered, as must be the process of tool development. Despite continuing efforts of those working on enhancing women's access to land, there is at present little systematic information on existing gendered land tools or even an adequate methodology on genderising tools. There are some good examples of gendered tools at community levels but these are yet to be fully documented, replicated at scale and rendered affordable. Given the limitations of existing piecemeal and ad hoc gender sensitisation land strategies, there is a potent demand for a better integrated gendered tool framework. Engendering the tool building process would require not merely the commitment but the pooling of capacity, expertise, and experience of various partners and an enabling mechanism for co-ordination to develop protocols. GLTN is committed to facilitating this process.

Islamic land tool development

A substantial portion of the global population is influenced to varying degrees by Islamic land law. Land, property and housing issues in Muslim communities have often been found to be a cauldron of secular, Islamic, customary and informal systems. A pioneering UN-HABITAT study of Islamic land and property frameworks (2005) as well as a recent publication supported by GLTN on Land, Law and Islam: Property and Human Rights in the Muslim World¹⁰ points to Islamic approaches which potentially offer innovative, pro-poor and gendered land strategies and tools. Furthermore, an Expert Group Meeting in Cairo December 2005

8 United Nations Development Fund for Women (2001) Women's land and property rights in Situations of Conflict and Reconstruction: A Reader based on the Feb, 1998 Inter-Regional Consultation in Kigali, Rwanda (Kigali: UNIFEM)

9 International Center for Research on Women. (2004) To Have and To Hold: Women's Property and Inheritance Rights in the Context of HIV/AIDS in Sub-Saharan Africa. (Washington, D.C.: International Center for Research on Women)

10 Siraj Sait and Hilary Lim, 2006

on innovative land tools passed a landmark resolution. The Cairo Initiative on Islamic Land Tools called upon the international community, the Arab States and regional organizations, and all stakeholders to commit their expertise and resources for the further study of Islamic land tools, as part of efforts to develop authentic, workable, pro-poor, inclusive and gendered strategies. The *Cairo Initiative*, noting that the highest seat of Islamic scholarship, the Al Azhar at Cairo, and the Egyptian government experts, had endorsed the UN-HABITAT commissioned study carried out by University of East London, and recommended that the study form the basis of further work.

There are several areas where further scrutiny and sharing of best practices from the Muslim world could facilitate effective tools as well as serve to counter injurious cultural practices. Islamic concepts of property, land tenure systems, legal framework and dynamics of rights are distinctive, though varied in practice. There is an increasing demand for 'authentic' land solutions in Muslim countries, for example with funding through Islamic finance, through models such as Islamic endowments (waqf). In addition, there are fields such as women's property rights and inheritance where Islamic principles are ubiquitous. In contrast to stereotypical perceptions, the research points to a range of innovative land strategies that could promote gendered security of tenure.

The UN-HABITAT study points out that, in order to transform these creative possibilities into workable tools, various stakeholders must constructively review the normative and methodological Islamic frameworks. However, despite abundant interest and increasing innovative material on actual Islamic practices, there are no existing networks dedicated to Islamic land strategies, let alone to develop Islamic land tools. Thus, there is a need to facilitate networks alongside stimulation of research and consultations on land tools. The UN-HABITAT study provides a useful starting point for Islamic tool development for further consultations and constructive dialogue between professionals, civil society, policy makers and development partners.

Housing rights, housing policy and security of tenure

The role of government housing policy should be to encourage a pluralistic land and housing market, in which a diverse range of suppliers compete to meet the needs of different segments of the population. Whilst the State will always need to provide a safety net, its main function within increasingly market driven economies, should be to create a regulatory framework and ‘level playing field’ within which a range of suppliers can operate.

Over the past decade, there has been significant advancement in the development of the conceptual framework of the “human right to adequate housing” owing to the consistent work of United Nations system and civil society. “Housing rights” has thus become a widely accepted term within the international community. This development has taken place in parallel to the wide consensus reached on the “enabling approach” as a fundamental element in shelter policy. This approach echoes the increasing focus of the international community on the rights-based approach to development which integrates the norms, standards, and principles of the international human rights system into the plans, policies and processes of national development.

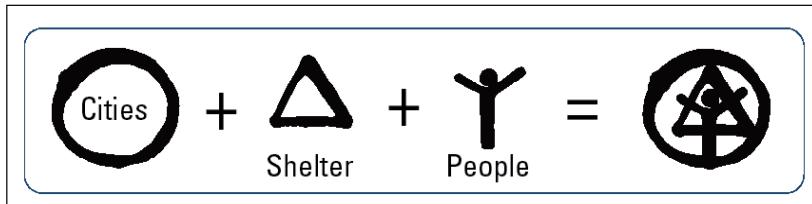
Security of tenure is a key element in the full and progressive realisation of housing rights. It applies to rental as well as ownership of housing, in formal as well as informal settlements. Countless examples show a direct relationship between security of tenure and improved individual, household and community investment in housing improvement. This in turn improves standards of living and the prospects of the realisation of housing rights. In some countries the ‘urban citizenship’ approach is progressing whereby governance processes and procedures are becoming more participatory and transparent. **Good urban governance is the essential environment where human rights in general and housing rights in particular can be fully and progressively realised.**

Tenure and governance

Tenure issues cannot be divorced from the broader issues of governance. UN-HABITAT defines good governance as characterised by sustainability, subsidiarity, equity, efficiency, transparency and accountability, civic engagement and citizenship and security. It recognises that the quality of urban governance is the single most important factor for the eradication of poverty and for prosperous cities. Tenure policies which satisfy these criteria can therefore contribute substantially to meeting the objectives of good governance. In addressing this issue, **it is necessary to recognise that although land tenure raises important technical and procedural questions, it is ultimately a political issue, since rights over land cannot be isolated from rights in general.**

Tenure policy needs to be considered as part of urban governance, spatial planning and infrastructure provision to ensure that security and rights are balanced with improved access to livelihoods, services and credit. There are five commonly adopted approaches to achieving these objectives:

1. The first option concentrates on asserting the need to implement land-use plans and regulations and generally involves the eviction and relocation of unauthorised settlements with, or without, compensation or alternative shelter. Such approaches invariably reflect a concern for visual order rather than meeting the needs of the poor.
2. The second option advocates the granting of full individual property ownership in the expectation that this will enable the poor to obtain credit, realise the potential value of their property assets and lift themselves out of poverty, whilst also raising revenues from property taxes. It may be undertaken as part of the first approach by granting titles to relocated households. Due to high land costs in areas near employment centres, such relocation projects are often outside the urban area and impose high transport and infrastructure costs on the poor.
3. The third option emphasises the need to introduce or expand 'intermediate' forms of tenure, such as community land trusts, Temporary Occupation Licenses, shares in land-buying companies, shared titles or land leases, etc to provide medium term security at prices lower than formal titles would command. These enable low-income groups to live in areas which would otherwise be unaffordable.
4. The fourth option focuses on the need to increase rights of occupancy, use, development, etc, for all households in unauthorised settlements, especially for women. Once the situation has been stabilised, emphasis can then move to building on existing local tenure systems with which people are already familiar, before importing new options.
5. Finally the last option involves integrating tenure policy with urban planning and infrastructure provision policies. Ideally, it involves combining forms of tenure which provide security and access to credit with efficient and flexible land use planning based on the priorities and perceptions of the residents, not just the professionals.



Conclusion

The goal of sustainable urbanisation is liveable, productive and inclusive cities, towns and villages. It embraces relationships between all human settlements from small towns to metropolises, between urban centres and their surrounding rural areas, and settlements in crisis. As a process, it captures a vision of ‘inclusive growth’ that is people centric and embraces social harmony, economic vitality, and environmental sustainability.

The challenge of sustainable urbanisation can only be addressed through a holistic approach to human settlements development that recognizes the linkages between rural and urban areas, the cross-sectoral nature of urban management, and the need to build partnerships between all spheres of government, civil society and the private sector. This approach also recognizes the need for timely and planned interventions in post-conflict and post-disaster situations to ensure sustainable recovery and reconstruction.

Efficient land markets, the equitable use of land and pro poor approaches to land administration and management are at the very heart of this move towards sustainable urbanisation. They are also a critical means to reducing the ecological footprint of our cities and to mitigating the negative impacts of human activity on global issues such as climate change.

Finally, I am honoured to be a member of the Board of Advisors to the Commission on Legal Empowerment of the Poor. The Commission aims to make legal protection and economic opportunity not the privilege of the few but the right of all. The Board of Advisors has been set up with terms of reference to provide independent counsel, institutional capacity, and advocacy. The Commission is of great importance in moving the

land agenda forward at global scale and by joint efforts with the Global Land Tool Network to address issues like pro-poor land reform, equal access to land and pro-poor land administration systems. I believe that by working together we can indeed make a difference in terms of improving the living conditions of the urban poor.



Mrs. Anna Kajumulo Tibaijuka joined UN-HABITAT as Executive Director in September 2000. Today she is the highest ranking African woman in the United Nations system. A Tanzanian national, she holds a Doctorate of Science in Agricultural Economics from the Swedish University of Agricultural Sciences in Uppsala. During her first two years in office, Mrs. Tibaijuka oversaw major reforms that led the UN General Assembly to upgrade the United Nations Centre for Human Settlements to a fully-fledged UN programme, now called UN-HABITAT - the United Nations Human Settlements Programme. Her appointment as Executive Director was confirmed at the Under-Secretary-General level, and Mrs. Tibaijuka was elected by the General Assembly to her first four-year term in July 2002.

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Indigenous Peoples and Collective Land Rights - Urgent Need for International Recognition

 Obtaining formal collective rights to their traditional territories is the main priority of indigenous peoples around the world. It is their key demand and the basis for all other strategies aiming to secure their material and cultural survival. The claim is rooted in international law, yet carries important links with the globally agreed goals of environmental sustainability and poverty alleviation. If policymakers around the world continue to ignore the collective land rights of indigenous peoples, they will, intentionally or not, become servants of predatory natural resource exploitation, not agents for a rights-based sustainable development.

In the ongoing international debate on how legal empowerment may strengthen property ownership by the poor and reduce poverty, far too little attention has been given to those who challenge the idea that the solution is necessarily to obtain individual property rights and be fully integrated in the market place. The dominant discourse ignores the fact that the vast majority of the poorest and most marginalized people in the world live in rural areas and depend directly on the land. This land is often under customary tenure regimes, but appropriated by the nation state. While policymakers have so far failed the rural population of the world in matters of tenure¹¹, it is a growing body of evidence and demand that they must amend this mistake, as unjust tenure policies continue to produce poverty, serious social conflicts and resource depletion.

Security over economic growth

For a large group of people often considered among the poorest and most marginalized, namely indigenous peoples, the ITR-approach (individualisation, titling, registration) to property ownership is considered harmful to their livelihood and human rights rather than as a solution to their challenges.¹² Most indigenous peoples around the world (about 350 million¹³ individuals, several thousand different peoples, in 70 countries) are directly dependent on permanent access to natural resources and well-functioning ecosystems for their material and cultural survival. Their expressed priority in relation to property rights is usually not to convert their traditional territories into fungible assets as a way of becoming fully integrated in the formal market economy and create more economic

11 Wily, Liz Alden (2006); Land Rights Reform and Governance in Africa: How to make it work in the 21st Century, UNDP discussion paper, UNDP, Oslo, 2006.

12 Colchester, Marcus et al. (2004); *Indigenous land tenure: challenges and possibilities*, in Land Reform, FAO, 1-2004 and Plant, R & Hazell, P. 2001. Land titling and indigenous peoples in Latin-America. Washington, DC, Inter-American Development Bank.

13 The estimate of the population of indigenous peoples around the world is varies greatly depending on the source of information, but the World Bank usually use this estimate.

wealth. The priority is on how to improve land tenure security and de facto sustainable management of their natural resources.¹⁴

Continued alienation

This, however, is not a priority shared by most governments and international development institutions.¹⁵ After centuries of violent conflict, genocide and marginalisation of indigenous peoples, serious conflicts continue to exist between the dominant economic growth policies based on natural resource exploitation and customary tenure regimes. The lack of efficient mechanisms to overcome these conflicts is a consequence of policies that consider indigenous collective land tenure an obstacle to economic development.¹⁶ When local communities choose to protest in order to protect natural resources on indigenous lands from being exploited by external economic interests, clashes may become violent and visible to the outside world. But these are just peaks of violence in a continuous process where indigenous peoples are being alienated, both in “legal” and in unlawful ways, from their traditional territories and natural resources, be it by governments, companies or individuals.

Weak legal framework

These contradictions make the topic of land rights of indigenous peoples a highly controversial issue that is systematically avoided or opposed by most national governments and international development institutions. This is the main reason why the international and most national legal frameworks concerning indigenous rights - if they exist - are still too weak to provide real protection or development opportunities for these marginalised groups. Even so, there is a growing body of international conventions, declarations, national laws and administrative

14 IWGIA (2004), Land Rights: A Key Issue, Indigenous Affairs 4/04.

15 Only 18 countries have signed the only binding convention on indigenous rights, ILO Convention 169, and only countries in Latin-America and Europe (www.ilo.org)

16 Wily, Liz Alden (2006)

mechanisms promoting different aspects of indigenous peoples' rights, including tenure. A number of key-rulings are seen as creating a significant jurisprudence in the field¹⁷ and international monitoring bodies make authoritative interpretations of universal instruments in favour of the specific rights of indigenous peoples. However, this has still not had decisive repercussions in terms of a broad acceptance - or implementation - of what are in fact legally binding standards relating to indigenous peoples' rights. There is, on the contrary, a significant and continuous resistance as recently observed in the UN General Assembly against the 2006 Draft Declaration on the Rights of Indigenous Peoples¹⁸, the marginalisation of the issue of indigenous collective property rights in the international Commission on Legal Empowerment of the Poor¹⁹, and the recently protested non-inclusion of indigenous peoples in the international climate negotiations in Nairobi, Kenya.

Attachment to traditional lands

The close affinity between indigenous peoples and their territories can be seen in the very definition of this group. While there is no universally accepted definition of the concept of indigenous peoples, three main characteristics are recurrent. First, self-identification as indigenous peoples is widely recognized as the fundamental criterion for determining which peoples should be considered as indigenous. Second, indigenous peoples are closely attached to the traditional lands on which they live and the natural resources on which they depend. Third, indigenous peoples live under social, cultural and economic conditions that are distinct from those of other sections of the national community. The absence of a definition of indigenous peoples in the most recent instrument providing for their rights, that is the UN Draft Declaration on the Rights of Indig-

17 MacKay, Fergus (2004); *Indigenous people's rights to lands, territories and resources: selected international and domestic legal consideration*, in Land Reform - Land settlement and cooperatives, FAO, 1-2004

18 United Nations, Human Rights Council, United Nations Declaration on the Rights of Indigenous Peoples, Resolution 2006/2, 29 June 2006

19 See articles on <http://www.landrightswatch.net>

enous Peoples, reveals a general consensus on the relevancy and use of these main characteristics, with preponderance of self-identification.

Collective rights

Indigenous peoples' customs and practices reflect the particular spiritual, cultural, social and economic relationships they have with their traditional lands and natural resources²⁰, as well as the concomitant responsibility for preserving the very foundation of their lives for use by future generations. The UN Draft Declaration on the Rights of Indigenous Peoples²¹, along with other international and regional human rights instruments and monitoring bodies²², accordingly recognises the indig-

20 International Labour Organization, Convention (No.169) concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989, Article 13-1: *"governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship"*

21 United Nations, Human Rights Council, United Nations Declaration on the Rights of Indigenous Peoples, Resolution 2006/2, Article 26: *"Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned".*

22 See for example International Labour Organization, Convention (No.169) concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989, Part II. Land, see especially Article 13-1 (cf also quote in end note 3), Article 14-1: *"The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect"*, Article 15-1: *"The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources"*; United Nations, Committee on the Elim-

enous peoples' collective right to own their traditional lands and manage their environment and its resources.

Indigenous individuals, as any human being, are entitled to all human rights recognized in international law, along with rights conferred on individuals belonging to minority groups, in case these groups can be considered indigenous. At the same time, indigenous peoples are entitled to collective rights whose formal recognition and effective implementation are prerequisites to the mere survival of the concerned peoples, to the sustainability of their specific characteristics and eventually to their development in accordance with their own collective values, aspirations and needs. These collective rights reflect the spirit of customary law - like customary land tenure regimes, which aims at ensuring the cohesion and sustainability of the concerned peoples, and their identity as indigenous peoples sharing common priorities.

Free, prior, informed consent

Their right of self-determination, shared with “all peoples” according to common article 1 of the UN International Covenants on Human Rights²³, is also important since it is the realization of this right that will ensure indigenous peoples’ right to decide their own priorities for and to control their development, on their traditional lands, in accordance

ination of Racial Discrimination, General Recommendation No.23: Indigenous Peoples, 18 August 1997, §5: *”The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories”*; Organization of African Unity, African Charter on Human and Peoples’ Rights, 26 June 1981, Article 14: *”The right to property shall be guaranteed”*, Article 21-1: *”All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it”*

23 United Nations, International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights, Resolution 2200 A (XXI), 16 December 1966, Article 1-1: *”All peoples have the right to self-determination.*

with their own aspirations and needs. In other words, indigenous peoples' right to self-determination means that they have the right to determine if development projects, resource exploitation or any other decision that may affect them, their traditional lands and natural resources, meet their own vision of development. They thus have the right to give or withhold consent over these projects or decisions, in conformity with the international human rights principle of free, prior, informed consent.²⁴ Governments and the international development institutions should strictly respect this principle in the design and implementation of development projects in indigenous areas, particularly when major private or public investments are at stake.

The mystery of collective land ownership

Even if collective land rights are recognized in international conventions, it remains a mysterious concept for most modern day decision makers. Yet it has been the dominant way of regulating access to land and resources over large parts of the globe, and many places it continues to be so.²⁵ Although not necessarily recognized by the legal system in the country, *de facto* access to land for cultivation, areas for hunting, rivers for fishing etc. continues to be obtained through customary collective mechanisms in large parts of Africa and many territories inhabited by indigenous peoples around the globe.

What is often mysterious to outsiders, is both what is implied by the concept of ownership in these contexts and the relationship between collective and individual rights. The relationship that an ethnic group or

By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”

24 United Nations, Commission on Human Rights, Standard-setting - Preliminary working paper on the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources that would serve as a framework for the drafting of a legal commentary by the Working Group on this concept submitted by Antoanella-Iulia Motoc and the Tebtubba Foundation, 8 July 2004

25 Wily, Liz Alden (2006)

a local community has to the land it uses is the result of an historic process. Exploring such a territory accompanied by members of that group can be a remarkable experience. With patience one discovers that the whole landscape is full of names, histories, memories of events - recent, distant, even mythical - and that it emits detailed information to the trained eye about the resource situation, the availability of food sources, maybe even the coming weather. This is the concrete manifestation of the "attachment to the land" that is so often listed as the defining criterion for indigenous peoples. Yet this attachment may be far removed from a western concept of ownership.

Belonging to the land

For many societies, the idea that one could own the land, in the meaning freely dispose of it, may be unknown, whereas the idea of belonging to the land may be commonplace. Some societies may have very precise notions about the geographical extension of their user rights. Others may be surprisingly lax in that respect, perhaps reflecting a situation where the focus is more on nurturing social relations and maintaining flexibility in geographical adaptation. The relationship between individual and collective traits in such tenure systems may be even more puzzling. Although land and resources "belong" to the collective, i.e. can be used by anybody belonging to the local group, clan or tribe as the case may be, respect for labour input and "investments" is widespread. A garden belongs to the ones who made it; a fruit tree to the one who planted it. Taking food from another person's garden is theft. Yet the exclusive user rights granted to a person or a family is normally of limited duration. It is not an eternal right, and any attempt to sell the piece of land itself would be stopped.

The proven strength of such collective management systems is that they provide access to land and natural resources for anybody belonging to, or having been accepted by, the local social group. Although this access may not necessarily be equal for all, especially not in hierarchical societies, the collective approach maximises benefit for a large part of the society by putting limitations on the individual. The key limitation is

that land is non-transferable. It cannot be sold. This limitation, however, is often combined with a surprising level of acceptance for individual entrepreneurship. Cash cropping, low level mineral extraction, even some logging for commercial purposes, sale of herbs, oil, plant medicine, nuts, resins, handicrafts etc. are generally accepted. Growing economic inequality may frequently be kept within limits by exercising social mechanisms of reciprocity, redistribution and the high social value assigned to generosity.

The wider benefits of collective tenure

While collective land ownership, despite its fundamental importance to indigenous peoples, is generally resisted by the powers that be, governments and the international community have yet to understand and recognize the wider benefits this form of tenure would have for the state: large units give less bureaucracy, less conflicts, improved natural resources management, and sustainable delivery of environmental services. The two latter arguments have been particularly strengthened in recent years by new evidence that show that the establishment of indigenous territories is a highly efficient manner to secure well-functioning ecosystems through sustainable use of natural resources, and sustain vital environmental services. The strong correlation has resulted in the acknowledgement of indigenous peoples' "vital role" in environmental management and sustainable development by various international legal and policy instruments²⁶, like the 1992 Rio Declaration²⁷, as well as the

26 United Nations, Human Rights Council, United Nations Declaration on the Rights of Indigenous Peoples, Resolution 2006/2, Preamble: "*Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs; Recognizing also that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment*".

27 United Nations, Rio Declaration on Environment and Development, 3-14 June 1992, Principle 22: "*Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and*

2005 World Bank revised operational policy on indigenous peoples.²⁸ A mapping of the Brazilian Amazon in 1999 showed that there is a significant overlap between indigenous territories and biological hotspots.²⁹ This led the authorities to recognize the establishment of such territories as a central mechanism to protect biodiversity.

This again has wider implications for the general fight against poverty, as nature represents the wealth of the poor.³⁰ Most of the poorest people in the world live in rural areas and depend directly on environmental services for their survival. This is one of the main reasons why Millennium Development Goal 7 underlines the need to protect the environment to combat increasing poverty. Secure access for indigenous peoples to natural resources may provide livelihood to a point where they are actually not poor in material terms, even if they may be suffering from marginalisation and lack of public services. It is when this access is denied that many indigenous peoples, and other rural populations, are thrown into abject poverty.

South America pioneers

Relatively few countries around the world have recognised indigenous land rights in their constitutions, and only a handful, mainly in South America, have ceded territories to indigenous peoples corresponding to traditional claims. Out of South American indigenous population of about 40 million in the 1990's (or about 10% of the total population), more than 90% depended on land for their livelihood.³¹ Besides popular

enable their effective participation in the achievement of sustainable development”.

28 The World Bank Group, Operational Policy 4.10 Indigenous Peoples, January 2005, §2: *“the Bank recognizes that Indigenous Peoples play a vital role in sustainable development”*

29 The project was “Biodiversidade Amazônia, and the process was called Macapa Workshop (see ISA 10 Years (2005), Instituto Socioambiental, São Paulo, Brasil.

30 FOE International (2005), Nature: Poor people’s wealth – the importance of natural resources in poverty eradication, in Poverty, issue 108

31 Griffiths, Thomas (2004); Indigenous peoples, land tenure and land policy in Latin America, in Land Reform, FAO, 2004-1

demand in countries where indigenous peoples make up a substantial portion of the population, this recognition is mainly a result of the new democratic governments that took power after the demise of the dictatorships in the late 1980's. They justified the incorporation of indigenous peoples land rights into the new constitutions as a rightful compensation for the historical injustice done towards these groups. The argument was strengthened by the fact that insecurity of land tenure is the main reason why the indigenous peoples in the region are poorer than other population groups.

This view was reiterated when most countries in South America ratified the ILO Convention 169 in the 1990's, thus representing half of the signing countries worldwide. There is, however, significant regional disparity in the actual application of the convention and recognition of indigenous territories. Colombia and Ecuador have given indigenous peoples strong territorial rights including jurisdiction of natural resource management. Something similar may be under way with the new constitution being developed by the Evo Morales government in Bolivia. Colombia has ceded 53% (212,404 km²) of part of the Amazon to 60 indigenous groups with a total population of about 80,000.³² This corresponds to 18% of the national territory. Brazil had conceded by August 2006, in accordance with the constitution of 1988, exclusive and eternal user rights of indigenous peoples to more than 580 indigenous lands, totalling an area more than one million square kilometres (1,070,000 km², but the State maintains control over sub-soil resources). This amounts to more than one-fifth of the Brazilian Amazon region and almost 13% of the national territory.³³ Even so 167 land claims were still pending. While territorial rights of indigenous peoples are still limited in Peru and Venezuela, although slowly improving, these rights are still weak in the rest of the South American countries.

32 Brackelaire, V. (2005): Tendencias socioambientales en la cuenca Amazónica, Informe para Rainforest Foundation Norway

33 ISA (2005), Almanaque Brasil Socioambiental, Instituto Socioambiental, São Paulo, Brasília.

One million square kilometres

The case of Brazil illustrates that it is important and necessary to grant land rights to significant traditional territories independent of the size of the indigenous population for these groups to survive as a culture. In Brazil the indigenous population living on indigenous lands amounts to 450,000 (or 0.2%) out of a national total population of 190 million. Out of the more than one million km² ceded as indigenous territories, almost all (99% by extension) is found in the Brazilian Amazon, where it benefits 170 indigenous peoples. This is of course a result of accessibility to land after indigenous territorial rights were recognized.

There are several important lessons from this experience:

1. The material and social well being of the indigenous peoples with secure territorial rights in areas of traditional use or occupancy, is dramatically better than for those with little or no land in the South and Northeast of the country.
2. Of all protected areas in Brazil, indigenous territories are the areas where the ecosystems, particularly rainforests, are best maintained. While deforestation in protected areas varies from 2% in areas with federal jurisdiction to 8% in protected areas at the State level, deforestation in indigenous areas is only 1%. Deforestation in unprotected areas is 20%, but most of this (four fifths) is concentrated within a few kilometres along the roads in the region.³⁴

Efficient protection, but no magic wand

The case of the Xingu indigenous territory illustrates these points. This area of 27,000km² was established already in the 1960's to secure the livelihood and traditional territories of 14 threatened indigenous peoples in and around the area. In recent decades there has been a significant population growth, and today the population is almost 5,000. The manage-

³⁴ ISA (2006), Povos Indígenas no Brasil 2001/2005, Instituto Socioambiental, São Paulo, Brasília

ment of the territory is well organized and the rainforest remains intact even if it is situated in the middle of the so-called “deforestation arc”. The area around the territory has the highest deforestation rates in the world during the last decade. Had it not been for the granting of collective territorial rights, combined with close and successful collaboration with dedicated NGO partners to secure long term sustainable management, the Xingu territory would have been agricultural land today and the 14 tribes of the area would have been wiped out.

This is not to say that securing traditional territorial rights is a magic wand, which automatically results in secure livelihood of indigenous peoples and the protection of the environment in these areas. In the case of the Xingu indigenous territory, the rivers are increasingly being polluted by industrial agriculture situated outside the territory. Air pollution follows the burning of newly cleared forest right along the border of the territory. There is a constant threat of encroachment by neighbouring property holders that practice illegal timber exploration, fishing or hunting along the 900 km border. There are also ample internal challenges to sustainable management in Xingu and other indigenous territories. These arise when communities become sedentary, grow in numbers, increase material aspirations and consumption and change traditional farming, hunting and other natural resource management methods. It is therefore of utmost importance that the indigenous communities develop political capacity and management practices that can deal with both external and internal threats to the long-term sustainability.

Lagging behind

Beyond Latin America, recognition of indigenous peoples and their rights varies dramatically. Many Asian countries, although they resist the term ‘indigenous peoples’, are ready to accept special rights for “tribal groups” or “traditional groups”, and ILO Convention 169 itself concerns the rights both of indigenous and tribal peoples.³⁵ In Oceania,

³⁵ For a good overview of Asia see Colchester, M (2004), *Indigenous peoples and communal tenure in Asia, in Land Reform*, FAO, 2004/1.

Papua New Guinea is the country in the world where legal acceptance of traditional collective land rights is most fully realised. Explicitly recognised in the Papua New Guinea Constitution of 1975, some 97 percent of the national territory is managed under traditional collective land rights regimes. African States, on the other hand, commonly deny the existence of indigenous peoples. No African State has ratified the ILO Convention 169. The result is a lack of recognition of indigenous peoples' rights in domestic law. This is in contradiction not only with most of African States' commitments under international and regional instruments relating to human rights and sustainable management of the environment³⁶, but also with customary laws and traditional land tenure regimes that dominate rural areas of Africa.

A recent example: The Democratic Republic of Congo

While the principle of legal pluralism is accepted in DRC, modern law systematically rubs out the application of customary law when private economic interests come into play. The State has been using the constitutional principle that all lands and natural resources on the national territory are the property of the State to allocate logging concessions, while the World Bank postponed the realisation of a forest zoning plan which should, if conducted with the effective participation of local peoples³⁷, identify and secure the customary collective land rights of the latter. This is in contradiction with the recent acknowledgement by the World Bank of the failure, both in terms of poverty reduction and development, of the

36 See for example the case of the Democratic Republic of Congo, State party to the UN International Convention on the Elimination of All Forms of Racial Discrimination (1965), the UN International Covenants on Human Rights (1966), the UN Convention on Biological Diversity, the African Charter on Human and Peoples' Rights (1981), to cite only legally binding instruments, all relevant for indigenous peoples' rights.

37 The World Bank Group, The Inspection Panel, Notice of registration, Re: Request for Inspection – Democratic Republic of Congo: Transitional Support for Economic Recovery Credit (Proposed) and Emergency Economic and Social Reunification Support Project (EESRSP) – (Credit No.3824-DRC and Grant No. H 064-DRC), 1 December 2005

forest management model based on the promotion of industrial logging. The development of alternative sustainable and community-based forest management models should be a priority. A prerequisite is to secure local peoples' collective land and resource rights, as actually implied by the consecration of the concept of State sovereignty in the new DRC Constitution³⁸, which is now preferred to State ownership and calls for the Congolese State to respect the rights and interests of indigenous peoples, including their collective right to own, use, develop and control their traditional lands and natural resources.³⁹

Concluding remarks

From a rights' based perspective on development, and considering the inseparability of indigenous peoples' livelihood and culture from traditional territories, nation States can only fulfil their obligations as rights bearers towards indigenous peoples by formalising the rights of these groups to traditional territories. To do this, relevant policymakers, nationally or internationally, must recognise a set of basic principles necessary to secure these rights, and secondly adopt these to practical procedure. There have been numerous attempts to promote such principles and procedures by indigenous peoples themselves and others, and the following is a condensed version of some of these.

The main principles policymakers must recognize are:

- Indigenous peoples are entitled to intrinsic collective rights.
- Collective ownership to traditional territories is a key to the survival of indigenous peoples.

38 République Démocratique du Congo, Constitution de la République Démocratique du Congo, 18 février 2006, Article 9: *“L'Etat exerce une souveraineté permanente notamment sur le sol, le sous-sol, les eaux et forêts, sur les espaces aérien, fluvial, lacustre et maritime congolais ainsi que sur la mer territoriale congolaise et sur le plateau continental”*

39 N. Schrijver (1997), *Sovereignty over natural resources: balancing rights and duties*, Cambridge, United Kingdom, CUP

- Free, prior, informed consent must be applied to all processes concerning indigenous peoples, both in indigenous territories and outside, and space granted to traditional decision-making procedures.
- Development in indigenous territories must reflect the real aspirations of the indigenous peoples living there, even if those aspirations differ from the mainstream perception of development.
- The establishment of indigenous territories is also an efficient way to protect biodiversity and secure well-functioning ecosystems.
- Indigenous peoples must be represented in all governing bodies relating to the management of territories or other issues of concern.

Legal and practical procedures to grant collective land rights

- Governments must explicitly recognise the existence of the indigenous communities living on their territories, and the rights of indigenous individuals and peoples.
- Indigenous land rights must be constitutional rights, and legal and institutional reforms must be carried out accordingly.
- Indigenous tenure rights must be streamlined in all relevant sector laws and policies, such as land use, development and conservation of natural resources, and poverty alleviation.
- Local communities must have a central role in the identification of the territory.
- There must be a clear legal procedure for dealing with territorial claims by indigenous peoples to traditional territories.
- Efficient dispute resolution mechanisms are needed to solve conflicts with other occupants of the same territory, with the aim to give priority to the claims of indigenous peoples.

A major challenge in securing the participation of indigenous peoples is of course the limited capacity within many communities to deal efficiently with complex legal procedures. It is therefore of fundamental importance that the communities are given the necessary assistance to be able to do this, either through government agencies or NGO partners. In a longer-

term perspective it must be a key strategy to “increase support for the institutional strengthening of indigenous peoples’ representative community-based and political organizations”.⁴⁰

International responsibility

Even if the main responsibility to secure indigenous peoples’ rights rests with national governments, it is critical that the international community contributes with political support, expertise and economic resources to assist governments to establish and secure the management of such collective territories. Besides recognising the importance of establishing indigenous peoples’ territories, the international community should be much more active in promoting initiatives, programs and procedures for this to happen. A number of governmental institutions and civil society organisations - including, of course, indigenous peoples’ organisations - have accumulated valuable experience related to the establishment and management of indigenous peoples’ territories. Based on merit, they should be given a leading role in this work. If these issues are not given a much more prominent place in international development efforts, including in the work of the Commission on Legal Empowerment of the Poor, the international community will once again have failed the indigenous peoples of the world.

⁴⁰ Colchester, Marcus et al (2004); *Indigenous land tenure: challenges and possibilities*, in Land Reform, FAO, 1-2004



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Øyvind Ravna

Recognition of Indigenous Peoples' Land Rights through Modern Legislation. The Case of the Sami People in Norway

Introduction⁴¹

The Sami are an indigenous people whose land territory, called *Sápmi* in the Sami language, through the drawing of nation state borders was split between four countries; Norway, Sweden, Finland and Russia. In all four countries the Sami have been subject to varying pressure to adopt the majority population's culture, language and livelihood

41 Thanks to research fellow Laila Susanne Vars, who took part in the preparatory work with the Finnmark act, for reading through and for giving valuable advice. Thanks also to Professor Martin Scheinin and research fellow Else Grete Broderstad for reading through and for advice, and to the Centre for Sámi Studies at University of Tromsø for financing the translation of the article.

activities, and at the same time put their own traditions aside. Rights to land and water in Sápmi have been debated and discussed for half a century. In this article I will limit myself to the conditions in Norway, which is home to the majority of the Sami people. Finnmark is the northernmost county of Norway and a central part of Sápmi.

In this article we shall look into the reasons why the Sami people's use of land did not lead to legal recognition or right of ownership until present. Thereupon we will discuss whether the Norwegian state, through adopting the Finnmark Act⁴² and transferring ownership, might be able to rectify the consequences of this long-lasting lack of recognition of Sami rights, and make a road map for property rights and real empowerment.

Historical development of the right to land in Sápmi

The development that led to Finnmark becoming part of Norway

The central parts of *Sápmi*, or the Sami land, were the last territories to be incorporated into Norway. Whilst Norway as a state is considered to have been established through the unification of the country by Harald Fairhair [Hårfagre] in AD 872, what today constitutes the county of Finnmark was not fully subjected to Norwegian sovereignty until almost 1000 years later.

We can say that Denmark-Norway got a sole jurisdiction over costal Finnmark after the Kalmar War in 1613. All the way up until the boarder between Norway and Sweden was settled in 1751, Interior Finnmark remained a common area, where Swedish jurisdiction was largely executed. With Russia, the border was not settled before 1826.

⁴² Act of 17 June, 2005, No. 85, concerning legal relations and management of land and natural resources in the county of Finnmark.

In 1775, the state started meting out land to the county's population.⁴³ This has at times been viewed as the foundation for private ownership in Finnmark, and may be taken to be the start of the land sale regime, which was used to manage land in Finnmark all the way up to 2006.

The State Land Doctrine

Despite the fact that parts of Finnmark did not fully become Norwegian territory until 1826, the view quickly developed, that the Crown or the State owned all unsold land in Finnmark, without any form of encumbrance due to private land use rights. It's later mentioned as "state land doctrine".⁴⁴

Act of 22nd June 1863, on Realization of State Land in Finnmarken's Rural District (the Land Sales Act of 1863), was based on the same point of view, where new principles were introduced for land meting. The Act clearly carried in it the "state land doctrine". From then on, land meting should take place through an *organised sale*. In the liberalistic spirit of that time, the land sale was initially envisaged as an auction, selling to the highest bidder.⁴⁵ During processing in the Storting, the Bill's most pronounced liberalistic traits were removed, resulting in the establishment of relatively strict requirements for sale of land. If the sale was inconsistent with the "District's Benefit", it could not be realized. A special provision was given, forbidding sale to individuals of areas which residents or nomadic Sami needed for summer pastures.

On what background was it then that the Sami areas, and especially Finnmark, ended up with a different ownership situation than the rest

43 The "Royal Decree concerning the Partitioning of Land in Finnmark and the meting out and taxation of Settlements therein, of 27th May, 1775" (The Land Meting Decree of 1775), established the practice of meting out land to individuals.

44 In 1864 the "state land doctrine" was pleaded by the state apparatus in the form we subsequently know it. This happened in connection with a dispute over logging rights in Alta (For more details, see NOU [Norwegian Official Report] 1993: 34 p. 86 et seq)

45 NOU 1993: 34 p. 420 q. 1.

of Norway? The explanation seems to lie partly in the “Cultural Stages Doctrine”, partly in security policy considerations, and partly in the development of Norway as an independent nation. The “Cultural Stages Doctrine” can be said to have its roots in the argumentation that was used when English immigrants needed legitimacy to seize indigenous land in North America.⁴⁶ Later on it has been used in other connections, when similar circumstances were in need of legal recognition. This “doctrine” was, briefly stated, about less developed cultures and peoples having to give way to the more developed ones, which were more useful for the development of society. In legal thinking this implied that the principle “first in time, strongest claim in law” (*Prior tempore, potior jure*) was set aside. From a cultural hierarchic point of view, nomadic land use was considered primitive.⁴⁷ In practice, this meant that Sami land use had to yield to that of the sedentary Norwegian farmer, who was viewed as both more developed and of greater national importance.

Under the influence of “nation building” and an increased fear of the “danger from the east”,⁴⁸ the ban against sale, when in conflict with the “Benefit of the District”, was extended to include “National Interests” as well in the new Land Sales Act of 1902.⁴⁹ Pursuant to the Act, regulations

46 See Nils Oskal ”The moral grounds for disqualification of indigenous property rights to land and political independence” in Kirsti Strøm Bull, Nils Oskal and Mikkel N. Sara, *Reindriften i Finnmark. Rettshistorie 1852 – 1860 [Reindeer Husbandry in Finnmark. Legal History 1852 – 1860]* (2001). Oskal illustrates this with a run-through of John Locke, *Two Treatises of Government* (1690).

47 A closely related view was that cultivation of land was a prerequisite for acquiring the right to it. Fredrik Stang (1867-1941), who was one of Norway’s most prominent legal scholars at the time, formulated this in the following manner in his *Indledning til formueretten* [Introduction to Property Law] (1911), p. 3: “So long as the people live as nomads, so long as the land is vast enough to offer to all the space they need, the land is, however, not subject to proprietary rights. It is not until a tribe settles down and performs agriculture, that right of ownership to the land arises.”

48 Knut E. Eriksen og Einar Niemi, *Den finske fare: sikkerhetsproblemer og minoritetspolitikk i nord 1860-1940* (1981). [The Finnish danger: security problems and minority politics in the North 1860-1940]

49 Lov 22. mai 1902 nr. 7 om afhændelse af statens jord og grund i Finmarkens

were given in Decree of 7 July, 1902, where it was established that sale could only take place to Norwegian citizens, under special "consideration to advance the Settling of the District, its Tillage and other Utilisation fit Population, which can speak, read, and write the Norwegian Language and employ it for daily use." The new legislation made it impossible for the Sami to become landowners unless they adopted Norwegian agriculture and Norwegian language. Even though there hardly exist instances of these regulations being enforced, they were a beacon in the Government's view of the Sami, and the large number of Norwegian-sounding family and farm names among sedentary Sami must be regarded as a direct consequence of this policy.

The voice of the Sami politician *Isak Saba* expressed the fact that many Sami were resentful to the new law, when he asked if "the grass won't grow just as well in the meadow, whether you speak Norwegian or Sami? Isn't it enough that the Sami have to purchase the land that from time immemorial has been their?"⁵⁰ Despite his seat in the Storting, Saba's voice did not carry far enough.

Changing views on the right to land in Finnmark

After World War II, the first signs of a changed and more positive view on Sami culture, language, and livelihood activities appeared. The Sami Committee was appointed in 1956, and in 1959 it submitted its report on the fundamental aspects of the Sami's societal position. The committee emphasized the importance of mutual respect between Sami and Norwe-

amts landdistrikt § 2. [Act of 22 May, 1902, No. 7, Relating to the Sale of the State's Land and Ground in the Rural District of Finnmark County, Rt. 1]

50 Sagai Muittalægje (Newspaper in Sami language) 1 March, 1906, from Steinar Pedersen, "Statens eiendomsrett til grunnen i Finnmark – en del av den interne 'kolonihistorie'" ["The State's Right to Ownership of the Land in Finnmark – a Part of the Internal 'Colonial History'"] in Harald Eidheim (ed.) *Samer og nordmenn* (1999) p. 37. Isak Saba (1875–1921) was also the first Sami to be elected to the Storting. From 1907 to 1912, he was a representative to the Storting of Arbeiderpartiet [the Norwegian Labour Party] from Finnmark. Today, Saba is best known as the author of the lyrics to the Sami National Anthem *Sámi soga lávlla*.

gians, which must be said to be a break with the Norwegianisation policy. In 1964 the Norwegian Sami Council was appointed, upon the Sami Committee's proposal, as a consultative body on Sami issues for regional and central authorities.

The Reindeer Husbandry Act Committee of 1960 was another exponent of this changed view. In 1966, the committee submitted its proposal for a new Reindeer Husbandry Act, which carried forward a quite different view on the reindeer herding Sami's rights than what the then extant legislation expressed. The Committee expressed the opinion that "the reindeer husbandry must at least be old enough to have become a prescriptive title already before the time of the law originators."⁵¹ The committee suggested giving reindeer owners legal protection against interventions, by only allowing such interventions if the measures taken warranted expropriation or replacement, or if they implemented compensation for the losses incurred by the reindeer husbandry or individual reindeer owner.

This did not, however, make the state change its views on reindeer herding rights.⁵² Nor were any changed views expressed when the time came to reevaluate the Land Sales Act. In the preparatory work it was said that: "As far back as Norwegian history can take us, all land and ground in Finnmark proper was considered to be state property."⁵³ This was the point of departure for the legislation that should apply until the Finnmark Act entered into force on 1 July, 2006.

The first weighty academic move in the debate on the right to land in Finnmark was *Sverre Tønnesen*'s doctoral thesis of 1972, aptly titled *Retten*

51 Report from the Reindeer Husbandry Act Committee (1966), p. 11.

52 See Ot.prp. No. 9 (1976–77).

53 In Innst. om lov og forskrifter om statens umatrikulerte grunn i Finnmark fylke ["Recommendations Concerning Act and Regulations Relating to Unregistered State Land in Finnmark County"] (1962) which was one of the preparatory works of the Land Sales Act of 1965, this doctrine is expressed as follows: "As far back as Norwegian history can take us, all land and ground in Finnmark proper was considered to be state property."

til jorden i Finnmark [The Right to the Land in Finnmark]. Tønnesen's dissertation was relatively quickly given weight by the courts. In the Varfjell-Stifjell judgement,⁵⁴ the Supreme Court, clearly inspired by Tønnesen, found that the legal circumstances in Finnmark were distinctive, "with partly unclear rules relating to the extent of the state's rights to unregistered land" (p. 498).

When the unregistered land was to be registered in 1980, it is worth noting that the Ministry of Environmental Protection, who was in charge of the land registration, in a letter to the Ministry of Justice stated that regarding the question "as to who should stand as title holder ... it would be unfortunate if the state was officially registered as title holder before the circumstances relating to ownership and land use rights to the unregistered land has been clarified more closely. We refer to, among others, the Supreme Court judgement of 6 April, 1979 (Rt. 1979 p. 498), where the grounds of the judgement refer to the fact that the extent of the state's right to the unregistered land is not clear."⁵⁵

The relationship between parts of the Sami population and the state became more complicated and difficult as a result of the Storting's decision, in 1978, to exploit the Alta-Kautokeino-watercourse. To the extent that a positive attitude had developed towards the Sami people, this industrial development showed to what limited extent this attitude was put into political practice. The big demonstrations against the development did not manage to bring about changes in the hydroelectric project. The Alta case nevertheless represented a turning point in Norwegian Sami policy, and it must be allowed to claim that it, perhaps jointly with Tønnesen's thesis, was an important reason why the Sami Rights Committee was established on 10 October, 1980. Its mandate was to give an account of the questions relating to the Sami population's legal status

54 Rt [Rettstidende; Supreme Court Law Report] 1979 p. 492,

55 Statens kartverk [Norwegian Mapping Authority], the Finnmark archives: Letter of 8 Nov, 1979, from the Ministry of Environmental Protection to the Ministry of Justice

concerning the right to and disposal and use of land and water.⁵⁶ This was the opening of the legislative work that a quarter of a century later led to the Finnmark Act. The Sami Rights Committee submitted its first report in the form of NOU [Norwegian Official Report] 1984: 18, on the legal status of the Sami. It gave a foundation for "the Sami Act" and Article 110a of the Norwegian Constitution.

The state's opinion and administrative practice did not change

Despite the fact that legal scholars and legal historians gradually lined up in broad unison behind Tønnesen's views and suggestions, and the Supreme Court through several court decisions determined that the Sami people had legally protected rights and at the same time questioned state ownership, this did not entail tangible changes in state owner disposal. The state land administration still had to relate to currently applicable law, as expressed through the Land Sales Act of 1965. However, currently applicable law is not a static entity, but often based on perceptions and decisions that change over time and thus influence the law. And this was exactly what was the case concerning the perception of the Sami's and the local population's right to the unregistered land in Finnmark. But contrary to the Courts of Justice and the legal scholars, the state's administrators of this unregistered land were rather unwilling to lend an ear to these new signals.

During the first half of the 1980's, the unregistered land was registered with the property term "state land" in the real property registry. Even though this reregistration was of a formal nature, caused by the then newly adopted Land Subdivision Act, it entailed that "state land" became formalised as property with registration traits such as registry number, property registry file, and the possibility to transfer by deed and to mortgage.⁵⁷ There was perhaps one exception: "division of property proceedings", or any other

56 NOU 1984: 18, p. 42, q. 1

57 Until 1980 properties in Finnmark had been registered according to a special system with "cadastral and registry number" in which only subdivided property had a registry use code. The registration of Finnmark was completed in 1986.

primary document, was missing due to the fact that the property had not been acquired through any form of ordinary legal transaction within the principles of contract law.

Seven years after the registration was finalised, on 11 August, 1993, the Government, represented by the Ministry of Agriculture, utilised the opportunity it had been given to transfer by deed. Despite the above mentioned official letter from the Ministry of Environment and the intention of the registration,⁵⁸ the authorisation for "state land" in Finnmark was then deeded to the newly established Statskog SF. As a state enterprise the administrators of "state land" in Finnmark were no longer subject to the strict principles of free access to public records of the Public Administration Act and at the same time they were given the objective of commercial management.⁵⁹ In the long term, this implied that the population's common land was treated as capital, with requirements of interest and surplus, while the legal disputes between state and privates increased.⁶⁰ In a comprehensive scientific work on jurisprudence, the reorganisation was elucidated relative to the Sami legal position. The authors are critical to the reorganisation and conclude by saying that: "The reorganisation of the Directorate for State Forests into Statskog SF [...] in our opinion violated ILO Convention no. 169."⁶¹

58 Reference can also be made to a speech by Jens Iversen, Norwegian Mapping Authority, given in *Posisjon* 2006 (14) no. 4, where he stated that "It was not the intention that the establishment of 512 land/title numbers (in 20 municipalities) in 1986, with the code 'state land' in the property registry, should accommodate for transfer and judicial registration from the State, by the Ministry of Agriculture, to Statskog..."

59 Statskog SF was established on 18 January, 1993, by means of a reorganisation of the Directorate for State Forests. The main aim of the enterprise can be found at <http://www.statskog.no> (31.10. 2006).

60 For instance, reference can be made to Hålogaland lagmannsrett [Appeals Court], judgement of 23 March, 1999 (LH-1998-707) and Hålogaland lagmannsrett judgement and verdict of 15 September, 2004 (LH-2003-14370 / LH-2004-10944). The cases were denied brought before the Supreme Court (HR-2004-02032-U and HR-2004-02033-U).

61 Ole Ch. Borge and Kristian S. Myrbakk "Samiske rettsforhold i Finnmark

The historical legislative development must be said to have reached the end of the line when the Sami Rights Committee's legal group in the report NOU 1993: 34 took a stand as to who had ownership of "state land" in Finnmark, an issue we will return to shortly.

The Finnmark Act and its legislative history

The Sami Rights Committee and ownership to "State Land" in Finnmark

The actual preparatory work on a new act on the management of land in Finnmark, started in September 1984 when the Sami Rights Committee established a working group consisting of highly qualified legal specialists, subsequently referred to as the *Rights Group*, to investigate the legal circumstances. Thus, parallel to the process that led to Statskog SF attaining warranted ownership of the land in Finnmark, the Sami Rights Committee was carrying out an investigation to find out who was the rightful landowner. Conveniently for Statskog SF, the majority of the Rights Group concluded that the state was landowner both in the interior and outer parts of Finnmark. Relative to the fact that the state had not been the owner before 1751, it was stated that "[in] Norwegian law, it is a fact that what once was right, does not necessarily have to be right now – relating to ownership as well as other rights issues. This applies even if the change is not based on agreement or clearly expropriational or legislative decisions, but is rooted in misunderstandings."⁶² Almost apologetically, it was stated that even though the misunderstanding at the time when it occurred was difficult to excuse, the rule still applies. At the same time, the Rights Group did not rule out that local societies might have acquired the right of use of certain resources in accordance

og Statskog SF" Tidsskrift for rettsvitenskap årgang 111 ["Sami legal position in Finnmark and Statskog SF", Journal for Legal Science, annual volume 111], 1998, pp. 182–285, on page 280.

62 NOU 1993: 34 *Rett til og forvaltning av land og vann i Finnmark*, [The right to and management of land and water in Finnmark], p 266 q. 2 and p. 263 q. 1, respectively.

with the rules for immemorial usage, local customary law or “established circumstances”.

In light of the above, the Sami Rights Committee’s second report, NOU 1997: 4, must be viewed as a proposal to rectify this misunderstanding, which had led to state ownership. The report argued in favour of local management, with the establishment of local land use areas based on traditional outlying land use.⁶³ In these areas, the local population should have special land use privileges in preference to other inhabitants of the same municipality. The proposal was based on the argument that such a local land use system could be viewed as a modern siida system [siida is historically a Sami local community] which would open up for local management of clearly defined rights for the local population.

The Sami Rights Committee also substantiated the proposed local land use system on the basis of universal principles of customary law, which imply that so long as the inhabitants of a local community have been making relatively intensive and long-lasting use of the benefits of outlying land adjacent to their community, believing that they have rights that correspond to this use, there may have been established local customary rights which may have precedence over universal legislation. The Committee proposed that the local land use areas should be established by commissions with local insight, with the Land Consolidation Court⁶⁴ as court of appeal. It was argued that “[the] Land Consolidation Court has long experience with concrete delimitations, and therefore stands out as the natural review body. Furthermore, a boundary delimitation case pursuant to the Land Consolidation Act [...] seems to be the most obvious format for such a process [...]”.

63 NOU 1997: 4 *Naturgrunnlaget for samisk kultur*, [The natural foundation for Sami culture], p. 239 ff

64 Jordskifteretten [the land consolidation court] is a special court which works with reallocation, severance, and consolidation. It has gradually developed into a specialised ‘land court’, dealing with boundary disputes and other disputes over land rights.

The Government Bill: Proposition to the Odelsting, No. 53 (2002 – 2003)

When the Government presented its Bill in the form of Proposition to the Odelsting no. 53 (2002 – 2003), it was pronounced that this would form the basis of a new land management scheme “in which the people of Finnmark themselves attain owner disposal and take on the responsibility for managing these resources, while the state withdraws from its role as landowner in Finnmark.” The proposal was meant to eliminate any possible doubt that the state’s ownership had been an obstacle to acquiring independent rights. It was also stated ”that any and all land use over time may lead to rights, independently of the users’ ethnic and cultural background.” Even though there had been periods when forms of discrimination – such as language requirements (see section 2.2 above) – had been practiced, it was declared that there had never been a dogma in Norwegian law stating that Sami land use should have less legal rights effect than the land use of other Norwegian citizens.

The Sami Rights Committee’s proposal, that Sami and other local rights should be *de facto* recognised through the establishment of local land use areas, was, however, left out. The Bill met heavy opposition.⁶⁵ County Council politicians feared that the Sami, due to the composition of the governing board of the proposed estate enterprise, would have too much influence. Sami sources pointed out that the Sami Rights Committee’s work had not been followed up, and that the Bill did not satisfy Norwegian international law obligations towards the Sami.⁶⁶ In May, 2003, the Sami Parliament plenary assembly rejected the Bill, against three votes. It demanded considerable changes to the Bill, and the initiation of consultations:”where the aim of these consultations must be to estab-

65 I have previously pointed this out in ”Forslaget til ’Finnmarkslov’ og bygdefolks rettigheter” [The draft ‘Finnmark Act’ and the local population’s rights” in *Kritisk juss* [Critical Law] No. 1, 2004, pp. 35 – 57, where there are also references to the referred quotes.

66 Former Sami Parliament President and then head of the United Nations Permanent Forum on Indigenous Issues, *Ole Henrik Magga*, in *Sagat* for 5 April, 2003, declared that the draft Act violated Norwegian and international law.

lish a legislative basis, which also the Sami Parliament could endorse". In October 2003 the UN Special Rapporteur on Indigenous Issues, Rodolfo Stavenhagen, came to Finnmark on an invitation from the Sami Parliament.

In 2004 the ILO expert committee concluded that the Act did not fulfil the minimum standard for recognition of indigenous rights of ILO Convention No. 169.⁶⁷ As a result of the doubt that was raised as to whether the Bill was in accordance with Norwegian international law obligations vis-à-vis the Sami, the Justice Committee appointed two independent legal experts (Geir Ulfstein and Hans P. Graver) to assess the Bill relative to international law. They concluded that the administrative regime prescribed by the Act was not in accordance with international law.⁶⁸ A government appointed expert (Carl August Fleischer), on the other hand, arrived at the opposite conclusion.⁶⁹

One of the reasons why the Bill was met with criticism can be linked to expectations being set quite high after the Sami Rights Committee had been working for so long, and at the same time the Sami had become more conscious of their rights. One must also be permitted to say that there was a striking lack of coherence between the Sami Rights Committee's recommendations and the Bill. One of the most important objections was precisely the fact that the government did not pursue the Sami Rights Committee's proposal to establish the local population's rights. The Bill also failed to take a stand on what rights the people of Finnmark had, thus *de facto* not recognising these at all. That the government argued in favour of the state's rights on the basis that the state's ownership arose

67 CEACR: Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Norway (ratification: 1990) Published: 2004. See document No. (iloex): 062004NOR169 especially section 16 and 19 (<http://www.ilo.org/iloex/> 27.10.06)

68 See Hans Petter Graver and Geir Ulfstein *Folkerettslig vurdering av forslaget til ny Finnmarkslov* [Assessment, relative to international law, of the new draft Finnmark Act] of June 11, 2004, (<http://odin.dep.no/jd/27.10.06>).

69 See e.g. Report No. 44 to the Storting, (2004-2005), Relating to the Sami Parliament's Activities in 2004, Section 2.2.3.

as a result of misunderstandings, where any rights to the population of Finnmark appeared not as concessions but as awards, obviously also served as a provocation.

The Finnmark Act

As a result of the criticism against the Bill, consultations were held between the Justice Committee, the Sami Parliament, and Finnmark County Council after the international law assessment. It can be argued that this established a new constitutional practice in Norway, and that it is of great significance to indigenous peoples' possibility to influence decision taking processes.⁷⁰ The consultations have led to relatively substantial changes being taken into the Bill that was presented to the Justice Committee in May, 2005.⁷¹ However, the main concept of the government's proposition – that ownership to the land, which today belongs to Statskog SF, be transferred to an independent body named *Finnmarkseidetdommen* [*the Finnmark Estate*] – remains in force.

In the following, I will go through the Finnmark Act, highlighting those changes that were introduced during consultations. They primarily consist in a changed composition of the governing board, the rules for processing changes in use of outlying land, and the implementation of ILO Convention No. 169 in the Act. It was also an essential demand from the Sami Parliament, among others, that acquired rights should be established by an identification committee. This has been taken into account.

70 In accordance with international law, the consultation obligation is included in ILO Convention No. 169, art. 6.

71 Innst. O. No. 80 (2004-2005) *Innstilling fra justiskomiteen om lov om rettsforhold og forvaltning av grunn og naturressurser i Finnmark fylke (finnmarksloven)* [*The Justice Committee's report on the Act relating to legal relations and management of land and natural resources in the county of Finnmark (Finnmark Act)*]

The Finnmark Act has six chapters.

- Chapter 1 gives general provisions for the understanding and application of the Act.
- Chapter 2 gives provisions for the new land management body, Finnmarkseiendommen *inter alia* relating to the composition of the board and case processing.
- Chapter 3 gives provisions for management of renewable resources, such as e.g. hunting, fishing and wood chopping.
- Chapter 4 addresses fishing in the Tana and Neiden watercourses. It says that "the Finnmark Act will not make encroachments into existing rights to fishing in these watercourses".
- Chapter 5 gives provisions for the two new bodies – the Finnmark Commission and the Land Tribunal for Finnmark.⁷²
- Chapter 6 gives provisions for entry into force of the Act, including the transfer of land from Statskog to Finnmarkseiendommen.

If we want to look more closely at specific issues that were of special significance during consultations, it is natural to start with Section 1, in which the objects clause was changed so that the management of land and natural resources should be to the benefit of the county's population and "especially as a foundation for Sami culture, reindeer husbandry [...]", whereas the "general public" was left out. Section 3, which grants precedence to international law, is perhaps of greater practical interest. It establishes that the Act applies with the restrictions that follow from ILO Convention No. 169, and that the Act should be applied in accordance with provisions of international law relative to indigenous peoples and minorities. Even though ILO Convention No. 169 was ratified by Norway already in 1990, this is the first time it has been given precedence over Norwegian legislation. Section 5 now establishes that the Sami collectively and individually have acquired rights to land in Finnmark through

⁷² The English translation of the Finnmark Act uses the term "The Uncultivated Land Tribunal for Finnmark". The term "uncultivated land" is not very suitable in a Sami context, since Sami livelihood activities and culture were, historically, primarily performed in this outlying land, which is consequently Sami "cultural land". Therefore the more neutral "Land Tribunal for Finnmark" is used.

long-lasting use of land and water, and that the Act does not encroach on rights which the Sami and others have acquired through prescription or immemorial usage. This too is a very important “signal provision”. At the same time it is of practical significance since it limits Finnmarkseiendommen’s authority over its “own” land.

Section 7 establishes that the governing board of Finnmarkseiendommen shall consist of six persons; three appointed by the County Council and three by the Sami Parliament. The board member without voting rights, which was proposed appointed by the government, has been removed.

How the board was to solve internal dissent concerning changes in the use of land, was a topic of discussion. Section 10 states that “Finnmarkseiendommen shall assess the significance a change will have for Sami culture, reindeer husbandry, use of outlying land, commercial activity, and societal life. The Sami Parliament’s guidelines shall be followed in the assessment of Sami interests.” Decisions concerning changes in the use of outlying land are based on rather complicated voting rules, pursuant to which a demand may be made for the matter to be placed before the Sami Parliament.⁷³ However, the state still has the final say when disputed decisions, concerning property which is no longer theirs, have to be made. If the Sami Parliament does not ratify the decision of the majority or fails to process the matter within a reasonable time, a collective majority of the board may demand that the matter be placed before the King, who shall decide whether the decision shall be approved. Such approval of the decision has the same effect as such a decision by the board. It is also worth noting that special voting schemes are prescribed if a proposal only applies to the Sami administrative area,⁷⁴ or only to the remainder of Finnmark, a practice which is explained on the basis

73 In Section 10, second paragraph, it says that “changes in the use, require the support of at least four board members if the whole minority bases its opinion on considerations for Sami culture, reindeer husbandry, use of outlying land, commercial activity, and societal life assessed on the basis of the guidelines of the Sami Parliament. If the majority consists of four or less, a collective minority may during the board meeting demand that the matter be placed before the Sami Parliament.”

74 The municipalities of Karasjok, Kautokeino, Nesseby, Porsanger and Tana.

of the requirements of ILO Convention No. 169, Article 14, relating to "recognition" of indigenous peoples' land rights.

Another contentious issue in the debate has been the general public's rights. In Ot.prp. No. 53 (2002 – 2003) the government suggested that the general public's right to renewable resources should be fixed by law. This was supported by the Norwegian Labour Party and the Norwegian Association of Hunters and Anglers, which throughout parts of the legislative process lobbied to secure statutory rights to hunt in Finnmark for hunters from other parts of the country. It is worth noting that the Sami Parliament and the County Council majority have now obtained approval that such rights should not be given legal protection. In relation to this, we can say that the Act is based on three "levels of rights". Level 1 is the municipality's population, which has the right to certain resources; e.g. gathering eggs and down, and limited logging. Level 2 is the county's population, which has the right to hunt and fish and pick cloudbERRIES. Level 3 is the "general public", which has access to small game hunting, angling and cloudberry picking for their own household.

The Sami Rights Committee, in NOU 1997: 4, proposed that it should be possible to establish local land use areas based on the local community's traditional use. In Ot.prp. No. 53 (2002-2003) this was left out.⁷⁵ This was met with broad criticism. The Justice Committee attached importance to the criticism, thus opening up for one of the Act's most exciting chapters, i.e. the provision concerning the establishment of the *Finnmark Commission* (Section 29), which at the same time is a real acceptance of the principle that the Sami and other local residents in Finnmark have obtained rights through immemorial usage, etc. This Commission shall, on the basis of current national law, investigate rights of use and ownership to the land Finnmarkseiendommen takes over from the state.

⁷⁵ I have discussed this in "The right to the land in Finnmark, Sami rights, and the draft Finnmark Act" in *Kritisk juss* [Critical Law], No. 2, 2005, pp. 200 - 211.

A special court, the Land Tribunal for Finnmark (Section 36), shall also be established, to consider disputes over rights that arise after the Finnmark Commission has investigated a field, e.g. in such matters where individuals or groups that claim to have rights pertaining to civil law, do not find acceptance for this with the Commission, or if Finnmarkseiendommen rejects the Commission's conclusions. The Land Tribunal shall consist of a chairman, a vice-chairman, and three permanent members, appointed by the King. Decisions of the Land Tribunal are subject to a limited appellate system, as they may only be appealed to the Supreme Court.

Clarification of legal circumstances in Finnmark

The process of rights identification and rights reinstatement was started when Statskog SF transferred the authority over the previously unregistered land to "Finnmarkseiendommen" on 1 July, 2006. The legal circumstances are now next in line for clarification by the Finnmark Commission, which is stipulated to be operative from 1 January, 2007. The Commission shall itself establish which fields to investigate, and in which order. It may omit to investigate rights that are clearly inappropriate for investigation by the Commission, and is itself responsible for obtaining sufficient information concerning the legal circumstances, cf. Section 32. The Commission shall investigate fields that it determines and delimits itself. After this, the Commission shall submit a report which shall contain information about: a) who, in the view of the Commission, are owners of the land, b) what land use rights exist, in the Commission's view, and c) the circumstances on which the Commission bases its conclusions. Finnmarkseiendommen shall assess the Commission's conclusions. To the extent that Finnmarkseiendommen agrees with the Commission that other parties hold rights, it is obliged to state this in writing, and ensure that the right is officially registered or, if appropriate, bring the matter before the *Land Consolidation Court* pursuant to Section 45 (for boundary marking on the ground and fixing of coordinates).

To what extent the Commission will solve this through negotiations and mediation, or if clarification must come through trials, only the future

will show. In the proposed regulations for the Finnmark Commission, it has been suggested that the Commission may also mediate in legal issues it has not investigated.⁷⁶

Will Sami historical rights be recognised as a result of the Finnmark Act?

Title transfer to "Finnmarkseiendommen" is insufficient as a recognition of the Sami's right to own their land

The Finnmark Act and the transfer of ownership from the state to the residents of Finnmark is a long step in the right direction when we talk about the Norwegian state's willingness to fulfil its obligations pertinent to international law, and to recognise Sami land use and ownership rights. We must, however, realise that as a result of the politically polarised process that led to the Finnmark Act – in which apparently also the legislature experienced a shortage of time – the Act may not have been given the comprehensive preparation it should have had in its final phase. There is a long distance, both in time and in material contents, between the bipartite Bill, which was sent out for comments after NOU 1997: 4 had been presented, and the Act, which found its final form after Innst. O. No. 80 (2004–2005) had been processed in the Storting. Whether or not a new round of comments should have been implemented at a later stage, I choose not to address, since the formal consultation practice was followed.

The actual process of rights reinstatement was, as mentioned, started when Finnmarkseiendommen became owner of the previous "state land" on 1 July, 2006. This was just a small, but formally important step in the initial stages of the process. At present, the process has not come much further than this. The new land administration body retained the staff and management from the old state enterprise, and the administration

76 Consultation paper from the Ministry of Justice and the Police, dated 28 June, 2006, cf. the draft Section 6, second paragraph.

is still located in Vadsø, not in Lakselv, as both the Sami Parliament and the board of Finnmarkseiendommen have determined that it should be. Due to these circumstances, the transfer has so far hardly been noticeable for Finnmark's population. Nor has it contributed to strengthening the feeling of ownership in the average Finnmark resident, that the new board distinguished itself by introducing fees for case processing and meting out land, and by keeping board meetings closed to the public.

The Finnmark Act should, as mentioned, be applied in accordance with ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries. Article 14 implies that Norway has taken on the responsibility to recognise the Sami people's right to own and possess those lands which they traditionally occupy, and furthermore that the authorities should take necessary measures to identify the lands which this people traditionally occupies, and guarantee effective protection of their rights of ownership and possession. These two points are reflected in Section 5 of the Finnmark Act.

In accordance with Article 14, adequate procedures shall be established within the national legal system to resolve land claims by indigenous peoples. Whether the system that is now established to take care of this, in Chapter 5 of the Finnmark Act, is appropriate, is still difficult to discuss, since there is as yet no extant practice or any other instances to refer to. We must, however, question the composition of the Commission, where emphasis has principally been placed on legal expertise, despite the Justice Committee majority's statement that "it is very important that the Commission not only consist of practitioners of law, and for it to have legitimacy within the entire population". Other professional and local knowledge does not seem to be given any priority worth mentioning.

Whether the system with a Commission and a specialised Tribunal with limited access to appeal, is more appropriate than processing in the ordinary Courts of Justice, enforced with the necessary expert lay judges, has not been discussed to any significant extent beyond the statement that the majority finds it "clearly not acceptable relative to international law to leave it up to the ordinary courts to decide which and how extensive

rights have been acquired in Finnmark.”⁷⁷ This last statement must be said to be a harsh criticism of our legal system concerning international law issues.

It is not without reason that there is a great deal of anticipation regarding how the rights identification process will be carried out. Sverre Tønnesen, 35 years ago⁷⁸, pointed out that the Finnmark Common Land was not one Common Land, but ”would, in legal terms, best be considered as several Common Lands, largely governed by the same general regulations.”⁷⁹ In my opinion, these are still weighty words, which those who are set to clarify the rights circumstances should bear in mind. A central issue is whether the process prescribed by the Finnmark Act, will be able to provide recognition and acceptance of rights to those who through historical land use have acquired such rights, be it local societies, kinship groups, siidas or individuals. This also includes the question whether the holders of rights will get to influence the management and administration of land and natural resources on a level that is in proportion to their legal stature. Even though the rules for board composition in Section 7 of the Finnmark Act, according to which the Sami Parliament appoints half of Finnmarkseiendommen’s board members, could be viewed as a result of recognition of the Sami people’s right to ownership and possession of their lands, collectively and individually, these regulations are hardly sufficient to say that the claim for Sami rights to ownership of their lands is fulfilled both pertinent to international and domestic law.

77 Innst. O. No. 80 (2004–2005), p. 28, q. 2

78 Sverre Tønnesen’s doctoral thesis of 1972, aptly titled *Retten til jorden i Finnmark* [*The Right to the Land in Finnmark*]

79 Tønnesen (1972), pp. 312–313

The execution of the rights identification process is of decisive importance

It is important that the rights which different groups of people in Finnmark – Sami as well as Norwegian – are entitled to, according to Section 5 of the Finnmark Act, are not confused with a public law access to practice management and administration. It is hardly the intention of the Act that the Sami Parliament should become co-owner of Finnmarkseiendommen at the expense of Sami who have acquired rights on the basis of immemorial usage.⁸⁰ This is also how we must understand the Justice Committee majority's statement that "land where Finnmarkseiendommen stands as owner of [may] in reality be owned by others, or there might exist land use rights for third parties on the same land".⁸¹ The extent of such ownership and land use rights can only be determined pursuant to a thorough and diligent mapping of rights and land use circumstances.

For the Finnmark Act to lead to a successful fulfilment of obligations vis-à-vis the Sami people, regarding ownership of the land to which they have historical rights, certain requirements have to be placed on the Commission. Rights of a private nature, both individual and collective ones, should be charted and determined in such a way that later on no doubt can be raised as to whether the obligations were actually fulfilled. The collective nature of rights to use, and ownership, in Finnmark's outlying land raises special challenges when it comes to determining rights holders' influence on management and administration. For ownership and land use rights to be real, the rights holders must get a share of the profit this property yields. This means that collective rights should be settled in a manner that is sufficiently precise and decisive to determine

80 Norway's international law obligations vis-à-vis the Sami must instead imply that the land use that has been practiced shall be recognized and be given legal status, as stated in NOU 1997: 5 *Urfolks landrettigheter etter folkerett og utenlandsk rett*, [Indigenous land rights according to international law and foreign law], p. 34. This may imply a certain degree of autonomy within both legislative and administrative authority. This authority should, naturally, be placed with the Sami people's elected Assembly, the Sami Parliament.

81 Innst. O. No. 80 (2004–2005), p. 18, q. 2

the rights holders' ideal shares in such a way that distribution of expenses and income, including responsibilities vis-à-vis third party interests, may be determined.

The Finnmark Act does not give indications of how rights holders, such as members of a local society or a siida, should look after rights that are of a financial nature, after the Finnmark Commission has identified them. In my opinion, this is a weak point in the Act. There are many similarities between the "Finnmark Common Land" and other common lands, and it is therefore relevant to look to the common land legislation – which does have solutions to such questions, where local or state common lands are involved.⁸² Seen in relation to the detailed set of regulations the state has adopted for common land rights holders, this appears to point to a legislative differential treatment in disfavour of Finnmark's population. The Local Common Land Act can probably be given direct application if the Commission arrives at the conclusion that Local Common Lands actually exist. If the Commission concludes that Finnmarkseiendommen is Common Land Proprietor, but that local societies have common land rights, questions will arise concerning extended or analogue application of the Mountain Act and the State Common Land Act.

In addition to the above, extensive rules related to land use will have to be prescribed for implementation in accordance with the regulations of the Land Consolidation Act, in order to render complex ownership relations, which might be uncovered, more serviceable. This could, in a natural way, include joint solutions relative to disposal and sale of hunting and fishing rights. It could also include rules for cost and income sharing, in so far as this cannot be deduced directly from established rights circumstances. It is thus a paradox that the planned rights identification process does not include the Land Consolidation Court's role in determining local land use areas, as proposed by the Sami Rights Committee. Nor

82 Cf. Act of 6 June, 1975, No. 31, relating to utilisation of rights and privileges, etc., in the state common lands (The Mountain Act), Act of 19 June, 1992 No. 59 relating to local common lands, and Act of 19 June, 1992, No. 60, relating to logging, etc., in the state common lands.

has any other form of land consolidation competence been included.

The right to practice reindeer husbandry is a land use right that is independent of who the landowner is, cf. Section 9, first paragraph of the Reindeer Husbandry Act. Consequently, it should not make a difference if a legal clarification were to result in a higher rate of private owner disposal. However, actual practice, *inter alia* from the South Sami areas, indicates that in real life this is not the case; land use conflicts arise much more easily where there is a private landowner.⁸³ Finnmarkseiendommen and the Finnmark Commission will have to take this into account as well, when they carry out the rights identification.

If the Commission concludes that the Sami people and others do have established rights on Finnmarkseiendommen's land, and at the same time does not introduce regulations that allow the rights holders to exert influence on the management and administration of the Common Land on a level that relates to their share in it, then, in my point of view, this implies that Article 5 of the Finnmark Act is set aside. Leaving management and administration to Finnmarkseiendommen would, as I see it, neither be in accordance with international law, nor with the principles that form the basis of Domestic Law.

Concerning recognition of the right the population of Finnmark has to Finnmark's land, it might be appropriate to refer once again to Tønnesen's eminent and still valid '*de lege ferenda*' views. Besides reinstating the population of Finnmark as rightful owners of Finnmark's land, he suggested a transition to a system "such that local Common Land Boards, elected by the entitled ones themselves, decide over all the rights that the land yields [...] The Common Land Boards should assume all authority of decision over woodlands as well as hunting grounds, salmon fishing grounds [...] etc. The proceeds from the subletting of these must go to the Common Land Chest [...]" Since there existed sufficiently strong groups of Sami

83 A number of such disputes have gone all the way to the Supreme Court, cf. Rt. 1892 p. 411, Rt. 1897 p. 759, Rt. 1931 p. 57, Rt. 1955 p. 361, Rt. 1968 p. 394, Rt. 1988 p. 1217, Rt. 1997 p. 1608, and Rt. 2001 p. 769.

descent in Finnmark, this would contribute to real Sami influence, and at the same time the Sami “would gain decisive influence over the development in those communities in which there is still something to be found that is typically Sami, namely in the interior local communities.”



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Dr. Angelika Brustinow

Out of Court Dispute Resolution as a Practical Tool for Legal Empowerment

SUMMARY

The UK Department for International Development (DFID) and the United Nations' Economic Commission for Europe (UNECE) have joined forces to help contribute to the analytical base and to identify best practice for the Commission on Legal Empowerment in Europe and the CIS region. Part of the "Access to Justice" theme of Legal Empowerment is the provision of alternative dispute resolution, mediation, conciliation and third party arbitration. The following description will draw heavily on DFID's programme of work in several countries of the Former Soviet Union.⁸⁴ DFID has supported land

⁸⁴ Since 1998 the UK Department of International Development has as part of its sustainable livelihood and agrarian reform programmes in the Russian Federation,

reform and piloted new approaches to rural development in several countries of the region, helping to provide evidence in support of important changes in national policies. One of these is the establishment of *Third Party Arbitration Courts (TPAC)* to help settle land, property and commercial disputes out of court.

For poor people around the world, getting access to courts and legal support to protect their rights is often impossible. In many cases, the reason for this is straightforward – they cannot afford to pay the legal fees.

In Tajikistan, the UK has helped to solve this problem by supporting Third Party Arbitration Courts. These courts are an alternative way of resolving disputes: two sides to a dispute agree to nominate a third party who they both trust to mediate their disagreement and come to a decision. Although they operate independently of the formal legal system, decisions are recognised by Tajikistan's official courts. This means that where parties do not comply with a decision voluntarily, the state can step in to enforce it.

Third Party Arbitration Courts provide poor people with a cheap, fair and accessible way of resolving disputes and protecting their rights. They are particularly effective at protecting the rights of women to land and property.

Third Party Arbitration has helped to make legal services available to 800,000 people in Tajikistan (12% of the population). The approach has also been used successfully in Russia, Kyrgyzstan, Moldova, Ukraine and Georgia.⁸⁵

Ukraine, Moldova, Kyrgyzstan, Georgia and more recently in Tajikistan assisted the establishment of more than 80 TPACs, the development of TPAC guidance manuals and the adoption of supporting legislation across these countries. This work has demonstrated the very specific advantages inherent in the TPAC principles. Several thousands disputes have been resolved by this existing network of TPAC service providers. This is still on-going work and is closely monitored and evaluated.

85 Department for International Development (July 2006) Eliminating World Poverty: Making Governance work for the Poor. A White Paper on International Development. Presented to Parliament by the Secretary for International Development, p.31.

REGIONAL CONTEXT

Access to land is an important driver of development and poverty reduction, across the world. Experience from many different countries has shown that land and related legal reform policies impact on property rights and access to resources. Access to legal information, advice and dispute resolution has proved to be fundamental to ensuring that land reform processes are both transparent and beneficial to the poor.

Over the last 15 years, Eastern Europe and Central Asia have seen dramatic change and many different policy reforms resulting in massive reallocation of state and private assets and resources (such as privatisation, land reform, industrial restructuring, legal reforms etc). This article aims to share a very practical experience in supporting poor people in countries of the Former Soviet Union to protect their rights and resolve disputes over land, property and related economic activity, in particular during this transition period.

Out of court mediation, conciliation and a third party arbitration mechanism for settling disputes, as described in this article, have formed part of the massive land and agrarian reforms in Russia, Ukraine, Moldova, Kyrgyzstan, Georgia and in post-conflict Tajikistan, to ensure fairness, equality, affordability and speed. Interestingly, the TPAC approach was *not* part of the original land reform package piloted with donor support, first in Russia and then across the region from 1993 onwards. Local staff members of the technical assistance project already implementing land reforms in Rostov-on-the-Don, Russian Federation, suggested adding out-of-court settlement to deal with the specific disputes arising from land privatisation and farm restructuring, on the project's pilot farms. They had been exposed to third party arbitration first when learning about international grain trading.

Working at the pilot farm level, Russian land reform practitioners had understood the necessity of handling disputes and securing effective ownership of land and property in a fair, timely and affordable way, in order to maintain the productive use of assets, protect the livelihoods of

those who depended on them and safeguard social peace in tight-knit rural communities. For farm workers and pensioners to have any chance that their claims over land and assets would be resolved fairly, required a neutral regulator/mediator capable of assessing competing claims and preventing capture of assets by elite groups (i.e., farm managers, governmental officials, unscrupulous investors). A recent USAID study concluded that dispute settlement and enforcement mechanisms are as important as the reform law itself⁸⁶ and should therefore be part of the planning process for any approach to formalisation of land and business matters.⁸⁶

To improve understanding of this dispute resolution mechanism, this article illustrates, in non-legal language and using case studies from Ukraine, Moldova and Tajikistan, how TPACs can benefit the poor.

PROS' AND CONS' OF ALTERNATIVE DISPUTE RESOLUTION (ADR)

Out-of-court settlement of disputes by alternative means is not a new approach. It has its roots in traditional alternative dispute resolution.⁸⁷ Across the world there are many successful examples of local or community based dispute resolution processes. Many have a long tradition and are based on informal local institutions which mediate between disputing

86 See: Formalization, Legal Reform, and Empowerment of the Poor. Overview and Issues by John W. Bruce, Omar Garcia-Bolivar, Michael Roth, Anna Knox, and Jon Schmid. Phase 1 Overview and Issues Paper, ARD Inc. for USAID. Contribution to the High Level Commission on Legal Empowerment of the Poor; January 10, 2005. p. 30. The authors suggest to create specialised courts for settling disputes; such as arbitration centres or mobile dispute resolution centres that handle small numbers of disputes, orally conducted proceedings and deliver decisions on the spot to help safeguard reforms.

87 A wealth of literature exists on ADR, including bibliographies and training manuals; I found very useful the following: Alternative Dispute Resolution. Practitioners Guide.-USAID, March 1998 in particular the Appendix D: Working Bibliography of Literature; Appendix E: Dispute Resolution Institutional Problems; DR / ADR Solutions and Conditions for Success

parties and help to solve problems without involving outsiders and the formal legal system. They provide a means of receiving justice by avoiding the formal court system. People feel less intimidated to approach them. Informal ADR has the potential for strengthening local level (community) governance since it can play a role in empowering communities to be self-supporting. Given that many local disputes arise from disempowerment and diminishing social cohesion at the community level, this is an important subsidiary aim of ADR mechanisms.⁸⁸

The majority of these traditional dispute resolution systems suffer from (at least) four problems:

- they **lack the back-up of the formal justice system**; (i.e., ineffective enforcement of ADR decisions)
- there is a **gender bias** in handling disputes and making decisions; (ADR throughout the world are often dominated by men of high status and tend to exclude women)
- they are susceptible to **local power imbalances** and may serve to reinforce existing power hierarchies and social structures at the expense of disadvantaged groups (i.e. class or cast divisions influence decisions; the local rich and well connected command undisputable authority and are often trusted with mediation in disputes potentially bringing in bias, unpredictability of ADR decisions, lack of impartiality by mediators from the community; structural inequalities may be perpetuated by decisions made by a local mediator)
- **unclear standards** and guidelines (traditional mediators may not be aware of, or may be unwilling to apply, national or international human rights standards.) As a result, outcomes of mediation settlements may not be compatible with national Laws and/or international standards. Local customary practices, especially those applying to women, may directly contradict protection provided by national and/or international Law.

88 Programming for Justice: Access for All. A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice. United Nations Development Programme, Bangkok 2005. pp.97-104

Empirical evidence from the DFID programme of work in support of TPAC suggests⁸⁹ that it is possible to provide access to justice for poor people, including in remote geographical areas, by **combining the best traditions of ADR with the formal enforcement of decisions achieved out-of-court**. Moreover, this practical experience shows that if poor men and women can **appoint judges of their choice** who they believe will protect their rights and interests, they are more likely to seek justice, take an active part in the process and implement decisions. This mechanism offers the combination of voluntary action, legitimacy and legality and prevents corruption.

How 'TPAC' operates in practice

In the context of the recent agrarian reform programmes in transitional economies, the label 'Third Party Arbitration Courts (TPAC)', is used to identify both the process of out-of-court mediation and third party dispute resolution and the institutional arrangements underpinning the application of the process (i.e. ad hoc TPACs for settling individual disputes where registered and permanent TPACs are not in place).

When a dispute over land, property, or related economic activity has arisen, the following steps are involved in the dispute resolution:

- One or both of the disputing parties visit the nearby TPAC office or contact a trained TPAC practitioner in search of **information** and **advice**. (Quite often they are encouraged by their friends or neighbours who know about the service.)
- Both parties choose one or several conciliators/arbitrators to

89 Regular lesson sharing between the TPAC service providers from across the countries and regions has resulted in an improved understanding of what works in practice and how it can be achieved. Representatives from national TPAC project teams joined forces to share their practical expertise in evidence based training for the emerging TPACs in Tajikistan. For the latest lesson sharing results on TPAC see conference proceedings: Supporting regional consultations of the High Level Commission on Legal Empowerment of the Poor: UK DFID/UNECE Regional Conference on Alternative Dispute Resolution, Mediation and Third Party Arbitration (TPAC), Kiev, 23-24 May 2006

consider their dispute. The number of arbitrators is deliberately uneven (i.e. one or three).

- The disputing parties **agree** to use the TPAC mechanism to settle their dispute.
- The chosen conciliator/arbitrator(s) consider(s) the dispute by **mediating and conciliating** between the disputing parties, who can agree to an acceptable **amicable** settlement at any stage during this process. Under the TPAC system an arbitrator can act as a conciliator or vice versa.
- If an amicable settlement cannot be agreed during conciliation, the disputing parties progress to the next stage which results in an arbitrator or an arbitration panel issuing an **arbitral award**.
- By signing the TPAC agreement the disputing parties make a **commitment** to accept the arbitral proceedings and to implement the outcome of the settlement agreement or arbitral decisions. An arbitral award is binding.
- If one of the parties does not comply with the arbitral award, the other party enjoys the enforcement of the arbitral award by the formal court system.
- The representative of the formal court system backs up the arbitral decision.

This TPAC mechanism is characterised by:

Cost-effectiveness: TPAC fees are considerably lower than those of formal courts. Access to information and advice is in all locations where TPAC work offered for free and is regarded a public good. It is too early to say whether dispute resolution services should also be provided entirely free of cost (at least for poor people). We have learnt that even poor people are willing to pay small fees. Some monitoring results suggest that a transparent and strictly regulated fee structure even enhances the authority of the TPAC service provider. Monitoring results from the field suggest that e.g., a poor woman who signs a dispute submission and pays a small fee feels more “legally empowered” due to the fact that she is a fee paying client who is entitled to a service and not simply asking for help.

It is important however to recognise that there is still a risk for TPAC to lose part of its poor target group if attempting to charge them at the full cost of providing this service.

Speed: Disputes are usually settled within two weeks; never longer than two months. Many disputes are settled almost instantly.

Flexibility: TPAC way of handling disputes is first to emphasise compromise, acceptable to both parties, rather than applying strict legal sanctions: It therefore settles often at win-win situations, rather than resulting in win-lost case scenarios of formal courts. If disputes during the hearing appear to be more complex than first presented, the informal system can accommodate other aspects of a dispute more easily than the formal system.

Access and Mobility: Unlike government courts, TPACs are not limited by territorial boundaries. TPAC judges may conduct sessions where the disputing parties live or the disputed property is located. This mobility is extremely important for the poor who can not afford high transportation cost and in particular women who might not be able to leave their families behind and travel long distances.

Voluntary Action and Genuine Mediation⁹⁰: Disputing parties must voluntarily agree for their dispute to be resolved using the TPAC mechanism. TPACs reach a higher percentage of amicable settlements than government courts with a high percentage of voluntary compliance with TPAC decisions.

90 It is important to distinguish between mandatory processes and voluntary processes. Some judicial systems require litigants to negotiate, conciliate, mediate, or arbitrate prior to court action. In TPAC submission on a dispute depends entirely on the will of the parties. Currently we are, however, testing suitable forms of introduction of the TPAC clause as part of prior contractual agreements between parties, for instance in loan agreements of micro credit programmes (best example Moldova's Savings and Credit Associations but more recently also for formal banks' credit programmes in Tajikistan) or for standard marketing/input supply contracts of cooperatives.

Active Engagement: Dispute parties appoint their conciliators or arbitrators; one arbitrator if both parties agree upon their case being heard by that one person, or alternatively each party appoints its own arbitrator and the TPAC appoints a third arbitrator to constitute a panel with an uneven number. Disputing parties may nominate conciliators or arbitrators, called “TPAC judges”; TPAC practitioners and judges need not necessarily be lawyers. They can be specialists in the subject matter of the dispute. This will depend on the national legislation which can, however, impose that a lawyer needs to chair the TPAC panel.

Simplicity and Confidentiality: TPAC dispute resolution procedures are kept as simple as possible and hearings take place in private. This is a vital condition and differs from the public nature of traditional community based ADR which take place in public and allow the whole community to be present which can intimidate poor people, minority groups and in particular women. We have learnt that TPAC’s confidential nature is a convincing argument for e.g. informal sector workers who do not need to fear disclosure of their conditions to the courts. Local elites, such as farm directors, also value the strict adherence to confidentiality which allows them to strike deals with employees or tenants without fearing loss of their authority which might result from public disclosure.

Independence and Mandatory Enforcement: TPACs operate independently of the formal legal system, but their decisions are recognised by the formal court system. Mandatory enforcement of arbitral awards is available where voluntary compliance does not occur. National Laws recognise TPAC procedures and arbitral awards.

TPAC AND ITS ROLE IN LEGAL EMPOWERMENT

“No empowerment without information”

One of the most vital functions the “Legal Support Centres” or TPAC offices provides is access to information about rights and the law. Isolated villages, deteriorating communications infrastructure, and decreased access to affordable transportation have limited the ability of the rural poor to have access to reliable sources of information and advice. Those living in remote locations especially value affordable legal advice and services tailored to their needs. Through direct interactions with such disadvantaged people and using simple, understandable, and socially appropriate messages, TPAC staff have a higher probability of success in encouraging individuals to seek more information about their entitlements, to claim their rights, and to solve their disputes out-of-court.

Setting the right incentives

This type of legal empowerment works best and contributes most effectively to livelihood improvements when not offered as a free-standing activity but when integrated within, or linked to other types of services such as access to micro-finance, re-training and job creation, input supply and markets, and support for small business development. Such direct linkage to other benefits and resources, helps to create the right incentives for people to take action, resolve their legal or property problems, and improve their skills and seek opportunities to improve their livelihoods. Recognizing the existence of such opportunities is often the trigger for people to feel self-empowered and to take action to claim their entitlements. Without such a perspective poor people often do not consider it worthwhile even to embark on the process of claiming their rights.

CASE STUDIES

A number of case studies from the region illustrate the application of the TPAC mechanism and how it empowers poor people and in particular women to protect their rights.

CASE STUDY 1 Ukraine: Domestic dispute over inheritance:

In Krasnoye village an extended family of 40 people were in dispute for over two years on how to divide the deceased grandfather's inheritance (family house and farm land). TPAC mediated between the two families who share the house, helped them to draw up a list of all items and negotiate an appropriate sharing of the assets. The house was divided into two halves, one being slightly bigger to reflect the bigger size of the family living in that part. In return the other family received the larger parcel of land which could now be brought back into productive use. Both parties have received the legal paper work underpinning their agreement and assets received. The long-lasting dispute was settled and within one month the case was finalised, with all parties receiving property and land according to entitlements in a manner acceptable to all.

CASE STUDY 2 Ukraine: Land reform property shares and farm equipment between group of people and farm enterprise

As part of the benefits given to people during the land privatisation and farm reorganisation process, farm workers received property shares distributed as "paper documents" stipulating their legal entitlements to part of the farm property. Many previous farm workers have approached TPAC hoping to claim their "paper" entitlements to real farm assets. A dispute had arisen over the allocation of property shares involving 83 farm workers. These former employees of a large state farm enterprise (before privatisation), all wished to exchange their paper certificate for farm machinery, which they planned to operate collectively. Through TPAC, an amicable settlement was reached between the former workers and their farm director, who was holding the assets under lock and key.

The 83 former farm workers received legal transfer of ownership of farm machinery with a total value of US\$130,000.

CASE STUDY 3 The Republic of Moldova: withdrawal of property shares from a farm enterprise

As part of the benefits given to people during the land reform and farm privatisation process, farm workers received unallocated property shares stipulating their legal entitlements to part of the farm property. A dispute had arisen over the distribution of property shares involving 145 former collective farm workers. In 2003, they had received farm assets totalling over US\$102,600 and become joint owners of that property, which was managed as one large enterprise.

After some time, disagreements arose between the co-owners and they refused to continue working as a single business. 52 workers or “co-owners” wanted to leave and start their own smaller enterprise. They demanded their share “in kind” equivalent to the value of their certificates. The farm director refused to release the farm’s equipment thus preventing the 52 workers from using the machinery as intended.

Previous experience of similar cases taken through the formal court system suggested that it could take a long time to solve this dispute and that it would also be too expensive for farmers who needed to finance their spring planting. They were afraid that a long dispute could compromise their plans and reduce the prospects of starting a profitable farming business.

The local TPAC office examined the case and on 30 January 2003, representatives of both parties, totalling 200 persons, and three arbitrators held a meeting. After more than 10 hours of discussion the parties reached a settlement. This process of involving both parties, assisted by the arbitrators, with relevant calculations made in a transparent way, was conducive to removing the initial tension and resolving issues amicably.

The monetary value of the equipment was US\$102,600 and the total cost was \$106 (TPAC charges of 0.1% of value of object under dispute). If handled by the formal court this dispute would have involved legal charges of 3% (i.e. US\$3080) and additional expenses per plaintiff, totaling US\$24,940 for the 145 workers concerned.

Handling by the formal court would have carried additional risks, such as lengthy repeated trials by a higher court. It is estimated that the time for considering this case would have been 18 months with no guarantee for compensation on the claim.

The equipment obtained in-kind now generates additional income as machinery services are provided to other farmers.⁹¹

CASE STUDY 4 Tajikistan: Fair settlement of a land tenancy dispute

Mairam is one of those women who have benefited from the new TPAC system operating in her neighbourhood— in fact it saved her livelihood. In the north of Tajikistan the manager of a large farm leases land parcels to tenants who grow wheat and pay rent out of their income from the crop. One such tenant was Mairam. She had rented four hectares of land and signed her tenancy contract for five years as prepared by the farm director without questioning the condition that it stipulated that her land is part of the (historical) category “irrigated land” commanding therefore a much higher rent. But there was no irrigation (actually for the last 15 years since the break up from the Soviet Union). Her margins were much less than expected and she earned not enough money to pay rent to the farm director. Her dilemma was that her rental contract was a legal document, which she had signed. Moreover, immediately at the start of her rental agreement she had paid as requested the rental payment for the first year and therefore confirmed acceptance of the conditions. But she refused to pay the following two years arguing that the land she rented

91 For more case studies from Moldova TPAC work see: Rural Moldova. Unlocking the Potential. Chisinau 2006; copyright DFID 2006, pp. 79-94

was not irrigated and as a result crop yields were seriously affected. She was now in debt to the farm enterprise and risked losing her land.

The manager of the large farm enterprise, registered as a Co-operative Farm, visited the Legal Support Centre to seek advice on how to claim the outstanding debt of 2,000 somoni (approximately US\$630) on the land tenancy contract. The Legal Support Centre contacted Mairam. She and the farm manager signed an agreement to resolve the problem by applying the TPAC mechanism. They selected a competent third party based at the Legal Support Centre and requested him to settle the dispute.

The arbitrator visited the site to determine whether or not the land should be classified as irrigated land. He concluded that, whilst the land had been irrigated some 15 years ago during the Soviet period, since the collapse of the Soviet Union the land had however not been used or irrigated and consequently could no longer be considered as irrigated land. Mairam's arguments were therefore considered to be well-founded and the contract between the Co-operative farm enterprise and Mairam was nullified on the basis that the land did not meet the description given in the original tenancy agreement.

Both sides signed a new tenancy agreement for the land where it was stipulated that the land was not irrigated. The landlord reduced the rent in the new agreement to reflect the revised description of the land and Mairam agreed to pay the rent arrears at the reduced rate.

Using the TPAC mechanism, and a trained arbitrator competent in land related issues meant that the dispute was settled quickly. The two sides reached a settlement in just nine days without incurring heavy legal fees or going through a protracted case in the formal law courts. The farm director secured the overdue rental payment although at a much lower level. Mairam secured her land rights and her livelihood. The confidentiality of the TPAC approach was important. A fair and amicable agreement was reached without any wider implications that could arise from a public judgement. This factor should not be underestimated in a society where “keeping face” and respecting authority is a cultural norm.

CASE STUDY 5 Tajikistan:

Istoda represents a typical example of a female headed household from a semi-rural settlement in the north of Tajikistan near Panjakent. Istoda discovered that the plot of land for which she held a proper land certificate, issued by the local administration, was being farmed by someone else (by Mr A.). Mr A., however, had also received a proper rental contract for Istoda's plot, as part of a larger land area at the edge of a local leisure park.

The TPAC's mediation resulted in an amicable settlement within five days, rectifying earlier mistakes. Two rental contracts were signed, one between Istoda and Mr A, and another contract between Mr A and the Director of the Park. As an outcome of the settlement, new documents, clearly stipulating rental payment and duration of contract, were signed. Istoda received legal recognition of her land rights, a rental payment for the current year and subsequent use of the land thereafter. Mr A did not lose the prior investment he had made in the land.

CASE STUDY 6 Tajikistan:

Economic dispute over payment for goods within the informal sector

A dispute arose in Turzunzade, a market town in Tajikistan, involving a woman entrepreneur operating in the informal sector and an owner of a local restaurant over payment for delivery of home made bread products over several months. The woman had delivered on a daily routine 35-45 pieces of bread products without being paid. TPAC provided conciliation services resulting in an amicable settlement. The woman received cash payment in agreed instalments. Moreover, she also received advice on simple book keeping and on delivering bread only against paper work with a signature.

Gender aspects in Tajikistan

In Tajikistan, women headed households have grown in number to 25,000 as a result of the civil war (which ended in 1997) and migration in large numbers of male workers to Russia and Kazakhstan.⁹² As many women like Istoda and Mairam have found, TPACs provide access to a system that no longer works against them.

There are also many examples of the successful application of the TPAC mechanism beyond the context of land reform, property and commercial disputes. In Moldova, TPACs have helped improve the smooth running of micro-financial services by inclusion of an arbitration agreement into loan contracts of Savings and Credit Associations. Further work is needed to help out-of-court settlement to become common practice in a wider range of civil and commercial contracts.

CONCLUDING REMARKS

Lessons Learned: A livelihood related rights-based approach for poverty reduction

A recent lesson sharing event brought together practitioners and policy makers from more than 10 countries, from Eastern Europe and Central Asia but also from Western Europe (in particular Norway⁹³), Bangladesh and Tanzania to Kiev to review experience with TPAC operations. Their conclusions and recommendations include:

Rule of law is essential to the achievement of sustainable reductions

92 For more information on the struggle of women for equal land rights and the gendered impacts of economic reform see: Gender Equality. Striving for Justice in an Unequal World. United Nations Research Institute for Social Development. Geneva, 2006. pp. 93-106.

93 Lawyers from Norway, linked to TRANSCEND, provided valid insights into Norway's experience and its increasing number of disputes which are settled out of court. More than 10,000 lawyers have joined a network in support of out of court settlement.

in poverty and improvement in the living conditions of poor people.⁹⁴ Poor men and women need to understand their rights clearly, but also be empowered to exercise these rights and turn them into livelihood improvements. This requires timely access to information, legal advice and a means of handling disputes over land and assets which is fair, transparent, locally acceptable and affordable.

TPAC offices serve a vital function, providing access to information, advice and dispute settlement services. This is to a large extent a public good function and should be recognised as such. Donor agencies and governments should provide financial support to maintain and support TPACs.

Legal entitlements to land and property assets on their own do not automatically improve the socio-economic situation of poor people. “Good Laws” at national level do not provide the guarantee of access to justice for poor people on the ground during implementation of land reform processes.

Special efforts and additional support structures are needed in order for poor people to be made fully aware of, and empowered to exercise their rights. This is particularly important for women and disadvantaged minorities. Without the reassurance that their efforts to exercise their rights and claim their entitlements will not backfire on them, many poor people literally feel disempowered to take action. Group solidarity can help but is often not sufficient. TPAC offer services and help protect both individual and collective rights.

TPAC has overcome some of the problems related to traditional dispute resolution mechanisms, already mentioned:

94 For a useful summary of the wider interlinkages of rights, livelihood security and development beyond the transitional context see: Caroline Moser & Andy Norton with Tim Conway, Clare Ferguson, Polly Vizard, *Claim our Rights. Livelihood security, human rights and sustainable development*. London, Overseas Development Institute 2001.

- **Lack of legal back-up:** TPACs operate independently of the formal legal system, but their decisions are recognised by the formal court system. Mandatory enforcement of TPAC decisions is available where voluntary compliance does not occur.⁹⁵
- **Gender bias:** It is recognised that women face disadvantages in securing access to land, water and other assets and resources, and, it requires special efforts to protect their rights and interests. Women are being recruited and trained to be involved in mediation and arbitration services to help ensure that special needs of women are addressed. A woman who wants to claim her rights and solve a dispute should be able to select a woman as arbitrator and protector of her interest, if she wishes to do so.
- **Power imbalances:** Voluntary decision to use this mechanism, individual choice of arbitrators by disputing parties and uneven number of arbitrators within a panel help that a “fair regulator/mediator” is capable of assessing competing claims according to rights provisions. TPAC are demand driven. If poor people would feel cheated by the process, they would not use them!
- **Unclear standards and guidelines:** Donor funded projects in Former Soviet Union countries have helped to showcase the approach, train service providers and support networks of paralegals. Where necessary, these projects have helped governments to develop and adopt national legislation providing the legal framework and basis for operation of TPACs. TPAC laws

95 According to a sociological survey undertaken in May-July 2003 in the TPAC programme in the Kyrgyz Republic covering TPAC operation in 12 district (*rayon*, administrative unit) offices, 58% of surveyed rural residents stated that they would not implement the outcome of dispute resolution procedures if they did not like the decision. This indicates that relevance of the legal enforcement TPAC awards enjoy. The fact that very few of participants of TPAC disputes address the courts for enforcement of the TPAC decision is proof that the sheer fact of the legal enforcement potential is sufficient to secure implementation without the need to actual request back up by the formal court. see: www.kalys.kg

and operational procedures provide the legal basis for the long-term application of TPACs and are needed to ensure that out-of-court dispute settlement become part of the legal fabric of these societies.

ISSUES FOR FUTURE CONSIDERATION

TPAC-laws and regulatory mechanisms

Although the alternative dispute resolution mechanism has become a vital element of civil society far beyond their land reform origins, their wider application in transitional societies is still under further test and development. The introduction of TPAC was facilitated by the fact that the “old” Soviet constitution referred to third party arbitration and permitted resolution of international commercial disputes by arbitration.⁹⁶ This meant that TPACs could initially start to offer a service without waiting for large scale legal reforms. All that was needed was to establish an *ad hoc* TPAC panel for each individual dispute. However, to put TPACs on a firm legal basis for the future, special national legislation has to be in place, including detailed regulations on who can chair a TPAC panel, what types of disputes can be dealt with and the fees which can be charged according to the size and complexity of disputes.

The process of conducting national consultations in advance of parliamentary readings of TPAC draft laws has meant that the “final” TPAC laws adopted may differ (perhaps considerably) from the draft proposals. For example, practical experience in a number of countries has shown that not all TPAC cases justify the involvement of (scarce) legally qualif

⁹⁶ Russia has a long history of arbitration. Current Russian Federation’s Law on International Commercial Arbitration 1993 is based on the UNCITRAL Model Law on International Commercial Arbitration of 1985. For more information on commercial arbitration in the Russian Federation see: Neil Aitken & Charles Spragge: A Guide to Arbitration and Litigation in Central and Eastern Europe. Cameron McKenna, London, 1998 pp.107-136

fied personnel. Indeed, it has helped to increase access and limit costs if para-legals are entrusted with handling disputes. However, the Kyrgyz TPAC law stipulates that the chair of a TPAC panel must have a legal education. The cautious approach adopted by the Kyrgyz government is intended to ensure TPAC compliance and consistency with state law. This outcome, however, limits the choice people can make when appointing arbitrators in the case they would like to select just one. It also adds to the cost of providing the service. It also potentially slows down the speed of operation. A round table discussion bringing together TPAC practitioners and other NGOs with the Inter-Agency Working Group tasked by the President of the Republic of Tajikistan to prepare a draft law regulating TPAC has shared concerns on some of the strict regulations in the draft law.⁹⁷

Restricted application

TPACs are allowed to handle disputes over land and property and other economic issues including disputes over repayments of loans, commercial trade operations between individuals and legal entities. TPAC offices are not allowed to resolve labour disputes, divorce or child custody cases (apart from property related disputes in the context of a divorce), or cases where one of the disputing parties is the state. Evidence from the field suggest, however, that in particular women in Central Asia approach TPAC offices for advice on many matters going beyond this current mandate. Advice can still be provided on other issues but it cannot offer settlement of cases. If and how to extend the service to currently restricted areas of application is still a subject of debate.

Further improvement of TPAC operations and their embedding into society require additional work on a number of issues which, while considered individually below, are highly interrelated. These include:

- **Local context matters.** More comparative analysis is needed to understand the strengths and weaknesses of various systems

⁹⁷ For more details on the round table discussion and composition of the Inter Agency Working Group and more case studies from Tajikistan see www.tpac.tj

of alternative dispute resolution in different socio-cultural contexts before general recommendations can be made.

- The jury is still out on **financial sustainability**: Is it feasible and/or realistic to expect commercial income to sustain pro-poor service delivery? Finding the right balance between institutional and financial sustainability and affordability; and maintaining quality training in support of local capacity remains a challenge. Further work is needed to improve the overall sustainability of local service provision, keeping it at very affordable levels in order not to lose its pro-poor focus. The challenge is to sustain the operations without loss of quality and mobility once donor support is over. It is important to respect the public good function of this service without undermining its ability to recover a percentage of the value of the asset or contract under dispute in commercial cases. But will it be possible to serve both sets of clients i.e. commercial fee paying clients and poor people who cannot afford to bear the full cost of services? Poor people are willing to pay a small fee for their dispute resolution,⁹⁸ but the information and advice provided prior to addressing a dispute is an essential public good and requires funding. Is it feasible or realistic to expect that income generated by charging fees (for certain services and commercial cases) can subsidise services for the poor?
- **Donor agencies can make a difference.** It remains a challenge to obtain state and/or donor funding for any new ADR mechanisms, including TPAC. Though the mechanism itself is not costly, funds are needed to train mediators/arbitrators, sustain the provision of services and ensure monitoring of proper TPAC processes. Support is needed to strengthen the confidence of local service providers, improve their professional capacity and the quality of services, and enhance networking

98 According to a sociological survey undertaken in May-July 2003 in the TPAC programme in the Kyrgyz Republic covering TPAC operation in 12 district (*rayon*, administrative unit) offices, 40% of surveyed rural residents stated that they can not afford paying for TPAC services. See: www.kalys.kg

and lesson sharing between the various local non-governmental organisations. It is widely accepted that financial support is key to the success of mediation programmes. TPAC commenced with donor funding. Continuing financial support will be needed when donor funding ends. In low-income countries such as Tajikistan or Moldova, Ministries of Justice or local courts are unlikely to allocate sufficient funding, given their own lack of resources. *Impartiality and avoiding financial dependency are also important aspects in this context.*⁹⁹

- **Better cooperation and improving referral mechanisms to TPAC.** Improved cooperation between local courts and this out-of-court settlement mechanism is needed. It is important to understand that the two systems should not compete, but should work hand in hand. Both make vital contributions to extending access to justice and legal protection to poor people and vulnerable groups, in particular in remote areas. In some locations local courts already transfer small cases to the nearby TPAC office. This should become the rule rather than the exception. Willingness to put in place referral mechanisms to mediation and third party arbitration is more likely once it is understood that the TPAC system is not competing for scarce resources with the formal judicial system.
- Recently efforts have been made to introduce out-of-court settlement approaches, including the specific TPAC mechanism, into the curriculum of higher education institutions. Partnership agreements have been signed with legal faculties of local universities and Law Schools. Facultative courses and

99 Financial independence matters for impartial advice provision and fair resolution of disputes. When donor project funding came to an end for the TPAC programme in Russia large private sector companies operating in the agrarian economy with substantial export/import operations offered to take over the local TPAC staff funding of the regional (*oblast, administrative unit*) network of TPAC offices. Although a financially lucrative preposition, the local TPAC staff decided against this offer and remains provides its legal services as part of the rural advisory network receiving part funding from the local government and partly charging fees for services.

opportunities for traineeships of Law graduates are needed to make sure that future generations of lawyers are well informed and understand the advantages of out of court settlements and can help TPAC to take firm roots within the legal profession.¹⁰⁰



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100 For more reflections on the potential role of Law students for legal empowerment see Steven Golub: Beyond Rule of Law Orthodoxy. The Legal Empowerment Alternative. Carnegie Endowment Working Paper No. 41, Rule of Law Series, Democracy and Rule of Law Project (Washington, D.C.: Carnegie Endowment for International Peace, October 2003)

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ment for International Peace,
October 2003)

Access to national TPAC opera-
tions in the Kyrgyz Republic,
Moldova and Tajikistan can be
found at:

www.kalys.kg, www.rural.md,
www.tpac.tj

Dr. Sadeka Halim

Access to Justice: Situation of Rural Women and Urban-Rural Migrant Workers in Bangladesh

INTRODUCTION

This article attempts to look at poor rural women's access to justice in both rural and urban settings. Poor rural women in Bangladesh are becoming increasingly visible in economic sphere. This is quite evident in the RMG sector and in the shrimp sector both at production and in processing plants. Practically in all spheres of the development women are contributing to the growth of economy through participating in various types of economic activities. Globalisation is having contradictory effects on the socio-economic and political status of women in Bangladesh, and particularly on rural women. The contradictory effects have been both empowering and disempowering. Globalisation has created opportunities and source of employment through micro credit and various other employment generations. Women's increasing involve-

ment in both agricultural work and in non-farm activities has provided with increased opportunities for wage work and certain economic independence (Halim and Kabir, 2005). Despite the large-scale involvement of women in economic activities, “*women are ignored socially, politically, deprived legally, exploited economically*” (Halim, 2001). Violence, discrimination and injustice towards women and girls, in domestic and public domains, remain unabated. Class, ethnic and religious disparities exacerbated such gender-based vulnerabilities. Law enforcing agencies riddled with corruption and tied down by political pressures, appear unable or unwilling to pursue justice on behalf of especially poor women. Meanwhile, the state continues to proclaim its rhetoric of empowering women (Halim, 2004b:95). The then government (2001-2006) changed in secretly the NPAW in May 2004, negating some of its crucial equality principles. This article focuses on the issue of women getting justice not in the sense of material gain, (e.g. income, wealth, freedom of power, etc), but highlights the capability approach as proposed by Amartya Sen (1995). The central argument of this article is that an important part of women’s freedom to achieve justice consists of their capability to function. However, in both rural and in urban areas poor women are systematically denied the enjoyment of fundamental rights and continue to be discriminated on the grounds of being women.

This article attempts to place the women’s access to justice in a broader legal, social and political context. Section I begins with an examination of the different aspects of women’s social, economic and political status. Then it explores various forms of violence and injustice that women encounter and turns to section II which highlights issues on why women’s access to justice is important and how various forms of *shalish* systems are addressing and catering to women’s injustices. Section III examines rural migrant women workers access to justice in RMG and in FFPI and ends with some concluding remarks.

SECTION I: CONTEXT

SITUATION OF WOMEN IN BANGLADESH

Bangladesh is a classic case of patriarchy: patrilineal and patrilocal socio-cultural values sanction sex segregation, households are corporately organised, and women are dependent on men. Virtually all women in Bangladesh are landless since very few own property in their own name (Nazneen, 2004). Women's rights in the inheritance of property receive little attention from policy makers, activists, NGOs, major political parties and donors. Women's organizations and legal aid NGOs have proposed Uniform Family Code demanding equal inheritance rights for men and women (Pereira, 2000; Halim, 2003). Women constitute about 48.5% of the total population, and 70% of women belong to small cultivator and or tenant households; most are landless farmers, depending on casual labour, begging and other irregular sources of income; approximately 9 percent of household are female headed; about 15 to 20 % belong to professional trading or large-scale land-owning categories, who do not generally need outside employment.

Most rural Bangladeshi women are conditioned by informal social, cultural and religious traditions, which emphasize their domestic roles as docile daughters, compliant wives and dependent mothers. *Purdah* (veil) as a practice has considerable impact on women's lives. *Purdah* implies restrictions on the mobility of women and their contact with the outside world, and it is used as an ideological instrument of patriarchy. The circumscribed behaviour of women is credited to men whose *izzat* or honour, lies with their ability to protect (i.e. seclude) women. In rural Bangladesh, confining women inside the home is the reflection of male chauvinism. *Purdah* creates various levels of dependency on men. It decreases women's ability to establish any kind of relationship with the outside world. Interlinking men's honour with women's modest behaviour, increase the inherent need of men to control women. Most women have limited access to the sex segregated labour market, which is the

centre of social, political and economic activities, and they are forbidden to enter the mosque and seldom go to school. A sense of “individuality “is still an alien concept to most rural women.

Women’s access to traditional and formal justice system is further marginalised by their subordinate role in politics. At the rural settings, participation in politics are still said to bring disgrace on the family. However, it is important to mention that since 1997 women are being elected to the seats of union councils members reserved exclusively for women. Though, most of these elected women are yet to have any major say in policy-making bodies. Many are ignorant about the decision making processes. Thus, as long as these women from rural areas do not have any major say in the policy formulation in various sectors and keep on conforming to the wishes of the various interest groups, bureaucrats and the vested interest groups, their position will continue to be marginalised.

In the national arena, majority women’s network actively lobbied throughout the 2003 for direct elections for women to Parliamentary seats. Mobilisation around the issue took on great impetus after the existing provision for women members (allowing for 30 women to be nominated by elected members of parliament) lapsed in 2001. However, women’s demand for direct election was turned down and 45 seats have been allowed to women through selection by the majority in the Parliament.

Another factor affecting women’s political participation is *purdah* which further divides political parties, trade unions, and student organisations into men and women wings. Although there are a few women in leadership positions there is still limited involvement in party hierarchical structures. Female members are conveniently used during election campaign, organising meetings, processions, rallies, etc. *Purdah* keeps women out of the *shalish*; however they are able to challenge it as indicated in the section, addressing NGO modified *shalish*.

CONSTITUTIONAL STATUS

- Article 27 of the Constitution states: “All citizens are equal before the law and are entitled to equal protection of the law”.
- Article 28 (1) of the Constitution states: “The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth”.
- Article 28 (2) states: “Women shall have equal rights with men in all spheres of the state and of public life”.

NATIONAL LAWS PROTECTING WOMEN

- The Child Marriage Restraint Act, 1929, amended in 1984, raised the legal age of marriage, of girls, from 15 to 18, and for boys from 18 to 21 years; violations are punishable offences.
- The Dowry Prohibition Act, 1980, amended in 1982, forbids anyone from demanding dowry and punishes violators with fine and imprisonment.
- The Prevention of Oppression of Women and Children Act, 1995, amended in 2000, seek to protect women and children against violence.

INTERNATIONAL INSTRUMENTS

- CEDAW ¹⁰¹
- United Nations Charter of 1945 (Arts. 1 and 55)
- Universal Declaration of Human Rights of 1948 (Art. 2)
- International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights of 1966 (Art. 2)
- CERD ¹⁰²

101 The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is an international convention adopted in 1979 by the United Nations General Assembly. Described as an international bill of rights for women, it came into force on 3 September 1981. The United States is the only developed nation that has not ratified CEDAW.

102 The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) is a United Nations convention adopted and opened for signature and ratification by United Nations General Assembly resolution 2106

Despite these human rights instruments, human rights continue to be violated in general in Bangladesh.

WOMEN, VIOLENCE AND INJUSTICE

Economic inequality and discriminatory social and cultural attitude reinforce women's subordinate position in Bangladesh society. Various forms of violence like domestic violence, acid throwing, sexual harassment at workplace, trafficking, child abuse, rape, etc are common occurrences. In Bangladesh domestic violence is still treated as a private matter despite the Prevention of Women and Child Repression Act 2000. The other problem is demand of dowry by the groom's family. Mostly it is claimed in the form of land, jewellery, furniture, etc. In recent years violence against newly wed brides whose family has failed to provide the dowry has assumed a serious magnitude.¹⁰³ Further in the era of globalisation, problems have also arisen from the use of new information and communication technologies for trafficking women and children for purposes of other forms of sexual exploitation.

Another form of violence is issuing of *Fatwa*¹⁰⁴ against women. “*Hilla marriage*”¹⁰⁵ is often used by the *fatwabaz* to harass and oppress women. “*Hilla marriage*” is declared illegal by section 7(6) of the Muslim Family

(XX) December 21, 1965, and which entered into force January 4, 1969.

103 For instance just between 1 st January to 31 st March 2001, 34 women were murdered for not providing the promised dowry (Odikhar, 2001 cited in Halim, 2003).

104 Despite the High Court ruling in 2001 declaring a *fatwa* illegal, a subsequent petition leading to stay order of the High Court's judgement, has allowed fatwas continued to be issued with considerable impunity. Of the 32 *fatwas* that instigated violence against women in 2002, only nine incidents were investigated. In 2004, 46 such incidents took place out of which charges were filed in only eleven cases (CEDAW Shadow Report to the Fifth Periodic Report of the Government of Bangladesh, 2004; cited in Halim, 2004:105).

105 ‘*Hilla marriage*’ is another form of fatwa which is given in traditional shalish through which divorced women are forced to marry a man selected by the arbitrators for a certain period if their husbands want to remarry them again.

Laws Ordinance of 1961. “*Hilla* marriage” is contrary to the Constitution and act related to oppression through the execution of *fatwa* is a plausible offence under the Code of Criminal Procedure. *Fatwas* of any kind are a violence of the fundamental rights as guaranteed by the articles 27, 28 and 31 of the Constitution. Article 26 states that all existing laws that are inconsistent with the fundamental rights will be considered as null and void to the extent of their inconsistency after the Constitution came in to operation. (*Protham Alo*, 10 January 2001).

Other forms of violence against the migrant female workers will be discussed in the section III. Rural women of all ages in urban settings are employed in smaller firms, workshops, or at home production, as maid servants and in transnational companies. It is to be noted that poverty has gender specific impacts. Many women in Bangladesh cannot join any program or avail credit because these women are too poor to be eligible to become participants in NGOs.

Women with HIV/AIDS suffer from discrimination and a stigma, and are often victims of violence. Some handful of NGOs have taken initiatives to prevent it, however, more effective strategies are needed to combat it. In most cases in terms of reproductive right, women cannot decide freely and responsibly the number, spacing and timing to have children and lack information regarding means to do so. Poor women are deprived to attain the highest standard of sexual and reproductive health.

These poor women in the rural areas and in the urban areas are yet to have the freedom to achieve justice when needed irrespective of any aspect when they encounter the above mentioned different forms of injustices. Poor people as argued by Barkat (2003) are caught into the deprivation trap and true development requires freeing the poor from the trap. As pointed out by Barkat (2003), growth of GNP or individual income can be important means for freedom; other determinants like social, economic, political, and civil rights along with liberty to participate in public discussion and scrutiny can substantially contribute to expanding human freedom (Barkat, 2003:36-37).

As mentioned above, the Constitution of Bangladesh ensures women their fundamental rights to sustain as equal citizen, and Bangladesh has numerous laws to prevent injustices and violence occurring against women. Still, crime statistics continue to increase every year; putting into question the efficacy of these laws in reducing gender based injustices. As pointed out by Sen (1995:266), access to justice implies freedom to achieve in general and the capabilities to function in particular. Sen's proposition to take "capability", as to what one should base judgments of equality or inequality and hence of justice on, seems to be acceptable.

The lack of power of poor women in terms of social, economic and political strength is reinforced by patriarchal and patrilineal family dynamics with segregation of the sexes, a strict division of labour and a systematic bias of male dominance and superiority. Men leave women no choice other than being dependent on men. Inheritance rights, wages and work related discrimination are areas where women continue to face gender-based disadvantages. It is against this context we need to understand rural women's access to various forms of *shalish*'s and migrant women workers access to justice in urban areas.

SECTION II: WOMEN'S ACCESS TO *SHALISH*

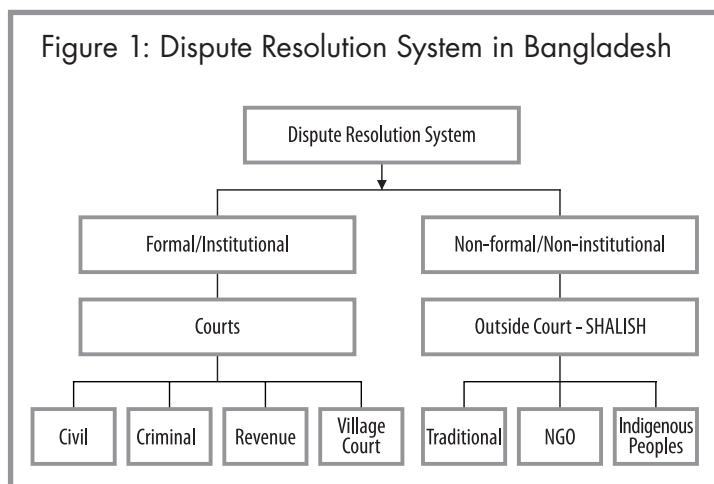
RURAL WOMEN AND *SHALISH*

The *shalish* should not be thought of as an alternative dispute resolution mechanism in Bangladesh. Many traits of *shalish* are similar to those of ADR, however, the former does not by any means constitute an alternative for the vast majority of the rural population. Despite its prominence, available statistics would argue for perceiving the formal justice system as the alternative form of dispute resolution (Siddiqi, 2004). *Shalish* predates colonialism in the India subcontinent.¹⁰⁶ It was the only practical option

106 See for detail Sirajul Islam Disciplining the Depressed Classes in Rural Bangladesh: A Critique on Resource Control and Social stability During Colonial and Post

available to ordinary people, as poor peoples' access to the courts was limited: the hazards, expense, and opportunity costs involved in travelling to district headquarters would have discouraged peasants from seeking justice in the official courts. In the circumstances, according to Islam (1997), the resort to local shalish was the only practical option available to ordinary people.

It is worthwhile to note here that the dispute resolution system in Bangladesh is a complicated and complex domain comprising both formal and non-formal structures (Figure 1). The formal-institutional system includes civil, criminal, revenue, and village courts with varying degree of disposal efficiency.¹⁰⁷ The non-formal non-institutional system implies outside court-shalish mechanism, which includes three major forms: traditional, NGO-mediated, and traditional system of indigenous peoples.



The *Shamaj* (village society) that governs rural people in various ways restricts women's movement further. Those who sit in the *Shalish* bench

—Colonial Eras, Willem van Schendel and Kirsten Westergaard (eds.). Bangladesh in the 1990's: selected studies. Dhaka: UPL, 1997.

107 See Barkat and Roy 2004: 80

as judges are known as *Shalishkars* (Adnan, 1990:17). There is hardly any record of women being the *Shalishkars*. Even the women who freed themselves from the purdah restrictions at the family level are not yet in a position to either become *Shalishkars* or to otherwise play a role in *shalish* proceedings other than as litigants. Women are usually seen as symbolic objects and their issues of honour are fought out by group of related men who protect their honour. The women who has lost their honour are no longer recognized as modest and respectable, and are not in a position to be treated as symbolic objects as worthy of social and familial protection (Adnan, 1990, Najneen, 2004). However, various research on *shalish* (Ahmed, 2004; Siddiqui, 2004) show that women want justice and justice to them is synonymous with presence of female jurors in the village court; as expressed by women in a study (Ahmed, 2004) that all-male jury blames women unfairly and when women are given chance to become part of decision making process, things change. These women believed that a female juror will be more empathetic to another women's situation (Ahmed, 2004). The following various shalish systems will delineate how women are located in these *shalishes* and in what manner their injustices are addressed. Following are the *shalish* systems for majority ethnic groups (i) Traditional *shalish*; (ii) *shalish* in Union Parishad; (iii) NGO *Shalish*, and (iv) for the Indigenous Peoples; Traditional Indigenous Justice Systems.

SHALISH

Traditional *shalish* is an informal system of justice which has no legal form. Traditional *shalish* generally involves a gathering of village elders, UP Chair and Members and concerned parties, exclusively male, for resolving disputes. *Shalish* is distorted by gender and class bias and power. The rich never face *Shalish*, and the one with power can always question the *shalish*. On the contrary, poor have to go on their hands and feet to get a resolution. *Shalish* judgements usually go against the poor, and in favour of the powerful (Siddiqui, 2004). Women have no voice in *shalish* and the following cases will reflect women's marginalisation. Women are present only as observers and when involved, as a part. Patron-client relationship between disputants and committee members further distorts *shalish*. Solutions prescribed in *shalish* can be arbitrary and uphold norms detri-

mental to women's situations. Due to National Constitutional Provision on Freedom from Torture and Inhuman Treatment, traditional *shalish* cannot impose inhuman corporal punishment.

Matters before Traditional *Shalish* are usually related to dowry, maintenance, sexual "deviance" and domestic violence, assault and rape cases. The rest are land disputes and other miscellaneous issues over resources (cutting down trees, trespass by farm animal, etc).

Traditional type of *shalish* or trial and punishment is a common practice in the country's remote villages, which are controlled by the religious leaders. Following example reflects on this.

Nazma Akhtar, 24, endured 100 lashes, in September 2002, after she eloped with her boyfriend and married him secretly. The flogging was ordered by a group of religious leaders of her village in Comilla district. The young woman, haunted by the public humiliation, never really understood why she had been punished. "Is it a crime to fall in love with the person you like and marry him? I did not protest the flogging after the so-called prosecutors threatened to expel my family from the village," said Nazma, nursing her wounds both physical and mental.

Nazma's instance has brought to remind the 1993 death of Noorjahan at Moulvibazar district. Noorjahan, 22, took her own life after she was buried up to the waist before being stoned in execution of a fatwa issued by a group of local Muslim leaders.

The New Nation, 18 December, 2002

Traditional *shalish* and UP *shalish* cannot issue *fatwa*. The *fatwa* perpetrators are usually influential people linked with the rich, while the victims are almost always women from the poor families. Noorjahan's death shocked the nation and raised serious concerns about the practice of *fatwa*. Penalties such as stoning and flogging are "totally illegal and violation of laws". *Fatwa* is even depriving women from their voting rights. There are still some pockets in Bangladesh where adult women are barred from exercising their constitutional voting rights. Female voters of Mahamaya

union of Chhagainaiya thana under Feni district have not voted since 1954, because of a *fatwa* pronounced by a local ‘*Pir*’ (religious preacher) and his successors.

As mentioned earlier the Supreme Court of Bangladesh has declared that “*fatwa*” means legal opinion of a lawful person or authority. The legal system of Bangladesh empowers only courts of law to decide questions on Muslim Personal Law and other laws. Therefore, all so called *fatwa*, by religious or other groups are unauthorized and illegal. This court decision is however not always followed in practice.

“*Hilla* marriage” is another form of *fatwa* widely practiced in rural Bangladesh. However, in 2001, the High Court ruled *fatwa* illegal. The judges – Nazmun Ara Sultana and Mohammad Golam Rabbani – were also declared “*murtad*”¹⁰⁸ by those who support such practice.

Apart from these rural women, some progressive female leaders also became the target of *fatwa*. Jahanara Imam who launched a movement against religious fundamentalism and fanaticism was declared “*murtad*” by a section of religious leaders. Besides, feminist writer Taslima Nasrin was compelled to leave the country after Islamic radicals sentenced her to death on charge of insulting Islam.

Women leaders in Bangladesh claim that such incidents of cruelty against women not only violate the fundamental rights of the women, but also stand against the country’s ratification of international charters of human and women rights.

108 A “*murtad*” is anyone who leaves Islam and becomes a “traitor” to it through their new beliefs or actions. The penalty for this is death.

UNION PARISHAD SHALISH

UP *shalish* Arbitration Council which is chaired by elected chairperson (in most cases men) claimed to be not that functional and exists mostly in papers. UP *shalish* has official status. The UP *Shalish* is empowered by the Muslim Family Laws Ordinance, 1961 on family Disputes (divorce, polygamy, maintenance). UP *shalish* cannot adjudicate on civil or criminal offences. The decisions taken by the UP Arbitration is recognized in the Family Court. UP *shalish* cannot issue '*fatwa*' (religious decree) or inhuman punishments that violate the freedoms guaranteed in the Article 35 of the Constitution (Golub, 2003; cited in Nazneen, 2004:25). UP *shalish* is regarded as ineffective and biased towards males.

The following case will reflect the reality where laws are supposed to work and how the situation gets distorted. The case shows how Karimon and her four daughters' fundamental right to enjoy the land as being the owners in reality gets violated.

*Karimon Nesa, a widow woman with four daughters in Kushtia suffered from misery caused by land disputes. She tried to get justice from three major institutions, but was subsequently denied justice from local **shalish**, UP **shalish** and then finally court. When she became widow her brother-in law Ibrahim took her vulnerability as an opportunity to take responsibilities of her and her daughters under the condition that he would be allowed to cultivate the land of his deceased brother. Karimon got married again and her daughters moved with Ibrahim. When Ibrahim started tyrannizing Karimon's daughters and forced them to do hazardous work, the daughters went living with Karimon at their step father's house. 6-7 years later after the death of their uncle Ibrahim, the daughters claimed their father's land back from their cousins. However, their cousins told Karimon's daughters that their father already had sold that land to their father, Ibrahim. To regain possession of the parental land Karimon's daughters agreed for a local **shalish**. As the cousins failed to show any legal documents the **shalish** ended without any solution. Meanwhile, the village touts and the influential provoked the cousins to make forged sale deed. Accordingly the sons of Ibrahim had made fictitious sale deed to some local influential. Thus Karimon was deprived from her late husband's property and her daugh-*

*ters from their hereditary property. Being unsuccessful with the local **shalish** Karimon procured necessary documents regarding ownership of her ex husband's land. When Karimon got the document from land office it became clear that the land had already been recorded in the name of four local influential. A **shalish** was held again and this time the decision was given in favour of Karimon; however, the four local influential refused to return the land to Karimon. In 1989, Karimon filed a case at the UP. The UP gave judgment favouring Karimon with an advice to file a regular suit to the civil court. The litigation is still under trial in the court, and the judgment has yet to come. Karimon became old in the process of this struggle and the journeys to court became hard as she had not much money after paying fees and bribes to advocates, assistant advocates and other court officials. Since her attempts to establish title on the land, Karimon has spent Tk. 171,500 in the process of litigation. In addition to this she has lost 410 work days. Due to the land dispute she had to sell other lands, livestock and poultry. Karimon also remarked that according to her, the court officials were not attentive with the people who come to the court. She alleged that the court and land officials act on the behalf of the rich and they do not bother about the misery and sufferings of the poor. She pointed out that if these officials were sincere and honest to their duties and responsibilities, her case would not remain pending for 12 long years (Barkat and Roy, 2004:161-168).*

The above example depicts three systems of major *shalish*; traditional *shalish*, UP *shalish* and formal court which subsequently denied Karimon justice not only on the ground of class, but as well on gender status.

INDIGENOUS WOMEN AND TRADITIONAL SYSTEM OF JUSTICE

There are approximately 45 ethnic minority groups in Bangladesh. Generally, indigenous women cannot claim parental property as of right. The notable exceptions, to an extent are the Marma people in the CHT, the Garo people in Modhupur and in greater Mymensingh, and the Khasis in greater Sylhet (Halim, 2006). The matrilineal traditional system exists in spirit and in most cases the decision making lies in the

hands of male members. Indigenous women are often excluded from roles of traditional leadership. For instance, under the hereditary traditional power structure among the indigenous peoples living in the CHT, the Headman and *karbaris* (village Chief) are men. Further, the Circle Chiefs are men, as these are usually passed down from father to son. Within the Garo matrilineal communities *Nakhmas* (village chief) traditionally used to be women, but now men have taken the position. *Nakhma*'s responsibilities include administrative and judicial activities. It may be noted that the patriarchal orientation of the *Nakhma* system mirrors to some extent to near-hereditary traditional Circle Chief, headman and *karbari* (village head; always men) power structure in CHT. Generally, in the rural setting in CHT the *Karbaries* resolve conflicts within the community; failing to do so, the cases are taken to the Headman. In both cases disputes are discussed openly, with male village elders acting as advisers to the *karbaries* and the Headman. Indigenous women are seldom consulted in such matters (desertion, divorce, child custody, etc); and far less involved in actual decision-making. Indigenous women's marginalisation is further enhanced by their complete absence in the mainstream power structures where presence of indigenous representation is almost non-existent. Many policies on indigenous women are aimed at the atypical cases of discrimination faced by ethnic Bengali women in the plain regions. Since the social, cultural, political and economic contexts on the hill areas and other regions inhabited by indigenous peoples are so different, many of these policies are not appropriate for preventing discrimination against indigenous women. The inadequacies are seldom addressed in the national discourses on women's rights, which are dominated by concerns for Bengali Muslim women, without accounting for the problems faced by minority and indigenous women (Halim, 2002).

NGO MODIFIED SHALISH

NGO guided *shalish* partially addresses exclusion of women, and are more equitable in treatment of women and poor than other *shalish*. It ensures greater representation of disadvantaged groups than other *shalish*, and trains *shalish* committees in human rights and relevant laws. NGO modified *shalish* lack official status and cannot adjudicate on criminal

cases. Like Traditional *shalish*, NGO modified *shalish* cannot deal with such offences as murder, kidnapping, robbery, rape, assault and theft. Leading NGOs working on NGO-Modified *Shalish* are: BLAST, ASK, NK, MLAA, BRAC, and The Nagorik Uddyog(NU). Following is the example of NGO modified *Shalish*.

Nijerakori (NK) participants demanded better wages from a landowner. When 13 workers (8 male, 5 female) formed a small group and started working in the landowner's field, he ventured to pay Taka 70 to the male workers and Taka 40 to the females. The workers protested and demanded a raise, especially for the female workers. Instead of complying with their demands, the landowner threatened the workers and abused the female workers. As a mark of protest, both the male and female workers left without collecting their wages. Most of the workers from neighbouring villages declared abstention from work until their demands for legitimate wages were met. The landowners tried to hire workers from adjacent areas, but failed. Thus they were forced to negotiate with the agitating workers through the UP chairman and influential owners and ultimately agreed to raise wages of female workers from Taka 40 to taka 50.

Area: Village Bargoan, Union No. 17 Nayergaon, Sub-district Motlob, District Chandpur

Acceptance of NGO Modified *Shalish*

- UNDP Survey 2002 (cited in Nazneen, 2004:26) on Public Awareness on Rights and Local Level Justice found that 45% of interviewees preferred theft cases to be dealt by NGOs rather than courts.
- About 20% in UNDP survey preferred serious crimes like murder, assault, etc. to be dealt by NGO *Shalish*
- BLAST survey (conducted in 12 districts) where BLAST mediation units have been working reported that a significant number of men and women supported NGO *Shalish* (Nazneen, 2004:26).

NGOs have challenged patriarchal *shalish* structures and practice. For example, Uttaran introduced activist's women in the *shalish* system for almost two decades. In the beginning women would just show up silent but in a big group. It was embarrassing for men to ask women to leave since everyone (in theory) is invited to attend. Furthermore women were not violating purdah as *shalish* took place within the courtyard of the petitioner's household, which is the woman's place. Gradually Uttaran started involving middle class women in *shalish* and women were incorporated as jurors. Equal representation comprising women from different socio-economic background is the key to Uttaran's success. The introduction of women in to the jury by ASK, NK, NU, BRAC and many other NGOs has weakened the patriarchal *shalish* replacing it with an institution in which the form is the same, but women have effective access to justice. However, this transformation of *shalish* is no accident of time but deliberate strategy of the women's movement including pro women rights NGOs to provide justice to rural women at the village level. The best practices of NGO *Shalish* when compared to the formal system are (i) co-option of women; (ii) mandatory stipulation about the gender and class composition of the *shalish* committee; (iii) ensuring representation of the poor, and (iv) involvement of elected women UP members (Nazneen, 2004). These initiatives ensure space for *shalish* members from different communities.

The opinion in the survey above reflects lack of awareness about the existing national laws. In order to evaluate the impact of NGO *shalish* on the inclusion of women, there is a need to focus on two interrelated areas: increased ability of women to seek justice, and participation of women as *shalishkars* (arbitrators). Moreover, studies (Hasle, 2003; cited in Nazneen, 2004) indicate that NGO modified *shalish* mostly functions in situation where disputants are poor (or rich, although rich usually may not want to be involved in a *shalish*). The pertinent question is whether NGO influenced *shalish* is effective tool for the poor when the accused party is from affluent or well-off background (Nazneen, 2004:31).

Section III: WOMEN'S ACCESS TO JUSTICE AS MIGRANT WORKERS

DENIAL OF RIGHTS: THE CASE OF RURAL FEMALE WORKERS IN FFPI AND RMG

Research findings from the Women in FFPI and in RMG¹⁰⁹, show that female workers are denied fundamental human rights. Mostly female workers are recruited as casual (except in EPZ¹¹⁰, where female workers are given appointment letters and other benefits) workers recruited through the contractors and do not fall under the purview of Factory Law of 1965. According to the Industrial Relations Ordinance of 1969, a worker “is a person who enters into a contract of service under the management and does not include a person who works under the control and supervision of the contractor”. Female workers who migrate from rural areas are mostly employed through subcontracting. The terms of employment must establish a relationship of master and servant or employer and employee between the person employed and the establishment. There are few permanent workers and causal female workers encounter different forms of discrimination:

- Casual workers are in the payroll of the contractors, and not in the payroll of the factory owners.
- Hired and fired easily by the contractors.

109 The migrant workers situation analysis have been drawn from two studies conducted by Halim and Faruque,O.(2002) and another study conducted by Halim, and Ariful, H. Kabir (2005) where a total of 100 women garment workers working in 15 garment factories have been interviewed

110 A free trade zone (FTZ) (or Export processing zone) is one or more areas of a country where tariffs and quotas are eliminated and bureaucratic requirements are lowered in order to attract companies by raising the incentives for doing business there. Free trade zones can be defined as labour intensive manufacturing centres that involve the import of raw materials or components and the export of factory products.

- Casual workers are not aware of the amount of money paid by the factory owners to the contractors for their hard labour.
- Overtime usually not paid in cash but in kind (e.g. food).
- Particular nature of work in FFPI and in RMG sector creates various types of health hazard such as weakness, malnutrition, endemic headache, dizziness, skin diseases and loss of eyesight.
- No formal policies in terms of work-related benefits.
- Female workers come from adjacent areas and the factory employers do not provide them with transport or housing.
- Large factories provide toilet facilities; however there are no such facilities available in small factories.

There are several reasons why women do not protest against above-mentioned discrimination. They are i.a.: (i) the supply of female labourers is higher than the demand; therefore, the employer takes the advantage of the situation of oversupply and exploits female labour; (ii) absence of better alternative sources of employment is compelling women to accept this low wage, low end job (Halim and Faruque, 2002).

RIGHTS OF THE WORKERS JUSTICE DEMANDED

The Labour Policy of 1980 deals with labour issues in general and does not mention issues related to women. The industrial policy declared and revised at different time (1975, 1982, 1991 revised 1992, and 1996) makes no mention of women or the need to address WID issue. In the 2005 policy, female entrepreneur advancement has been notified but the absence of WID is also visible.

The Government has ratified numerous ILO conventions to provide

rights of workers¹¹¹ Bangladesh has also ratified the CEDAW.¹¹² The legal provision most relevant for advancing women's equality related to employment, including the right to work and to equal pay for equal values, is stated in Article 11 of CEDAW. Factory workers of any industrial sector deserve the right to have trade union activities according to factory law of Bangladesh, but the scenario is completely different especially in FFPI. Since May 2006 labour unrest has began in garment industries demanding minimum wage and finally in September 2006 it was decided that the minimum wage would be Tk 1650(per month).

Major agencies like the Ministry of Fisheries and Livestock, The Department of Fisheries and BFFA are involved in the FFPI. However, they have no policy and programme to address the welfare of the female workers. The EU is concerned with the "Health of the Shrimps", and maintains the quality of the products through HACCP.¹¹³ The HACCP training does not however address training on workers fundamental rights, decent employment, etc. HACCP is completely devoid of social dimensions and lack strategies to improve the employment situation of female workers in FFPI (Halim, 2004 a).

Not only are these female workers harassed at the workplace, on the street and in the areas where they reside, these women working in the garment factories and in other sectors do not have proper occupational safety protec-

111 ILO Convention on Equal Remuneration, 1951 (No. 100), ILO Convention on Discrimination (Employment and Occupation), 1958 (No. 111), ILO Convention on Freedom of Association and Protection of the Rights of Organization, 1948 (No. 87), and the ILO Convention on the Right to Organize and Collective Bargaining, 1949 (No. 98). As a member state of the ILO, Bangladesh has undertaken to respect, promote and realize the principles contained in the 1998 ILO Declaration on Fundamental Principles and Rights at Work and can call upon ILO assistance to help achieve this.

112 The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

113 Hazard Analysis and Critical Control Points (HACCP) is a systematic preventative approach to food safety that addresses physical, chemical and biological hazards as a means of prevention rather than finished product inspection.

tion. In recent past we have seen many female garment workers that have lost their lives due to fire hazard. In this regard BLAST has taken some legal measures to pay compensation to the affected workers as per provisions under the Workmen's Compensation Act 1923. BGEMA has provided interim compensation to the victims of the fire disaster and has to some extent paid for medical expenses incurred by the survivors of the fire.

In most cases, in the RMG and in FFPP, factories hire young unmarried women and their work is often insecure and low paid. The international conventions, treaty and factory laws are not followed by the garment owners. Exploitation of the workers is being continued at various levels and female workers in RMG have on some occasions started movements to resist employers' illegal steps, which do not correspond to the above-mentioned legal regimes (Dannecker, 2000).

Both in the FFPI and in the RMG sector, women have no platform to express their grievances. There are no labour standards or social protections which are followed in RMG industry and in FFPI. The Government has allowed formation of trade unions, although with some restrictions, to ensure workers' rights, and a new law has already been passed in parliament. There is a provision in Industrial Relations Ordinance of 1977(section 24) to form a participation committee; both workers and management shall be part of it. Female workers in both of the researches pointed out that if there were women's associations, the opportunity of getting jobs and better working environment could have been enhanced.

The common violation of labour rights and human rights are: forced overtime, wage below minimum, cheating on overtime payment, restriction on toilet use, refusal of payment of legal severance, absence of provision of sick day, violation of code of conduct, absence of health and day care facilities, absence of regularly scheduled holidays, lack of provision for maternity pay, and physical abuse (Majumder 2000; Begum 2000; Barkat et.al 2005). It is to be mentioned that all the existing studies on labour practices prepared during the last decade provide a uniform picture of violation of labour laws and ILO conventions by the majority of manufacturers, both domestic and foreign (*ibid*).

TRADE UNIONS AND WORKERS ORGANIZATION

It is against the context described above that we need to comprehend the situation of female workers in Bangladesh. Although the Constitution of Bangladesh guarantees freedom of association, fundamental rights of the workers have been restricted in many areas by the government. Workers' democratic rights are important in making decisions on their own future. They should have the right to negotiate their wage with their employers through their freely chosen trade unions.

Female workers' rights are least protected in the RMG sector where they account for around 90% of total employment. They work 12/14 hours a day with low wages generally in relations to male workers and very little overtime work, no weekly holiday or maternity leave, no medical or welfare facilities, and above all no contract agreement. The fundamental principles and rights at work are not guaranteed and protected as they are not organized and have no bargaining power and employers are exploitative.

Factory workers of any industrial sector have the right to have trade union activities according to the Factory law in Bangladesh of 1965, but the scenario is completely different especially in FFPI. A few trade union organisations are working with the garment workers, which is mainly concentrated in Dhaka city. There is no permission to form trade union activities in EPZ area.

Female workers are resisting various malpractices of the employers. However, female workers are mostly dealing with their problems individually, and they lack mechanisms to cope with the injustice and harassment. Very few female workers are in a position to seek justice in a formal manner and continue to work with different type of unfairness. These women have no choice than to accept their fate.

The National Trade Union leaders supported also some of the movements and these turned quickly into formal resistance, which compelled the employers to talk to the workers and ensure their rights. For example

one movement was organised by the entire garment workers of Narayangonj Small and Cottage Industry Corporation (BSIC) area associated with some national trade union organisations on November 3, 2003, to demand workers fundamental rights as well as one Kamal, a valiant worker of the movement, was killed by way of the event (For detail see The Daily Star and The Prothom Alo, November, 4, 2004; cited in Halim and Kabir, 2005).

Besides the formal resistance, sometimes garment workers individually negotiate with the authority to establish their rights and perhaps this type of resistance bears an important role to make a formal resistance. In our research, we found that most of the resistance has been neutralised individually. Even though every informal resistance does not bring result, nonetheless, it encourages the workers to continue to resist (Halim and Kabir, 2005).

CONCLUDING REMARKS

For rural women *shalish* is an important avenue for accessing justice at the local level. Near four million litigation are running in Bangladesh, annually. Among these, the number of institutional litigation in the major courts under operation are 3 million and near 1 million litigation are solved unofficially through *shalish* per year (Barkat and Roy 2004:78). A growing number of litigation is implying an increased suffering of poor people in Bangladesh. It has been argued (Barkat and Roy, 2004; Nazneen, 2004) that if the village courts are empowered to deal with village level disputes, people, especially poor people could benefit. Therefore, government should institute arbitration, *shalish* and dispute resolution systems at the community level to stop poor people, especially women's, sufferings by sending them to court.

NGO guided *shalish*, more than traditional *shalish*, has emerged as an important vehicle for legitimising and representing the cases of poor rural women. However, the issue, which is the matter of concern, is that how far can NGO modified *shalish* push the agenda that favours women and the interest of the poor? NGOs have to compromise and agree to

arrangements that fit cultural norms and at the same time try to promote human rights agendas (Nazneen, 2004:32). When NGO arbitration fails, NGO modified *shalish* usually comply with formal court. For example BRAC and BLAST forward such failed cases to their selected panel lawyers who in turn take necessary action to file a regular case in the local court.

The NGOs in rural areas have led to at least some empowerment of poor rural women. Although NGOs are more directly targeted towards the economic and social empowerment of women, social and economic empowerment no doubt leads to political empowerment as well at least to a limited extent. However, for substantial political empowerment (i.e. making women vocal and active agents of social change rather than beneficiaries and participants in the different decision making bodies) requires in many instances legislative measures (such as for affirmative action like reserved seats in elective bodies and other institutions, like various forms of *shalish*) which can only be done through the government. Similarly change in political sphere may also require the cooperation of political parties (so that they nominate more women). Likewise, social and economic empowerment may require the combined efforts of the government, political parties, NGOs and other parts of the civil society. Clearly poor rural women's empowerment strategies must seek coordinated approach by all the actors mentioned above from government to civil society.

This article has further highlighted the access to justice for the rural women migrating to urban areas. It is clear that these women are encountering human rights violation at various levels, and that deprivation and exploitation of women has increased. These women are still lacking the capability and freedom to achieve justice. Access to justice remains the most important human rights need for the poor women. The legal processes prevalent in the country are riddled with centuries old social ills and injustice. Women, both in rural and in urban areas, demand to participate in the process of development as active agents, standing firm on their rights guaranteed by the Constitution and law. In a context like this, where Bangladesh ideologically agrees to gender equality but shies away

from implementing it in real sense of the term, it is vital that initiatives in different economic sectors that employ and benefit women, like the garment industry, are taken in policy level that intentionally, carefully and positively incorporate gender equality to ensure women's fair share in society. The challenge for policy makers is perhaps devising ways that are practical, implementable, culturally sensitive and also pro-women. In order to meet all these demands of gender equality policy, there has to be gender analysis of existing policies, programmes and practices, as well as having a good-thorough knowledge of gender relations, social dynamics etc so that policies can be shaped in the most effective ways.



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Acronyms used in the article:

ADR = Alternative Dispute Resolution;
ASK = Ain-O-Salish Kendra;

BFFA = Bangladesh Frozen Food Association;

BLAST = Bangladesh Legal Aid Services Trust;

BGMEA = Bangladesh Garments Manufacturer and Exporters Association;

BSCIC = Bangladesh Small and Cottage Industries Corporation;

CEDAW = Convention on the Elimination of all Forms of Discrimination Against Women;

CERD = Convention on the elimination of all forms of Racial Discrimination;

CHT = Chittagong Hill Tracts;

EU = European Union;

FFPI = Frozen Food Processing Industries;

HACCP = Hazard Analysis Critical Control Point;

ILO = International Labour Organization;

MLAA = Madaripur Legal Aid Association;

NK = Nijera Kori;

NGO = Non-Government Organization;

NPAW = National Policy for the Advancement of Women;

WID = Women-in-Development.