

**THE INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY**

## **Sixth Annual Assembly**

**Access to Human Rights: Improving Access for Groups at High Risk**

**Guadalajara, 17-18 January 2003**

### **ACCESS TO HUMAN RIGHTS: OBSTACLES AND ISSUES**

**Stephen Golub**

© 2003, International Council on Human Rights Policy  
ICHRP commissioned this document as a Working Paper.  
ICHRP has not edited it and is not responsible for its accuracy or for the views and opinions expressed.  
ICHRP welcomes the re-use, re-publication and re-distribution of this paper, appropriately cited.

1. Despite the widespread formal acceptance of international human rights law and norms, actual access to those rights is limited across the globe. A large portion of humanity has rights in theory, but not in practice. Why is this the case? This overview paper seeks to help answer that question by describing the diverse obstacles and constraints impeding practical implementation of human rights. It then goes on to sketch selected issues that pertain to a human rights approach (as a means) for advancing human rights (as a goal).
2. Because it is an overview paper that complements a series of other, subject-specific reports commissioned by the International Council on Human Rights Policy, this document is intentionally general in nature. It reflects an effort to avoid excessively technical or legal language. (It should not be seen as a summary of those other papers, for they have been prepared independently.)
3. In an effort to minimise technical language, repetition and explanation, though at the expense of conceptual clarity, I employ certain terms interchangeably. In referring to human rights, such terms as access, enjoyment, protection, implementation and advancement are freely substituted for each other. The paper sometimes provides examples of constraints. This is not to imply that these examples are exclusive or comprehensive illustrations of the points being made.
4. Though at times the paper mentions links among various constraints, for the most part it operates on the assumption that the reader is aware of their complex interplay, with cause and effect often entwining. The division of constraints into two broad categories — Institutions' Characteristics and Circumstances and Individuals' Characteristics and Circumstances — and the several sub-categories only approximate the web of interconnected obstacles. Even without repeatedly emphasising the matter, the paper also assumes that many obstacles to the enjoyment of human rights are themselves violations or deprivations of rights.

#### **CONSTRAINTS ON THE IMPLEMENTATION OF HUMAN RIGHTS**

## **Constraints connected to institutions' characteristics and circumstances**

### *Shortage of financial resources*

5. A lack of financial resources fundamentally constrains many governments' capacities to protect human rights (as well as carry out other responsibilities). This manifests itself in numerous ways and springs from diverse causes, some of them the responsibility of governments themselves.
6. One basic cause is that some societies are too poor to generate the funds necessary to ensure even minimal adherence to international norms and obligations concerning health, education, employment, personal security, justice and a host of other rights. They lack the resources to support the salaries, equipment, training, administration, oversight and other elements that can advance those rights.
7. The lack of funds can in turn spring from the policies of the international community and/or its most influential member states. Inadequate foreign aid, unfair imbalances in trade and market access, and imposition of counterproductive economic policies all can contribute to the shortage of resources. Another resource-limiting obstacle often comprises domestic laws and policies. Tax regulations that favour the rich or allow them to legally avoid payments result in an empty treasury. Homegrown economic policies may bankrupt a country.
8. Corruption similarly plays an important role, both by denying funds to governments and bleeding away resources that they temporarily have. Illegal tax evasion and smuggling can cut into revenues in major ways. Whether subtly or prominently, government officials and cronies in some countries use national coffers as de facto personal bank accounts. This in turn can cause international development agencies to deny or limit grants and loans for projects that supplement societal resources and that directly or indirectly advance human rights. It also can deter foreign and local investment that provides jobs, aids economic development and generates tax revenues.
9. Whether due to external or internal factors (or both), regional and national economic crises of recent years have had substantial rights-restricting impact. They have stripped governments of the funds necessary to maintain health, education and other services that embody and advance human rights, and cut back the number of individuals that can afford such services. By triggering rises in unemployment and inflation and depletion of household savings and government resources, they have increased such violations as gender violence.
10. Shortage of resources does not only constrain governments. Nongovernmental organisations (NGOs), community-based groups and other civil society organisations in many countries engage in effective advocacy, training, promotion and protection of human rights, often with greater effectiveness, dedication and creativity than government counterparts. Yet they typically receive far lower levels of foreign funding for law-oriented work than do government institutions.
11. While civil society groups' absorptive capacity is smaller than that of governments, this does not completely account for the funding disparity and the resulting constraints on their resources and their capacities to advance human rights. Funding agencies' policies, philosophies, politics and inertia also contribute to this imbalance.

### *Inadequate commitment of political leadership*

12. Another fundamental obstacle is inadequate government commitment (sometimes called lack of political will) to human rights in general and to specific institutional reforms and services that advance human rights. In its most extreme form, this takes the form of a national leadership's

outright repression of the populace, with subordinate officials either enforcing the leadership's policies or being afraid to act in a contrary manner.

13. Inadequate commitment by the leadership can take more subtle forms, however. Its rhetoric and even its policies may be relatively benign, but it may be indifferent to human rights and accordingly take no affirmative action. Given the unavoidable divisions in all but the most dictatorial polities, however, many countries may manifest situations in which some political leaders and government ministers support some or all human rights, while others are opposed or indifferent.
14. Inadequate commitment also can manifest itself where top officials do support implementation of the law and promulgate promising initiatives in ways that have strong human rights implications, but with little vigour or persistence. Without sustained, dedicated effort, they may be unable to overcome internal institutional resistance or external opposition (constraints discussed below). An order by a minister of justice to root out and punish corrupt and abusive police may prove meaningless if that top official depends on police or their patrons for political support and is therefore reluctant to follow through, or if such reforms simply are not high priorities.
15. Even proposed solutions seeking to advance human rights can prove to be part of the problem. Reform efforts concerning judiciaries, ministries or other institutions may fail because even well-intentioned governments and development institutions may pursue unproductive approaches. These include taking inadequate account of incentives and interests at play, pursuing a "one size fits all" programme rather than adapting strategies to specific societies and agencies, ignoring potentially crucial civil society and citizen input, and analysing institutional problems in narrow technocratic ways rather than in terms of political economy.
16. Sometimes the problem is not a flawed reform programme, but rather an excessive faith in institutional reform itself. In terms of both opportunity costs and effectiveness, human rights may be advanced in some situations by working around a government institution than seeking to improve it. Better options may be found in resorting to alternative government services and processes, whether ongoing or new, as well as in civil society and use of media.
17. The role of the international community in inadequate government commitment should not be ignored. Development agencies may overlook this problem in their rush to push loans and grants out the door and put the best face on problematic projects. In order to satisfy their national security or economic interests, donor nations (and multilateral funding sources whose policies they influence) may also condone recipient governments' outright repression or milder indifference to human rights. They may even encourage a lack of commitment where it serves their interests.

#### *Inadequate capacities and commitment of government personnel*

18. Even given the most dedicated and vigorous leadership, high level initiatives to promote human rights and relevant reforms may be dashed by subordinates' lack of commitment to these causes, negative incentives that undermine their devotion to justice and good governance, or lack of capacity to carry out their relevant responsibilities. They may delay action until there is an eventual change of leadership, do the minimal amount necessary to carry out directives, obfuscate in reporting to the top, or take other steps to frustrate progress. They also may lack the training, supplies and equipment to carry out their responsibilities properly. Their conduct may in turn flow from a host of factors.

19. One such factor is corruption on the part of judicial and other government personnel. The illicit purchase of processes, delay and decisions can block the vindication of rights. This works to the detriment of upland communities whose land and livelihoods are threatened by illegal logging and urban residents whose health is threatened by polluters evading environmental laws. In many cases, the problem is fuelled by basic greed, the low salaries of public employees, and entrenched, self-perpetuating patterns and interests. In other instances, corruption may spring from more specific factors such as exploitation of ambiguities and loopholes in the law itself. Police may operate on the self-serving assumption that no action is legal unless it is regulated by law, and proceed to solicit bribes from street vendors or motorcycle taxi drivers despite the fact that their businesses are not banned.
20. The ability to avail of human rights is further constrained by a variety of non-pecuniary influences. In some societies, extreme personalism influences government personnel to make decisions based on kinship, friendship, common regional and academic backgrounds, or the sharing of mutual acquaintances, rather than on sound legal principles. Tribalism also may bias official conduct, as may private parties performing favours that create psychological debts the recipient officials feel obliged to repay down the line.
21. Patronage blends with personalism and psychological debt where government employees owe their positions to politicians or influential private parties. In return, the employees may issue permits and rulings that favour the well-connected — to the detriment of the disadvantaged. Fishing communities may find their waters invaded by large commercial ships — sometimes under the cover of the law and sometimes with the tacit help of authorities who neglect to prosecute illegal practices.
22. Gender, class, caste, tribal, ethnic and racial biases similarly preclude state agents from carrying out their responsibilities. A judge who views an ethnic minority as untrustworthy will not accord a member of that group a fair trial. An official who consider urban slum dwellers worthless by virtue of their poverty will likely reject their applications to gain some semblance of title to their plots.
23. In the many societies where the law has served (and may continue to serve) as a historical instrument of control and social engineering, officials view it as a means for projecting their power rather than protecting citizen rights. Such a view may even extend to physical intimidation by state agents, sometimes acting on the behest of self-interested elites. Even in its more modest forms, this perspective makes government personnel imperious or indifferent to the rights of the public they are supposed to serve. Police, prosecutors and judges accordingly may operate in a harsh and threatening manner.
24. While the discussion thus far has highlighted the pernicious effects of undue influence on and ill will by government personnel, many officials with good intentions are hampered by lack of knowledge of the law. Inadequate or non-existent training, sometimes due to insufficient resources, prevent them from competently carrying out their work.
25. Training deficiencies may not only perpetuate legal ignorance, however. Even if workshops competently convey the letter of the law, they may fail to acquaint judges, prosecutors, police and other officials to the circumstances of women, the poor and other disadvantaged populations. Thus, the training may make no effort to dispel the gender-biased belief that a rape somehow may be a woman's fault, or to sensitise officials to the fact that a poor, illiterate farmer may require more help than a well-educated merchant in understanding the charges against him/her, testifying in court or understanding the significance of evidence.

26. Government officials also are handicapped by inadequate supplies, equipment and facilities. To the extent that these hamper their capacities to hear cases or provide services, they in turn may undermine the protection of human rights. In addition, intimidation of judges and other state agents can cripple even the most devoted public servants' capacities to protect human rights. Such intimidation can include job transfers, loss of employment, harassment, violence and even the threat (and reality) of assassination.

*Illegal actions by private parties*

27. What was implicit in the discussion of government personnel's roles in constraining rights should be made explicit: they often act under the undue influence of private parties. Whether through bribes, patronage or personal connections, this improper impact on court and administrative proceedings plays a crucial role in a government's failure to fulfil its human rights obligations.
28. Though human rights law mainly is framed in terms of government actions and obligations, a plethora of private parties commit abuses. Domestic violence is rampant across the globe. Landlords and other parties dispossess tenants of land and livelihood without repercussions in many settings. Factories subject employees to egregious working conditions. Governments sometimes condone such actions, but these also occur in some nations where political leadership and government employees are committed to preventing them, due to such constraints as lack of resources.

*Inconsistent, misinterpreted and flawed laws*

29. Many laws in many societies continue to fly in the face of human rights norms. They permit or even require mistreatment of women, minorities and numerous other groups and run roughshod over individual rights. Laws also may be unclear, inconsistent, and outdated. A given upland area may have overlapping and contradictory legal regimes concerning mining, logging, agriculture and indigenous peoples. In the realm of environmental law, diverse executive agencies may have overlapping responsibilities. This kind of serious problem is often exacerbated by increasing international and domestic pressure to reform legal frameworks, particularly in the commercial sphere. In the rush to develop and pass new legislation, insufficient attention is paid to consistency between new and existing laws.
30. Inconsistencies in a legal system may have historical roots that work to its detriment. The fusion of civil and common law traditions may result in the worst of both worlds rather than the best. Judges may adopt the relatively passive, impartial role characteristic of a common law system, even as they administer a civil code that would otherwise require a more active approach. This blend can operate against the interests of criminal defendants who require a more consistent judicial perspective to protect their rights.
31. Conflicts between contemporary national and indigenous legal norms may have a negative effect on cultural minorities' rights. While a registered land title may be the best proof of ownership in contemporary systems, many such indigenous groups tend to see themselves as using rather than owning land. They rely on their ongoing association with it as sufficient proof of a right to future use. In the absence of official recognition of those user rights, a government or private party can usurp the territory.
32. Conversely, state laws that protect the rights of the disadvantaged may not be enforced where they conflict with repressive traditional norms. Restrictions on child marriages and multiple

marriages mean little where those traditions take precedence over national legislation and where the authorities are unwilling to take action.

33. Sometimes traditional norms are distorted to work to the even greater detriment of women and other disadvantaged groups. Religious doctrine is twisted and misrepresented to require harsher forms of treatment and punishment. Moreover, the literal language of the law may block effective access to the legal system. In some societies, laws are drafted and court cases are conducted in English or other foreign languages that most citizens do not understand. Such linguistic gaps can constitute large obstacles to people knowing their rights, not to mention acting on them.

#### *The burden of illegality*

34. Certain particularly vulnerable populations face special obstacles to enjoying their rights when they live outside the law to begin with. Illegal immigrants face deportation or worse if they complain about abusive employment practices. Women who are forced or lured into prostitution in foreign lands often face the double constraint of engaging in illegal conduct while in a country illegally. They may fear seeking assistance from the police, and may be abused, scorned or jailed should they do so.
35. Laws also may inappropriately place a stamp of illegality on endeavours that would flower to the benefit of the poor if unrestrained (and that sometimes thrive despite such restraints). Rights to housing and employment are frustrated by excessive regulations that render some small businesses and urban poor neighbourhoods illegitimate and/or impose bribery of government officials as a cost of operating an enterprise or residing in a home.

#### *Paucity of affordable legal services*

36. Access to human rights for the poor is fundamentally constrained by the shortage of free or subsidised legal services, defined here to include legal training, advice and representation. The most obvious example of this is where attorneys' fees and other costs block impoverished persons from filing cases and defending themselves in the courts. Yet the lack of legal services similarly hinders effective access to numerous other forums, including quasi-judicial tribunals and administrative settings. Thus, even where the poor know their rights and even where the courts and other fora function well, access is not a reality.
37. Although some countries have national legal aid systems that are administered by their governments or bar associations, many of these are under-funded, stretched impossibly thin, improperly managed or poorly served by the attorneys staffing them.
38. In many societies these problems are exacerbated by non-existent or inadequate mass dissemination of legal information by government, media or NGOs, in ways that effectively educate large populations. The constraint may not simply be a lack of effort, but also the uneven quality of whatever initiatives do occur.
39. The attitudes and practices of the legal profession place a further constraint on protection of human rights in numerous societies. Many lawyers have minimal contact with disadvantaged populations and little commitment to the public good. Other attorneys may take advantage of low income clients' lack of education and status to charge them relatively substantial sums for unsubstantial services.

40. Though lawyers and their professional organisations sometimes are at the forefront of the fight against repression, many bar associations operate in a guild-like manner that frustrates less dramatic struggles for human rights. They may resist the introduction of free legal services that reduce or limit the dependence of laypersons on lawyers, even if such services emphasise training and advice over litigation. The dynamic is a complex one. While educating ordinary citizens about their rights may result in increased business for lawyers (to the extent that the poor can afford professional services), it is also possible that such knowledge may in fact prevent legal problems from arising to begin with. From the perspective of lawyers, the latter situation undermines their professional business interests. The establishment of paralegals (laypersons who receive specialised legal training) within communities may likewise reduce demand for the professional expertise and services of attorneys. This is also the case for administrative and alternative dispute resolution procedures in which informed citizens can participate without formal legal representation.
41. Attorneys also may pursue their own interests to the detriment of the rights and interests of their clients. Where they are compensated on a per appearance basis, they have an incentive to string out trials into as many steps stretching over as many months (or years) as possible.
42. The guild-like practices of some bar associations also reflect the problematic nature of legal education in most countries. With few exceptions, formal education curricula and teaching methodologies tend to build technical capacity at best. This fails to impart a critical view of the law, an awareness of how it often works to disadvantaged groups' detriment, an appreciation of how lawyers can protect human rights, or even knowledge of how to discuss the law in terms laypersons can understand.
43. While in some societies the vacuum in legal services, public sector commitment and capacity, professional standards and legal education is partly addressed by NGOs and clinical legal education (law school programmes that combine practical training with service to the disadvantaged), their outreach is constrained by limited resources. Governments typically are reluctant to aid such efforts. Foreign funding agencies frequently provide support, but at far lower levels and often for far shorter durations than such agencies' assistance for government institutions.
44. Where independent or modern civil society is a relatively new phenomenon, the problem is not simply the limited resources and outreach of NGOs and law school clinics, but also limitations in their institutional and programmatic capacity. These require time, leadership, and sustained resource streams to reach their full potential.

*Lack of knowledge about successful human rights activities and strategies*

45. A fundamental constraint on advancing human rights is the startling dearth of reliable evaluation and research regarding both specific activities and overall strategies that seek to advance it. Much of what passes for evaluation in the international community is anecdotal and impressionistic, lacking the rigour of such fields as public health. There is little reliable documentation of what constitutes effective human rights education and whether such education alone advances human rights. There similarly is a lack of information on the success or failure of more complicated strategies for promoting human rights.
46. This informational vacuum is exacerbated by inadequate dissemination of whatever data does exist. For the most part, the international community's diverse members do not know or learn from each other. While governments and NGOs may conduct little research that can improve their work, a more crucial constraint consists of funding organisations' lack of support for

rigorous inquiries. It is ironic that many such organisations support research on a wide variety of human rights topics (as well as other subjects), but not on the very projects that they fund.

## **Constraints connected to individuals' characteristics and circumstances**

### *Poverty*

47. As a threshold consideration, poverty constitutes perhaps the broadest type of constraint on individuals' capacities to assert their rights. As employed here and by most development organisations, the concept involves not just lack of funds (income poverty), but also lack of health, housing, education, participation and power. Its impact is explicitly and implicitly explored in more depth below.
48. Income poverty is a major obstacle to human rights implementation, in that it powerfully contributes to other forms of poverty (concerning health, education and participation, to name a few) and concomitant constraints on rights. Where people cannot afford education for themselves or their children (whether because they cannot cover the costs or must work when they otherwise would attend school), they lack an important tool in further learning and asserting their rights. The poor (perhaps particularly such groups as children, homeless, migrants and non-citizens) similarly may lack access to health or social welfare outlets and resulting rights where they cannot pay government registration fees. They even may lack funds to cover the cost of transportation to such outlets. Most generally, people for whom having enough to eat is a daily struggle may have little time, energy or opportunity to focus on asserting their rights.
49. Lack of economic independence substantially overlaps with income poverty as an important constraint. Those who largely depend on their employers, husbands, landlords, patrons or other parties for subsistence face serious obstacles to exercising their rights. The problem most extensively, but by no means exclusively, manifests itself with respect to gender disparities in incomes and economic power. Economically dependent women who challenge or leave abusive husbands risk a descent into even deeper poverty, as well as further violence and social ostracism.

### *Inadequate legal knowledge, awareness and skills*

50. Lack of education, often resulting in illiteracy, constitutes an important obstacle. Though people can learn about the law even in the absence of a basic education, that lack of education still causes practical problems (such as the inability to read) and cognitive difficulties (such as a limited understanding of complicated legal matters).
51. Inadequate knowledge of the law often flows from lack of education, but they are not one and the same. As just noted, people can come to know their rights (to at least a basic extent) even if they are illiterate. Conversely, even well educated individuals may know nothing about the law.
52. The most extreme manifestation of this legal ignorance might be called lack of legal awareness: people not realising what rights are or that they have them. That is, while some may at least know that they have rights, though not what they are, other persons may not even be aware of the concept. Absent a minimal level of awareness, they do not even consider accessing the legal system, participating in governmental or other decisions shaping their lives, or otherwise asserting their rights.

53. Even if people possess a general awareness that they have rights, they may lack specific knowledge of how to get them enforced. A woman may have a vague sense that she can use the law to produce concrete benefits, but she may have no idea that her country's laws grant her inheritance rights and prescribe the processes through which she can assert them, or that there may be NGOs, paralegals or government offices that can help her with such processes. Without more detailed knowledge of this kind, she may be effectively powerless.
54. Another aspect of the lack of detailed knowledge is the lack of legal skills. Farmers seeking to secure land tenure or land reform may need affidavits, other proof of their status, and familiarity with how to fill out and file relevant forms. Wives seeking to stop their husbands' domestic violence may need to know how to report such abuse to the police, pursue a court case, prompt an arrest or simply have the incident entered on a police blotter as a means of intimidating their spouses and thereby (possibly) discouraging further attacks. While it may be impractical and even impossible for all farmers and women to learn about such matters, the fact that no one in a community has such skills can block their use of whatever other legal knowledge they have.
55. Inadequate legal knowledge and skills may be exacerbated by the absence of personal contacts in courts, administrative agencies and other government institutions. Institutions ideally should operate in professional, responsive ways free of ongoing personal connections, but the enduring reality across the globe is that such connections help institutions function and in fact are a basis of much human interaction. Parents seeking to register their children and thereby qualify them for government benefits may not know who in a given office handles or can guide them through such procedures. What in some societies are known as "touts" and "fixers" prove necessary partly because they pay bribes to facilitate such services, but also because they have the necessary contacts in relevant bureaucracies. As with legal skills, it is not practical to expect everyone to develop such personal connections, but the absence of any community members who have them, and who can facilitate assistance by similarly helpful government personnel free of charge, blocks access to what often are intimidating, impersonal bureaucracies.

#### *Counterproductive attitudes*

56. As already implied above, attitudinal constraints overlap with lack of legal knowledge and awareness. Deeply inculcated gender and caste perspectives leave many women and other marginalised groups resigned to inferior treatment, yielding a sense of "learned helplessness." This refers to a fatalistic attitude and lack of expectations among those who feel that traditional power relations will invariably leave them powerless to assert their rights or to otherwise participate in decisions that shape their lives. Experience leaves them little hope of exercising their rights, and with a tendency to view legal reform efforts with skepticism or indifference. The ineffectiveness of laws and widespread corruption in public institutions and processes may further contribute to public cynicism and to the absence of public demands for reform.
57. Under certain circumstances, people may go beyond resignation, to actual endorsement of their own low status. Raised to believe that the status quo is for the best and fearful of changing it, they accept their place as part of a natural, protective ordering of the world.
58. Repressive groups also may see such discriminatory treatment as correct. In keeping with traditional norms, they may even view it as natural, just and/or in the best interests of everyone. Denying women exposure to education, to men who are not family members and to the outside world may be seen as protecting and even honouring them.
59. Generations of state repression breed a perception of law as an instrument of government control rather than of citizen freedom even after that repression ends. Similarly, the experience

and perception of the law as a tool for powerful private interests steer ordinary citizens away from trying to assert their rights. Such factors can outweigh any availability of legal recourse and people's knowledge of international, national and local legal guarantees.

#### *Rational restraint*

60. Even in the absence of external threats and other pressure, a rational calculation of self-interest and personal priorities can in effect act as constraint on implementation. People in a newly stable situation after years of war, dislocation or upheaval may just want to get on with their lives in ways that cause minimal disruption. Even where they know they are being treated unfairly and illegally, they may prefer to avoid asserting their rights. Similarly, farmers in long-standing stable situations may place a higher priority on learning and using more productive cultivation techniques than learning and using their rights. This is not to suggest that such persons are making "correct" choices, particularly where asserting their rights can improve their lives, but the choices nevertheless may be rational rather than products of ignorance, fear or attitudinal obstacles.
61. The cumbersome, expensive and unfair nature of many legal systems similarly may drive the disadvantaged to rationally choose to avoid them and/or rely on patrons for services. Either course can result in sacrificing their rights.

#### *Inadequate power*

62. Disadvantaged populations in particular may lack organisation and thus lack a fundamental vehicle for asserting their rights. An individual woman seeking police help in stopping domestic violence may be met with condescension or scorn. In some contexts, a group of women acting in concert may receive respect and action. A farmer seeking to have his land tenure registered with a government agency may encounter an indifferent bureaucratic maze. If he belongs to an association, he can draw on that group's expertise and collective influence to penetrate the bureaucracy. In such situations, membership in an effective group can overcome obstacles to enjoying one's rights. It also can confer a feeling of security in knowing that one is not alone in seeking redress or services. Thus, while "knowledge is power" is a popular adage, in fact "organisation is power" may carry more weight. The two factors of course are not mutually exclusive and in fact are mutually reinforcing. Impoverished persons who are not organised may face even greater obstacles to asserting their rights than those who are ignorant of the law. Even if it does not conceive of its interests and potential benefits in terms of rights, a well organised group may advance its rights where a well informed individual may fail.
63. The most fundamental obstacle to assertion of rights may well be lack of power on the part of the disadvantaged. Depending on the context, this constraint flows from a varying combination of other factors identified in this paper. Government corruption, private parties' undue influence, the absence of legal services, and impoverished persons' lack of organisation and legal knowledge may combine in a given context to make the poor powerless and deny them their rights.

### **A HUMAN RIGHTS APPROACH: SELECTED ISSUES FOR INITIAL CONSIDERATION**

64. The International Council is interested in exploring how to ensure implementation of human rights, particularly in light of the manifold obstacles to achieving this end. It particularly seeks to assess the merits of a human rights approach to accessing human rights. What might at first seem

to be the apparent circularity of this quest becomes an important, sensible inquiry when the approach is seen as the means and access as the goal.

65. It is beyond the purview of this paper to fully explicate what a human rights approach would mean as a strategy for advancing human rights, particularly since the development and human rights communities as a whole are in the relatively early stages of sorting out how the approach applies to any number of goals. The objective here is simply to sketch selected questions and issues for initial consideration.
66. The point is not to draw to conclusions. Rather, the discussion raises these issues in case participants at the International Meeting care to discuss whether certain activities fall within or outside of the human rights approach and what their implications are for the effective implementation of human rights. In posing questions, some of them provocative, the intent is to stimulate discourse, not to offend.
67. Before considering those issues, some very brief attention to the concept of a human rights approach is in order. As the Office of the High Commissioner for Human Rights (OHCHR) has noted, “There is no single, universally agreed rights-based approach, although there may be an emerging consensus on the basic constituent elements.”<sup>1</sup> One core element is government obligation based partly but not wholly on international law. In explaining the rights-based approach, the University of Minnesota Human Rights Resource Centre notes that “a right entails an obligation on the part of the government to respect, promote, protect and fulfill it...based on international human rights treaties and other standards, as well as on national constitutional human rights provisions.”<sup>2</sup> The OHCHR expands on this to suggest that “while a state is primarily responsible for realising the human rights of the people living within its jurisdiction, other states and non-state actors are also obliged to contribute to, or at the very least not to violate, human rights.”<sup>3</sup> At the same time, the OHCHR also highlights empowerment, participation, international human rights’ universality and numerous other concepts and activities as key elements of the approach.
68. Is use of international human rights law (or its domestic equivalents) essential for the protection of human rights? If in fact a development initiative provides or improves housing, income or health care without any reference to human rights or state obligations, is it nevertheless serving to advance human rights? If such an initiative is advancing human rights, does the difference that the approach draws between rights and needs dissolve, at least in a functional if not a conceptual sense? Might the development initiative be advancing rights even if it presents such work in terms of needs?
69. Should development organisations work with governments and officials that perpetrate or condone human rights violations if doing so represents the only potential avenue for ameliorating the situation? Abusive police might moderate, but not end, their violent and corrupt violations of human rights if they receive training and other forms of assistance. Is continuing work with them justified? Is it consistent with a human rights approach?
70. Similarly, should development organisations work with or otherwise condone private parties that commit violations, if doing so addresses the needs of the victimised? What if the victimised individuals choose to remain engaged with those private parties even after being fully informed

---

<sup>1</sup> Office of the High Commissioner for Human Rights, “Rights-based approaches: Is there Only One Rights-based Approach?” at <http://www.unhchr.ch/development/approaches-05.html>

<sup>2</sup> University of Minnesota Human Rights Resource Centre, *Economic, Social and Cultural Rights Activism: A Training Resource*, at <http://www.hrusa.org/hrmaterials/IHRIP/circle/modules/module1.htm>

<sup>3</sup> Office of the High Commissioner for Human Rights, *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies*, paragraph 13, at [http://www.unhchr.ch/development/povertyfinal.html#\\*](http://www.unhchr.ch/development/povertyfinal.html#*)

of their rights? Participation by and empowerment of disadvantaged groups is essential to a human rights approach. Is it consistent with such an approach to seek to close factories that pay less than minimum wage and impose horrid occupational and safety conditions if the employees freely prefer to continue working there?

71. What of a strategy that seeks improved working conditions and schooling for children toiling in factories in violation of the law? Might it justifiably sacrifice the children's rights in the short term in order to promote them over the longer run? Is that appropriate? And regardless, is it a human rights approach?
72. Are there circumstances in which seeking to hold a government legally accountable, through national or international tribunals, is less effective than alternative strategies? Such strategies might embrace use of the law, such as through law reform or administrative advocacy. Yet other options might eschew the law completely, such as by seeking accommodation with the government or employing political mobilisation to pressure it. What if domestic courts do not present promising paths for relief (due to conservatism, corruption or other factors) and international legal avenues appear to be ineffective for a given issue in a given country? Again, what if the affected individuals whose rights are violated prefer other strategies, even accommodation? Does abandoning a focus on government obligations mean abandoning a human rights approach?
73. Does a strategy that prioritises strengthening government institutions, rather than holding them accountable, represent a human rights approach? Especially if such institution-strengthening entails abandonment of other activities, within what time frame should positive impact be expected?
74. Given the central importance of participation by and empowerment of persons whose rights are being violated or are in danger of being violated, should more resources focus on directly empowering them through legal services, including advice, training and other capacity-building? In view of recent research indicating that a civil-society based, integrated legal empowerment strategy (combining legal services with other development initiatives) positively impacts poverty alleviation and human rights,<sup>4</sup> should a human rights approach pursue such integration even if in some forms it does not prioritise holding governments accountable? Conversely, what if it even excludes focusing on government in any direct manner, instead directing resources to civil society? Finally, given that even increased flows of funds will leave decision-makers with difficult resource-allocation choices, should direct empowerment of the disadvantaged take precedence over government institution-building?

---

<sup>4</sup> "Legal Empowerment: Advancing Good Governance and Poverty Reduction," in *Law and Policy Reform at the Asian Development Bank*, 2001 Edition, Office of the General Counsel (Manila: Asian Development Bank), also at [http://www.adb.org/Documents/Others/Law\\_ADB/default.asp?p=lawdevt](http://www.adb.org/Documents/Others/Law_ADB/default.asp?p=lawdevt)