



## REVIEW VIA THE WEB DISCUSSION FORUM - BACKGROUND AND GUIDE

The **overall aim of the review and validation process** is to promote ownership of the Handbook by APJRF members, and maximise the quality and relevance of the Handbook's content via a coordinated review and networking approach based on both remote and direct engagement strategies.

The **objectives of the review of first chapter drafts** are to:

- Provide chapter authors with objective feedback and constructive guidance on the *technical aspects* of their chapter contributions - to promote intellectual rigour and honesty throughout the Handbook's drafting.
- Promote *relevance* of the Handbook within the region by providing the APJRF's members with an opportunity to engage the Handbook's development.

### **Practical Guidelines in Providing Feedback:**

1. **Scope of Drafts:** the development of chapter drafts is the culmination of a comprehensive consultation process with the APJRF's membership. Chapter topics and scope have been developed in consultation with the membership and approved by the member's representatives, the Project Board.

Contributions are still *drafts*, and consequently, they are largely unedited. Authors, however, should provide a comprehensive self-evaluation of why/why not the reform activities they are discussing were successful - and the implications of this.

2. **Scope of Comments:** comments provided should be informed by the 'Core Concepts Underpinning the Handbook.' These are based on the philosophy articulated in the Manila Declaration and the discussions at the APJRF round table meetings. They are, to:
  - Promote *standards of justice* established in international instruments.
  - Contribute to developing a *shared vision* across the region.
  - Empower and *enable reform actors* throughout the justice system.
  - Create a *practical tool* for exchanging learning and use by each other.
  - Describe our actual *experiences of common challenges*.
3. **Framework for Comments:** this has been developed to structure, and maximise the relevance of, the feedback received. It is intended as a *guide* for reviewers:
  - *Description* - is content clear, interesting and relevant for the reader?
  - *Communication* - are structure, format, writing style and words simple, concise, clear and compelling for the reader?
  - *Effectiveness* - does the content inform, provide insight, stimulate consideration to adapt and implement locally?
  - *Analysis of the Local Experience of What Works / Doesn't Work* - is there sufficient critical self-evaluation using (self-identified) criteria?
  - *Transformation of 'Know-how'* - are the 'Key Messages' relevant to others in region?
4. **Timing and Submission:** all comments on first drafts need to be submitted via the APJRF's on-line forum (<http://www.apjrf.com/discussion/>.) The forum will close at 5:00 pm, 14 March Australian eastern summer time (GMT +11 hours.)



# ***Judicial Reform Handbook -***

## **Draft Chapter 2: Promoting Access to Justice through Judicial Reforms**

### **TABLE OF CONTENTS**

Abbreviations and Acronyms .....	iii
Glossary .....	iii
1.0 Key Messages for the Chapter .....	1
1.1 What is Access to Justice? .....	1
1.2 Barriers to Accessing Justice .....	1
1.3 Developing Responses to Improve Access to Justice .....	2
2.0 Description of Reform Experience .....	3
2.1 Case Study One: Domestic Violence protection orders, Vanuatu .....	3
2.1.1 Problems/Challenges .....	3
2.1.2 Actions Taken.....	4
2.1.3 Outcomes .....	5
2.1.4 Analysis of Successes/Constraints .....	6
2.1.5 Lessons Learned.....	7
2.2 Case Study Two: Rights Applications, India .....	8
2.2.1 Problems/Challenges .....	8
2.2.2 Actions Taken.....	8
2.2.3 Outcomes .....	10
2.2.4 Analysis of Successes/Constraints .....	10
2.2.5 Lessons Learned.....	11
2.3 Case Study Three: UNDP Project, Timor Leste.....	11
2.3.1 Problems/Challenges .....	11
2.3.2 Actions Taken.....	13
2.3.3 Outcomes .....	13
2.3.4 Analysis of Successes/Constraints .....	16
2.3.5 Lessons Learned.....	16
2.4 Case Study Four: Equal Access to Justice Project, Sri Lanka .....	16
2.4.1 Problems/Challenges .....	16
2.4.2 Actions Taken.....	17
2.4.3 Outcomes .....	19
2.4.4 Analysis of Successes/Constraints .....	19
2.4.5 Lessons Learned.....	20



- 2.5 Island Courts, Vanuatu..... 20
  - 2.5.1 Problems/Challenges ..... 20
  - 2.5.2 Actions Taken..... 21
  - 2.5.3 Outcomes ..... 22
  - 2.5.4 Analysis of Successes/Constraints ..... 23
  - 2.5.5 Lessons Learned..... 24
- 3.0 Synthesis Analysis/Evaluation of Experience..... 25
  - 3.1 Key Questions/Know How..... 25

Annex One

- A1.0 Country Context Background: Vanuatu .....A1-1
  - A1.1 Country Context.....A1-1
  - A1.2 Judiciary and the Courts .....A1-2
- A2.0 Country Context Background: Sri Lanka .....A1-4
  - A2.1 Country Context.....A1-4
  - A2.2 Judiciary and the Courts .....A1-5



## ABBREVIATIONS AND ACRONYMS

CLT	-	Customary Land Tribunal
CLTA	-	Customary Land Tribunal Act
CO	-	??
CoC	-	Council of Coordination for the Justice Sector
CPD	-	??
DFID	-	UK Department for International Development
DVPO	-	Domestic Violence Protection Orders
IDPs	-	??
LTC	-	Legal Training Center
MOCA	-	Ministry of Constitutional Affairs and National Integration
PDO	-	Public Defenders Office
SIL	-	Social Interest Litigation
UNDAF	-	The United Nations Development Assistance Framework
UNDP	-	United Nations Development Programme
UNMIT	-	United Nations Integrated Mission in Timor-Leste
VUV	-	Vanuatu, Vatu

## GLOSSARY

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## 1.0 KEY MESSAGES FOR THE CHAPTER

### 1.1 WHAT IS ACCESS TO JUSTICE?

5 The Manila Declaration for a 21<sup>st</sup> Century Independent Judiciary states, we need to accomplish 'a 21<sup>st</sup> century civilisation grounded in the rule of law and access to justice for all citizens.'

10 The traditional approach to access to justice has been to focus on how to improve access for disadvantaged, vulnerable or marginalised groups. It has also tended to focus on providing access **to** courts. Whilst this is important, access to justice is a much broader concept. If the justice system as a whole prevents the judiciary from being able to secure accountability of power-wielders, serve as a check and balance between different branches of government, apply the laws in an even handed way, and deliver timely justice then access to courts in itself is of limited value.

15 Instead, justice needs to uphold the rule of law. Access to justice therefore includes the quality of the decisions that are being made; access to justice **through** courts and the justice system. For example, if there is physical access to courts but:

- 20 • delays of years in gaining a decision;
- incompetent or unethical judges;
- lack of independence of the judiciary; or
- no enforcement of decisions;

then access to justice is compromised.

### 25 1.2 BARRIERS TO ACCESSING JUSTICE

There are many different sorts of barriers that can affect access to justice. They can be grouped into three broad types of barriers: physical barriers; social and cultural barriers; and concerns about the quality of justice.

30 Physical barriers include matters such as:

- the location of courts;
- the location of legal services;
- lack of services to make courts useable by people with disabilities; and
- 35 • lack of security for court users and personnel.

These barriers are often caused by lack of resources. Solutions often involve altering how resources are deployed.

40 Social and cultural barriers include matters such as:

- the costs of accessing legal services;
- lack of information or awareness about what the law is and how courts work;
- the language used in court;
- low levels of literacy; and
- 45 • fear due to the lack of familiarity with court procedures.

These barriers are created by the wider social context and are tied to wider issues of development. Solutions to these sorts of barriers often need to focus on increasing



50 peoples' knowledge, and altering court systems so they are easier to understand and less intimidating.

Concerns about the quality of justice include matters such as:

- delays in processing cases;
- lack of enforcement of decisions;
- 55 • fears that judges are biased;
- fears that the law favours particular groups of people; and
- fears of negative repercussions for taking matters to court.

60 These barriers are created by lack of trust in the justice system. As lack of trust relates to internal attitudes towards and perceptions about the justice and governance system as a whole these barriers are the most difficult to effectively address. Solutions need to be carefully tailored to the particular environment and the underlying causes of the concerns about justice.

### 65 **1.3 DEVELOPING RESPONSES TO IMPROVE ACCESS TO JUSTICE**

The particular barriers to accessing justice depend entirely on the specific context in which the justice system is operating. As a result, responses to improve access to justice need to be based on research and evidence of the actual needs in a particular setting and solutions need to be appropriate to that setting.

75 Developing context specific responses to access to justice problems needs creative solutions. Solutions should not only focus on how to improve service delivery by formal courts and how to increase demand for justice but should also consider how to expand the delivery of justice beyond formal courts. In all settings there are other institutions that are already engaged in maintaining peace and ensuring order. These include:

- customary governance structures;
- religious bodies;
- civil society groups;
- 80 • the media; and
- the education system.

85 These structures contribute to justice in society and should be engaged in developing and delivering solutions to access to justice problems.

Projects aimed at improving access to justice work best when the stakeholders agree on the need for such a project and the relevant authorities support the project.

90 Projects need to be sustainable, both in terms of human and financial resources.

The ultimate goal of access to justice is only achieved once everyone in society can readily access justice; justice for all. As a result solutions for improving access to justice need to specifically consider strategies for ensuring access for disadvantaged, vulnerable or marginalised groups.

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## 2.0 DESCRIPTION OF REFORM EXPERIENCE

100 The four countries discussed in this chapter are India, Sri Lanka, Timor Leste and  
Vanuatu. They share several common challenges in securing access to justice for the  
people. These challenges include, *inter alia* a high incidence of poverty, illiteracy, lack of  
information and legal guidance/assistance, corruption, congestion and backlog of cases  
105 in the judicial system. Additionally, there is also a sense of injustice, and a widely-shared  
perception that access is mainly for the affluent and ruling elites. Thus, the judicial  
process is often being seen as an accessory (if not an instrument) in exclusion,  
domination and exploitation of the underprivileged. The judicial process can even be  
used as a tool to deny justice (by using the courts for delaying tactics to stall resolution of  
disputes, as in Pakistan), if not as a tool of oppression (for example, to facilitate  
expropriation of land from poor rural families and “returnees”,<sup>1</sup> and to target political  
110 rivals<sup>2</sup> as in Cambodia).

110 There are five case studies in this section. The first two, domestic violence protection  
orders in Vanuatu and rights applications in India that have been chosen as they both  
illustrate judicial reform projects that streamlines application procedures and reduces  
costs for a specific type of order. These case studies also illustrate approaches that were  
115 led by judiciary and required few resources to implement. Comparing these two case  
studies highlights how a similar conceptual approach to improving access to justice can  
differ widely in implementation due to contextual differences.

120 The next two case studies, of UNDP funded projects in Timor Leste and Sri Lanka,  
illustrate approaches that can be taken in a situation where there is funding support for a  
bigger project that addresses many different access to justice issues at one time.  
Comparing these two case studies highlights the strengths and pitfalls of implementing  
large scale projects. They also raise specific issues relating to rebuilding justice in a  
125 post-conflict situation.

130 The final case study, of island courts in Vanuatu, illustrates an internally driven project  
that attempts to harmonise customary authority and the state legal system in order to  
enhance the delivery of justice. The Sri Lanka case study also involves some  
approaches that attempt that harmonisation process. Again, comparing these two case  
studies highlights how a similar conceptual approach to improving access to justice can  
differ widely in implementation due to contextual differences, differences in the particular  
135 problems that need to be solved and differences in the scale of the project and the  
resources committed to it.

### 2.1 CASE STUDY ONE: DOMESTIC VIOLENCE PROTECTION ORDERS, VANUATU

#### 2.1.1 Problems/Challenges

140 There are many barriers to accessing the courts for the majority of the population in  
Vanuatu. Vanuatu is a least developed country and the average income is very low, but  
court filing fees and lawyers are expensive. Vanuatu only gained independence in 1980,  
and the legal system has been adopted from the colonising powers. As a result many

<sup>1</sup> See Shaun Williams, “Where has all the land gone: Land Rights and Access in Cambodia Volume 2” (1999)  
<http://www.ngoforum.org.kh/Land/Docs/draftlandlaw/wherehasallthelandgone-2.htm>.

<sup>2</sup> Human Rights Watch, ‘Human Rights Overview: Cambodia’  
<http://www.hrw.org/english/docs/2006/01/18/cambod12269.htm>.



145 people are unfamiliar with how the legal system works. This lack of familiarity is compounded by low levels of functional literacy in English, which is the predominant language of the law, and limited physical presence of the courts and other legal services in Vanuatu. Vanuatu has about 60 inhabited islands, however the Supreme Court only has a presence in the two urban centres, and police and lawyers are also largely concentrated in these centres.

150 These problems affect the majority of the population. Women face additional difficulties. This is largely due to patriarchal nature of Vanuatu society. In custom almost all chiefs are men and women do not usually play a role in decision making. Women who wish to leave their husbands are often required to stay by customary dispute resolution bodies.<sup>3</sup> Women tend to be less educated than men. There are fewer women in formal employment, and those that are tend to be paid less. As the police force and judiciary are  
155 mainly male women may not feel comfortable in raising complaints.

160 Whilst there is considerable concern about violence within the home, which is usually, although not always, directed towards women, Parliament has delayed in passing the Family Protection Bill for more than 5 years. As a result, people who wanted to seek injunctions to prevent further violence from occurring needed to file a civil case for trespass to the person and ask for an interim injunction. This was costly and slow, and as a result very few people sought the help of the court. The absence of quick, cheap, and easy to use legal mechanism for people suffering from domestic violence to seek protection is a problem that needed addressing through an avenue other than  
165 Parliament.

### 2.1.2 Actions Taken

170 One response to these challenges was the redrafting of the civil procedure rules, a project that was initiated and led by the judiciary. This redrafting was done with the broad '*...overriding objective... to enable the courts to deal with cases justly.*'<sup>4</sup> The working party drafting the rules agreed that they should be 'user friendly; suitable for the people of Vanuatu; [and appropriate to] the realities of the local context.'<sup>5</sup> The Civil Procedure Rules 2002 are written in plain English and are simple. They also allow for active case management by the judges.  
175

180 One of the innovative inclusions in the rules is the provisions on domestic violence protection orders (DVPOs). In 2001 the Chief Justice of Vanuatu hosted a conference on women, children and the law. The theme of this conference was largely driven by a growing awareness in society of unfair treatment of these groups, particularly in relation to domestic violence. One of the outcomes of the conference was the decision '*...to pass interim rules to help facilitate access to civil procedure remedies for victims of domestic violence.*'<sup>6</sup> These rules were intended to provide some avenue of protection until Parliament passed a law on family protection.

185 The rules themselves<sup>7</sup> allow for any person to file for a DVPO against another member of her or his family. No lawyer is required for these proceedings. Filing requires the

<sup>3</sup> See, for example, *Public Prosecutor v Kota* [1993] VUSC 8, in which a woman was kidnapped and returned to her husband, following a customary decision that she must stay with him.

<sup>4</sup> Civil Procedure Rules 2002 1.2(1).

<sup>5</sup> Ted Hill and Sue Farran, *Commonwealth Law Bulletin* 1112

<sup>6</sup> Shirley Randall 11

<sup>7</sup> Part 16, division 4.



190 completion of a statement of claim and a sworn statement, which can be  
handwritten. The cost of filing is 3,000 Vatu, instead of the usual 8,000 Vatu for most  
other magistrates' court claims. One the documents are filed the registrar is required to  
immediately inform the magistrate of the claim, and the magistrate is required to hear the  
claim as soon as possible. This claim is heard in chambers. No notice is given to the  
defendant of the hearing.

195 The order can include giving the claimant exclusive occupation of the family home,  
requiring the defendant to cease all contact with the claimant or other members of the  
family, and prohibiting the defendant from using violence or threats of violence. The  
order is temporary, and may be in effect for up to 28 days. The order must usually  
'include a statement authorising the police to arrest the defendant if he or she breaches  
the order.'<sup>8</sup> It is served as soon as possible by someone other than the complainant, and  
200 a copy of the order must be given to the police.

A further hearing takes place either on the date set by the magistrate in the order, or on  
application of either party. At this time the order may be continued, amended or revoked.

### 205 2.1.3 Outcomes

The Rules came into effect in early 2003. The court staff and judiciary have been  
supportive of the initiative and applications for DVPOs are regularly made, with the  
majority of applications being made by women. From 2006 to 2007 the number of DVPO  
applications made by the University of the South Pacific Community Legal Centre  
210 doubled.

In order to prevent abuse of DVPOs, which are made without any evidence from the  
other party, magistrates frequently request that applications be accompanied by a  
medical report and a copy of a complaint laid with the police. These documents are quick  
215 and cheap to obtain. The "informal" requirement to provide supporting documentation  
means that, in the absence of physical abuse a DVPO is harder to obtain. However,  
DVPOs are still available without this support, although magistrates will consider the  
applicant's statement more carefully in order to ensure the judicial process is not being  
abused.

220 In order to support the implementation of the Rules the Vanuatu Association of Women  
Graduates, along with the University of the South Pacific School of Law, Wan Smolbag  
Theatre and SR International and Associates implemented the "Awareness Raising on  
Court Rules Relating to Domestic Violence in Vanuatu Human Rights Project". In  
225 addition to public workshops to groups throughout Vanuatu, publicity was done through  
brochures, posters, comic books, videos and radio shows.

230 A package for people wanting to apply for orders was compiled. This package is  
available in the three main languages of Vanuatu, Bislama, English and French, and  
explains to people the steps they need to take in applying for a DVPO, and what  
happens after a DVPO is granted. All the forms that need to be filled in are included in  
this package. Ongoing free information is available through the Vanuatu Women's  
Centre, the public solicitor's office and the University of the South Pacific Community  
235 Legal Centre.

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<sup>8</sup> 16.17(6).



#### 2.1.4 Analysis of Successes/Constraints

240 The reform of the Civil Procedure Rules has, in many ways been successful. The  
simplicity of the approach is one of its major strengths. The rule change has resulted in a  
rapid judicial remedy for victims of domestic violence, which can be obtained using a  
fairly simple and relatively cheap procedure. The initiative was low cost to implement. As  
245 changing the rules did not require action by the government, only support of the judiciary,  
this change did not get blocked. Because the rule change was initiated by the judiciary  
itself, this internal support was present. The project also had widespread support from  
civil society groups who saw the need for the rule change. As a result these groups took  
on most of the work in raising awareness to the wider population about the rule changes  
and how to use the courts to get a DVPO.

250 However, there are many constraints to the reform. The first of these is that there may be  
lack of effective follow up once the DVPO is gained. DVPO's are not always served and  
the police are not always willing to intervene if a DVPO is breached. One reason the  
police give for this is that they do not have the resources (trucks, boats or fuel) to be able  
to rapidly respond in the event of a complaint, but another is that not all of the  
predominantly male police force is committed to eradicating domestic violence.

255 Despite awareness raising around the country, chiefs may not recognise or understand  
DVPOs. There is a fundamental collision between the state and customary systems as to  
how best to deal with family disputes. In custom the emphasis is on keeping the family  
together, and although a person who is committing domestic violence may be fined, it  
would be very unusual in custom for a husband to be restrained from seeing his wife. At  
260 times chiefs can be fearful that the introduced legal system is undermining their authority  
and there is cultural pressure on people to not use the legal system, particularly if it may  
mean breaking up a family. As there are no women's shelters it can make it very difficult  
to resist this cultural pressure. In practice, this collision between state and customary  
systems, and the importance of customary law, means that women may find themselves  
265 without any real protection.

270 The ideal situation is, maybe, that DVPOs provide temporary respite from a dangerous  
situation, and that once the immediate danger is removed, parties can find a lasting  
solution. Customary dispute resolution which aims at building a lasting peace can  
potentially play an important role in finding this solution. However, in order to develop  
harmony between state law and custom further change is needed. It would be possible to  
provide chiefs with more training in order to encourage an attitudinal shift: keeping the  
family together should not override the safety of all family members. However, attitudinal  
shifts are very difficult to bring about and to monitor and training in itself may not be an  
275 adequate solution. It would also be possible to bring customary dispute resolution within  
the state legal system. Already Vanuatu's Civil Procedure Code allows for cases to be  
referred for mediation. Cases could be referred to a "custom style" dispute resolution  
process, in which there were also "human rights representatives" either acting alongside  
chiefs as mediators or providing a viewpoint that chiefs need to consider.<sup>9</sup> Such a  
280 solution would meet the fear that the introduced legal system is undermining customary  
authority without sacrificing women's rights which are frequently not well recognised in  
custom.

<sup>9</sup> There is provision to allow for people knowledgeable in custom to sit with judges of the Supreme Court or Court of Appeal (*Constitution*, Article 51), in order to try to bring introduced state law and customary law into harmony. The use of people knowledgeable in law/human rights to sit with chiefs is a symmetrical concept, also aimed at developing harmony between the two systems.



285 Problems of geographical reach and cost that affect access to justice for a wide variety of matters also affect DVPO cases. Magistrates courts are only found in a few locations, and the reach of the police is also limited. The 3,000 vatu fee is also still too high for some people.

### 2.1.5 Lessons Learned

290 The judiciary and court staff can act as leaders in improving access to justice. In creating a climate in which the judiciary sees this as a legitimate role, key personnel (the Chief Justice, in Vanuatu's situation) need to take the lead. Conferences or other forums in which the judiciary as a whole can discuss their concerns about the delivery of justice  
295 can help to develop a shared vision amongst the judiciary of a better justice system, and this shared vision can be used to implement changes within their courts, to suggest new laws, or to contribute to public debate about what an ideal justice system should be. Whilst individual judges may not be comfortable in this leadership role, if the judiciary as a whole is seen as expressing a shared vision to help improve access to justice, this discomfort is minimised.

300 When judges and court staff act as leaders in changes they are then more likely to implement the changes. This is because they have "ownership" of the changes, and are not having new rules imposed upon them by external authorities.

305 Judges should listen to the needs in the community when thinking about ways in which rules can be altered in order to make justice more accessible. The community will then support the changes and assist to ensure that there is meaningful implementation. As the judiciary may be limited by time and other resources to conduct implementation programmes this community support is vital.

310 Justice needs to take into account what happens after a court order made in order to be truly comprehensive. This may be out of the judiciary's direct control, however, the judiciary can play an important role in raising awareness of the need for support following the making of a court order. In particular the judiciary can suggest legal reforms to  
315 Parliament, and can hold public conferences or make other public statements about the work of the courts and the need for wider systematic support following the making of court orders.

320 Changes should attempt to get all stakeholders and influential groups involved at the time that they are being made. By ensuring that all stakeholders, and particularly enforcement agencies, are involved, greater commitment to implementing them is likely to ensue.

325 Altering rules of court procedure is something that is relatively cheap and easy to undertake, and which can make a real difference to access to justice. However, changing rules, in itself, is not sufficient to alter access to justice, if the public is not aware of, or does not see the need for, changes to the rules. If the changes are driven by people in the community, who then support the changes once they are made, it is more likely that the changes will have lasting impact.

330 For truly successful change, there often needs to be changes to multiple parts of the justice system. However, if resources do not permit systemic changes, then smaller



changes which improve access to justice for at least some people is better than no change at all.

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## 2.2 CASE STUDY TWO: RIGHTS APPLICATIONS, INDIA

### 2.2.1 Problems/Challenges

The socio-economic conditions prevailing in India in the post-independence era presented a challenge in as much as a legal framework and static judicial system was not by it self sufficient to secure access to courts and rights of people.

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Social and economic conditions compounding the effects of expensive, complex and time consuming judicial processes presented barriers against access to justice. Further, lack of access to information, legal aid and resources exacerbated the situation. Also, in instances, there were no express enforceable rights available to persons. Thus, aggrieved individuals and communities, especially the underprivileged and marginalised often found no meaningful justice in the world's largest parliamentary democracy.

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Thus, three of the principal challenges lie in:

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- developing a supra-level judicial mechanism for securing justice, in protecting and where necessary evolving or shaping legal rights, especially for the underprivileged;
- developing efficient justice delivery structures; and
- enhancing the ability of aggrieved persons, especially the disadvantaged, to access justice through judicial means.

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### 2.2.2 Actions Taken

The first of these challenges was addressed through the ingenious efforts some judges in the Supreme Court of India and the High Court and public interest lawyers and groups, to evolve a framework for “social interest litigation” (SIL), comprising additional procedural and legal rights, evolved or shaped through judicial decisions in a common law system.

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These courts encouraged a rights-based approach under Articles 32 and 226 respectively of the Constitution of India, to directly approach these courts for protection of fundamental rights of aggrieved persons. The following salient actions were taken in this process:

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- Relaxation of the doctrine of *locus standi* allowing NGOs, social action groups and individuals to bring action on behalf of others, whose fundamental rights under the Constitution were violated or threatened.
- Departure from the adversary mode of procedure by allowing actions to be initiated on the basis of simply addressing a letter to the Judge and courts also take notice *suo motu*, on their own volition, and commenced judicial proceedings, on issues concerning fundamental rights of people.
- Court-appointed Commissions of Inquiry (comprising lawyers, academics, social workers or district judges) to inquire into issues raised in the petition and report back to the Court.
- Retention of jurisdiction over the matter even after the Court has issued its directives and orders, to ensure compliance with such directives and orders.

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- 380
- Monitoring of the Court's directives and orders through Court-appointed Commissions on the basis of which further directives and orders are issued by the Court, as when needed and appropriate.
  - Absence of express enforceable rights was addressed by reading such rights in right to life under Article 21 of the Constitution of India.

385 One of the recent projects in addressing the next two challenges hereinabove, for enhancing efficiency of justice delivery structures and ability of people, especially underprivileged to access justice to courts is the UNDP pilot project extending from August 2006 to December 2007.

390 Despite the achievements of *social action litigation* at the level of the apex courts, problems persist, especially at the lower levels of the judiciary. Major challenges include mounting backlogs of untried cases, inordinate delays in disposals, excessive costs, uncertainties of litigation, and insensitivity to the problems of the marginalized groups.

395 Many of the problems in the lower courts stem from basic human resource and capacity gaps among court administrators and judges such as insufficient management and administrative capacity. Also, factors such as weak institutional structures, poor working conditions, inadequate administrative support and case management structures (records are lost or misplaced thereby prolonging and delaying court proceedings) and insufficient

400 coordination between actors of the justice system are important barriers for people's access to justice.

The project also aims to improve access to justice for the most disadvantaged people in society as a way to ensure that these people have better opportunities of realizing their human potential, of participating in the governance of the country and ultimately of improving their livelihoods and choices in life. The Project supports initiatives directed towards strengthening justice delivery through the court system, informal justice processes, the criminal justice sector (police, prisons and prosecution), the informal as well as para-legal agencies and non-governmental organizations engaged in the provision of legal services. The Project at the same time supports activities directed towards empowering the most disadvantaged groups (poor people, displaced people, tribal populations, scheduled castes, women and children) to seek remedies when they are aggrieved.

415 The Project is being implemented in two phases. In Phase I (August 2005-August 2006), the Project:

- conducted base line surveys on Access to Justice issues and prepare the design and Project Implementation Plan of the Project - including measurable indicators to monitor the impact; and
- created a Justice Innovation Fund to support small, innovative proposals from all over the country that will inform the Project Implementation Plan through lessons learned and may be replicated and up-scaled in Phase II.

In Phase II, the Project will:

- 425
- implement strategies and activities as outlined in the Project Implementation Plan; and
  - up-scale the Project Implementation Plan upon further resource mobilization.

430 The Innovation Fund will provide lessons learned from the pilots that will be fed into the Project Implementation Plan and into the main project over the remaining period. In this



way there will be a constant development of project activities in light of the lessons learned under the project.

### 2.2.3 Outcomes

435 SIL framework in India, also see through the lens of judicial activism, has led to an  
enhanced perception and effect of rule of law. The apex courts have issued a number of  
judgments against governmental actions and inactions concerning the fundamental rights  
of people. This has enhanced timely judicial review of government actions and also  
required positive action by the government for securing fundamental rights. The apex  
440 courts have also expanded on the concept of right to life under the constitution to include  
right to fresh water or air,<sup>10</sup> right to a clean environment,<sup>11</sup> right to education,<sup>12</sup> right to  
shelter,<sup>13</sup> and right to health.<sup>14</sup>

445 The SIL in India has also created significant peer-group pressure on judges throughout  
South Asia and beyond.

In the UNDP pilot project focusing on the lower judiciary, assessment on completion of  
Phase 1 is anticipated to include the following outcomes:

- 450 • strengthened capacity of the actors of the lower formal court system (through  
improved case management, strengthened business procedures, training etc.) to  
provide fair, equitable, effective and efficient justice to poor and disadvantaged  
groups;
- improved capacity of the criminal justice system (Prison, Police and Prosecution)  
to provide access to justice for poor and disadvantaged people;
- 455 • strengthened capacity of the actors of the informal justice system to increase  
consistency, predictability and equality in the application of the law and strengthen  
conformity with the normative justice system;
- improved capacity of the poor and disadvantaged groups (through legal  
awareness and a range of support mechanisms) to seek justice remedies; and
- 460 • improved formal and informal legal aid services provided to poor; and  
disadvantaged people especially at district and sub-district level.

### 2.2.4 Analysis of Successes/Constraints

465 Notwithstanding the success of SIL in India as a viable and durable approach to judicial  
reform, a few constraints, as below, need continued monitoring and action. Constraints  
include lack of understanding and support by some constituents of courts and lawyers;  
need to strengthen capacity of judges and other players to adopt and sustain SIL,  
especially after prominent judicial champions have retired from the bench; need to make  
media and the public aware of the “silent revolution” in access to justice and judicial  
470 reform; need to prevent abuse of the process by a few persons attempting to bring  
routine cases through the SIL system to take undue advantage of its efficiency, and the  
backlash that has followed on the part of some of the judges and lawyers. The courts  
themselves are addressing the abuse of process issue through setting up their own  
screening procedures and mechanisms to deal with social action litigation petitions. The

<sup>10</sup> See e.g., *M.C. Mehta v. Union of India*, AIR 1988 SC 1037 and *A.P. Pollution Control Board v. Prof. M.V. Naidu*, (1999) 2 SCC 718 (Supreme Court of India).

<sup>11</sup> See e.g., *A.R.C. Cement Ltd., v. State of U.P.* (1993) Supp. (1) SCC 57 (Supreme Court of India).

<sup>12</sup> See e.g., *Mohini Jain v. State of Karnataka*, AIR 1992 SC 1858 (Supreme Court of India).

<sup>13</sup> See e.g., *Olga Tellis v. Bombay Municipal Corporation*, (1985) 3 SCC 54 (Supreme Court of India).

<sup>14</sup> See e.g., *CERC v. Union of India*, (1995) 3 SCC 42 (Supreme Court of India).



475 courts are also addressing the backlash issue and promoting sustainability through a process of engagement with the judges and lawyers.

### Short paragraph on Analysis of Successes/Constraints of UNDP Project to be added

#### 480 2.2.5 Lessons Learned

- It is critical that dedicated access to justice capacity be identified and appropriately equipped *within* the CO (not just the project level) if UNDP seriously intends to take on access to justice as one of two governance areas. No doubt appropriate capacity will also need to be established in the project team.
- 485 • The scope of the project, including the number of states to be covered and the range of issues to be addressed, need to be determined on the basis of the availability of in-house capacity within UNDP and the national counterparts.
- Although some of the studies done in the current three states should provide some relevant information, it is critical that baselines be established and a  
490 minimum understanding of the issues in each of the six new programme states is reached before advocating for policy changes and resource allocation.
- Given that UNDP is designing a five-year a programme, it may be useful to carry out a more exhaustive in-depth assessment of access to justice issues of the disadvantaged.
- 495 • If UNDP is to play a central role in facilitating partnerships between the various actors in the justice system as anticipated, it will be critical to also ensure the support of other donors involved in the sector such as the World Bank, Asian Development Bank, UK Department for International Development (DFID) and the Ford Foundation. As a relative newcomer to this area in India, this may require a concerted effort.
- 500 • Developing partnerships and participation plans within the new project will be most useful.

### 505 2.3 CASE STUDY THREE: UNDP PROJECT, TIMOR LESTE

#### 505 2.3.1 Problems/Challenges

There is widespread dissatisfaction with the present functioning of the East Timor justice system. In fact some; use the word “paralysis” to describe its present state. Several factors contribute to the problems:

- 510 • transition from Indonesian occupation, through UN administration to independence;
- the devastating impacts of the Indonesian occupation, and the resultant long struggle for liberation, on East Timor’s human resource capacity- base;
- transition from a Bahasa-based Indonesian legal system to a Tetum and Portuguese-based national, civil law system;
- 515 • arrested institutional development of the justice system. Several key institutional components (the Court of Appeals, the Supervisory Council of Judicial Magistracy, the Office of the Prosecutor -General, the Office of the Public Defender) are yet to be fully established;
- gaps and inadequacies in existing laws;
- 520 • difficulties in striking a balance between issues regarding abuses of the past; immediate needs in the period of transition; and long-term development of an



- 525 effective, independent, professionalized justice system operated by skilled professional, of highest professional integrity;
- difficulties in striking a balance between exercise of authority in the interest of accountability and real or perceived interference with independence and autonomy among the institutional components of the justice system;
  - a general atmosphere of lack of trust, confidence and willingness to communicate, much less cooperate, among the institutional components of the justice system; and
- 530 • tensions, sometimes bordering on hostility, between nationals and internationals working in the justice sector in East Timor

535 The historical legacies that Timor Leste has had to cope with have been formidable. In August 1999 there was not a single judge left in the country and only some 70 persons with legal training. By August 2001 after some crash course training, 25 judges, 13 prosecutors, 10 public defenders and 12 registrar/clerks had been appointed. Even today, capacity remains the single-most important factor in judicial reform.

540 The Courts are the target of complaints many of which are directed at the investigative judge. The complaints include: orders issued which are not in compliance with law; failure to ensure release once warrants have lapsed or sentences served; delays and backlogs; lack of capacity, knowledge and skills; unavailability of judges (especially on non-official holidays), reluctance to hold hearings in the afternoon. Judges in turn, complain of their indeterminate status. As one judge put it “Am I Judge or a trainee on trial”. There are complaints that the judicial training being given is inappropriate or unintelligible due to language problems compounded by translation difficulties.

545 Communication between judges and prosecutors or public defenders is minimal. Lacking communication, misunderstandings are rife and sometimes take the form of charges of Executive interference with the independence of judges. Critics of the judges feel that there is persistence of “the Indonesian mentality” and deficiencies in the work ethic of some judges. A strike by the judges fuelled further criticism and there is also criticism of some judges being too media friendly even regarding cases pending before them.

555 Regarding the operation of the Court there are problems relating to computers, lack of a database, internet access, transportation, and staff-management. The switchover of the system of court administration from the Indonesian to the present, poses a few problems. The role of Court clerks is substantially the same under both systems. The problem is however that Court clerks are not always doing their jobs, for example in providing written minutes for every meeting of the court. The court administration faces problems

560 with judges, who often lack experience and do not understand what the court administration and case management reforms are trying to achieve.

565 The relationship between the judges and others in the justice system notably prosecutors is plagued by a lack of direction as well as a lack of information and communication which hampers the work. Each tends to interpret the law differently. Lack of clarity about existing regulations creates confusion especially with respect to investigation and with court orders to release, which prison officials often do not understand or comply with. The judge does not also inform the Court administration about the detention period ordered. As a result, the Court administrator is not always able to inform the judge when

570 the period of detention is over and the judge should order release. There is also a discrepancy in the records at the Courts and in the prisons.



575 A combination of heavy workload and too few prosecutors to handle ordinary crimes and regular work meant that cases that are required by law to be handled within 24 hours just cannot be done so in time. The whole process of investigating is too rushed; and procedures are not adequately followed. As a result, the prosecutor has to send back the file for further investigation and documentation and this results in further delay.

### 580 **2.3.2 Actions Taken**

The original UNDP Judiciary Support Project in Timor Leste (which had its mid-term review in October 2001) had 5 project components: “multidimensional” judicial mentors; study tours and training; translation/interpretation; coordination; and rehabilitation of court buildings and infrastructure.

585 In November 2002; at the request of the Ministry of Justice, a 12 member Mission undertook a comprehensive review of the UNDP Judiciary Support Project based on which a new 3 to 5 year Project was to be developed. The ensuing project, “Enhancing the Justice System to Guarantee the Democratic Rule of Law - Strengthening the Justice  
590 System in Timor-Leste”, was launched in July 2003, in close collaboration with the three pillars of the Justice System, the Ministry of Justice, the Judiciary, and the Office of the Prosecutor-General. The programme was established to assist the justice sector in Timor-Leste for a period of 3 to 5 years, in order to improve the judicial system through a balanced sequence of support measure to the Courts, the Prosecution and the Justice  
595 Ministry, the latter including the Legal Training Center (LTC), Public Defenders Office (PDO) and the Prison sector. The steering committee for the project was formed at a high level, and comprised the Minister of Justice, the Chief Justice and the General Prosecutor. This body is called the Council of Coordination for the Justice Sector (CoC).

600 In late 2005, a revision team assessed the first Justice System Project, and, following extensive consultations that team produced a new project document, which was signed in December 2005. The new effort was titled “Strengthening Justice System in Timor-Leste Programme”. The Programme was launched in January 2006, with an estimated  
605 duration of 3 to 5 years. It is essentially a capacity development effort to improve the institutional and human resources capacity of the Courts, the Prosecution and Ministry of Justice, with the purpose of providing access to justice, upholding the rule of law and protecting human rights. The programme is a multi-donor programme funded by Australia, Belgium, Brazil, Denmark, Ireland, Norway, Portugal and UNDP.

### 610 **2.3.3 Outcomes**

The revised 2005 UNDP Strengthening the Justice System in Timor-Leste Programme (the Programme) provided for an independent external mid-term evaluation which was undertaken in July-August 2007 by an 8 member team comprising: the team leader, the  
615 UNDP policy advisor for legal reform and justice, a nominee of UNMIT, one national judge, one national prosecutor, and members sponsored by some of the donor agencies providing support to the programme (Australia, Ireland and Portugal). The starting point for the evaluation team has been the premise that a ‘good’ justice system is one that is ‘good enough’ for people to want to use, commanding their confidence, and not necessarily a system whose members are highly competent by the yardstick of  
620 international professional standards for legal knowledge and skills.



625 The Expected Outcome of the UNDP Programme (as per the Country Results Framework) is: *Improved institutional capacity (system and skills) of the courts, prosecution service and Justice Ministry to provide access to justice, uphold the rule of law and protect human rights.*

630 The evaluation team concluded that the Programme has made a significant contribution to the strengthening of the justice system. However, overall progress on the achievement of the programme outcomes has been slow, and, as yet, the programme has not made a significant impact on access to justice in Timor-Leste. The limited progress made can be explained, *in part*, by the serious constraints arising from the 2006 April-May crisis.

635 The Strengthening the Justice System programme document presents seven large outcomes detailed into sixteen outputs. A summary of the findings of the Evaluation team, regarding each Outcome, follows.

640 ***Outcome 1: CoC facilitating the development of a cohesive and effective administration of justice through strategic planning and improved coordination, resource mobilization and implementation support to the justice system*** - the Programme has provided a framework for coordination of policy and strategy for the justice sector. Although the 2006 crisis posed significant challenges to the justice system and to the Programme, the timely and coherent response of the CoC to the crisis ensured that the justice system continued to function, and this is particularly commendable. The CoC's adoption of an information, communication and education justice (ICEJ) strategy is an equally commendable response to the challenge of  
645 enhancing public confidence in the justice system.

650 ***Outcome 2: Ministry of Justice capable of coordinating the legislative drafting through the Directorate of Legislation, promoting legal awareness, assisting the implementation of policies in the areas of Justice and Law as defined by the Council of Ministers and the National Parliament*** - incremental progress has been made on the achievement of this outcome. However, the Ministry of Justice remains dependant on international assistance to discharge its legislative drafting role. The limited role ascribed to Tetum as a language for legislative drafting contributes to this  
655 dependency and limits opportunities for consultation on draft legislation.

660 Progress in the promotion of legal awareness and the provision of public information is one of the weaker components of the programme. Little progress has been made to date on the implementation of the ICEJ strategy. Lack of access to legal materials and information on reforms is also constraining the functioning of justice sector professionals, in particular, private lawyers.

665 Human resources in the Translation and Interpretation Unit remain seriously inadequate to cope with the increased caseload and extensive demand, leading to adverse consequences for access to justice and adherence to due process. The capacity of national clerks remains extremely weak, leading to serious delays and inefficiencies within the justice system.

670 ***Outcome 3: National justice sector professionals with access to certified legal education, postgraduate training and continuing legal education*** - the strategic decision to establish the Legal Training Centre (LTC) professional training programme has played an important role in strengthening national justice capacity. The appointment of 27 national actors in June 2007 is one of the most significant outputs of the



675 Programme. The improved skills of LTC graduates were commented upon  
favourably by many stakeholders. Despite the achievements of the LTC, serious  
concerns were expressed by current trainees and recent graduates about the  
professional training programme. Lack of flexibility in the language of instruction (and in  
some instances, limited academic legal background) has hindered the acquisition of  
knowledge and skills. Planning for greater national ownership and expansion of the LTC  
680 (through e.g. training of trainers) and, more attention to the training needs of private  
lawyers, is needed.

685 **Outcome 4: The Public Defender's Office (PDO) providing improved access and  
quality of legal aid services to the disadvantaged** - staffing capacity (national and  
international) of the PDO has been substantially expanded. Improvement in knowledge,  
skills and performance of PDO personnel is evident.

690 The evaluation team noted, with concern, a perception within the PDO that the role of the  
public defender is not as highly valued as that of other justice system roles. This  
perception could potentially limit progress towards a justice system based on rule of law  
and human rights.

695 **Outcome 5: Timorese correctional system in line with international standards** -  
progress under this outcome has been slow. Conditions of detention in Timor-Leste's  
detention facilities broadly comply with international standards. However, separate  
detention facilities for juveniles or female inmates do not yet exist. The corrections  
system continues to face serious difficulties, in particular, a lack of effective security  
structures, which contributes to a growing sense of impunity.

700 Social reintegration and vocational training supported by UNDP were interrupted by the  
2006 crisis and have not yet recommenced. There is limited use of diversionary (non-  
custodial) sanctions within the justice system, due primarily to a lack of policy in this  
area.

705 **Outcome 6: Courts capable of delivering justice according to the applicable laws  
through national staffing** - progress is being made towards achievement of a fully  
functioning court system. Professional training, including 'on the job' training and  
mentoring of trainee judges, was successfully concluded and 11 judges were appointed.  
The Superior Council of the Judiciary was established and is now operational. However,  
710 court actors (national and international) are not deployed full-time to the districts. The  
establishment of streamlined case management systems has not yet been achieved.  
Inadequate support to accommodate different language capacities among national staff  
hinders the effective functioning of the courts. The limited functioning of the courts in the  
area of civil law was widely acknowledged as a matter of concern, given the prevalence  
715 of land, property and family disputes, and lack of access to effective remedies.

720 **Outcome 7: Public prosecution service capable of performing its constitutional  
mandate, attend the requirements of its organic law and expedite access to justice**  
- incremental progress has been made in the prosecution service, primarily through  
support to the training and appointment of national prosecutors and the establishment of  
the Superior Council of the Prosecution Service. Service delivery within the prosecution  
service, however, remains a matter of concern. The violence of the 2006 crisis exerted  
unexpected pressures on the prosecution service, contributing to a backlog of cases  
(now in excess of 4100 cases) and a growing problem of impunity. As yet, prosecutors  
725 and support staff are not employed full-time to the districts. Overall, progress is slow,



with limited attention given to strengthening the office's long term strategic planning capacity.

### 2.3.4 Analysis of Successes/Constraints

730 Several factors constrain implementation, including: external factors and the crisis of 2006; an overload of cases, exacerbated by the Commission of Inquiry cases; language; and human resource scarcity and limitations.

735 Looking to the future, several steps need to be taken to bring about badly-needed enhancement of implementation:

- Access to justice outside of Dili remains unacceptable and priority needs to be given to establishing full functioning capacity of the courts outside Dili.
- So far as justice sector human resources policy and planning is concerned, a comprehensive, sector wide human resource/workforce planning exercise is recommended.
- 740 • Steps need to be taken to build public confidence in the judicial system.
- Issues relating to the language of the legal system can no longer be wished away.
- There is considerable scope for improvement of both strategic planning and oversight in the justice sector. Programme management systems and procedures also need improvement.
- 745 • The performance, evaluation and reporting systems for international justice actors should be strengthened to ensure that the objectives of international technical assistance are being met. National justice actors should contribute to such evaluations.
- 750 • Consideration be given to progressively increasing national budgetary appropriations for the justice sector.
- The Public Defenders Office needs to be strengthened in many ways. So too does legal education and training.
- 755 • Donors and the CoC should consider establishing a Trust Fund to support access to justice in Timor Leste and continued capacity building, on completion of the current programme cycle.
- Future justice sector programming should incorporate lessons learned from the current Programme, including the need for more effective internal M&E mechanisms; inclusive, democratic and effective over-sight mechanisms; greater attention to cost-effectiveness; and increased dialogue between the CoC and development partners on policy and strategic planning for the justice sector.
- 760

### 2.3.5 Lessons Learned

- 765 • **Specific lessons learned to be developed/crystallised in light of the above discussion.**

## 2.4 CASE STUDY FOUR: EQUAL ACCESS TO JUSTICE PROJECT, SRI LANKA

### 2.4.1 Problems/Challenges

770 Sri Lanka presented challenges of programming in: (i) conflict, post-conflict and non-conflict areas; (ii) context of economically (et al) disadvantaged segments of society;<sup>15</sup> and (iii) a post-natural disaster (tsunami) situation.

<sup>15</sup> 6.6% of Sri Lankans who earn US\$ 1 per day, and 45.4% who earn less than US\$ 2 per day, are classified as living below the income poverty line.

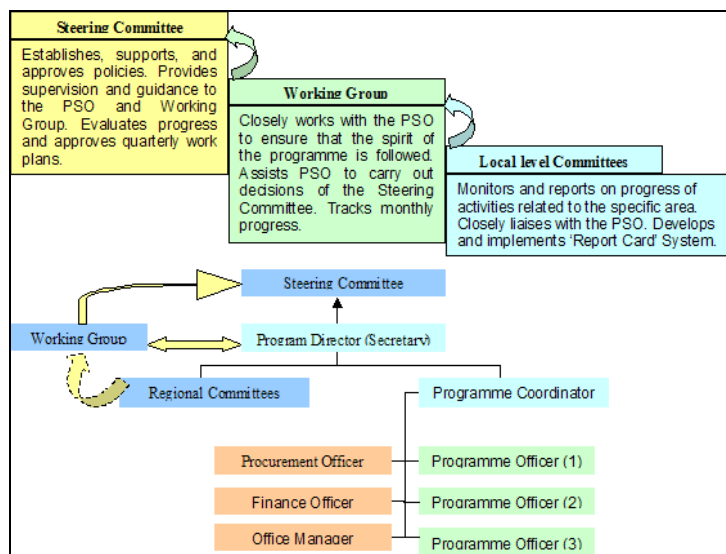


775 The UNDP Equal Access to Justice Project was initially conceived in 2004 when the  
 cease-fire agreement was in place and the assumption was that the country was moving  
 towards peace. The project however, was neither a peace initiative nor a human rights  
 initiative but by facilitating equal access to justice, it did seek to positively influence the  
 climate for peace and the protection and promotion of human rights through its efforts to  
 provide justice for all. The problem addressed by the project was (and continues to be) a  
 780 lack of equal access to justice by the disadvantaged in general, (which of course  
 includes poor racial minorities, amongst other groups). The negative impact of this  
 situation results in a lack of empowerment, which continues to weigh heavily on the poor  
 and is therefore intimately connected with poverty.

785 However, the situation has changed dramatically with the tsunami of December 2004  
 and the periods of escalating conflict in areas of the north and east. These events have  
 both contributed to numerous grievances as large numbers of people have been  
 displaced often several times, livelihoods have been compromised and people face  
 ongoing security concerns. In this environment, protection of human rights is a top  
 priority and it has become necessary to alter the focus of the UNDP Equal Access to  
 790 Justice Project so that it is able to address the most pressing justice and human rights  
 issues that currently face the most vulnerable groups in the country.

**2.4.2 Actions Taken**

795 Project Objectives: to increase  
 access to justice by  
 disadvantaged groups in the  
 society namely the poor, the  
 disabled, internally displaced  
 persons, women and children;  
 800 through the application of a  
 human rights-based approach,  
 by: (i) increasing the number  
 and diversity of persons receiving  
 effective legal services; (ii)  
 805 increasing the number and  
 diversity of persons receiving  
 information on their rights and  
 duties; (iii) decreasing the  
 barriers to accessing the justice  
 810 system; (iv) increasing number  
 and diversity of persons receiving  
 community-level Alternate Dispute Resolution services; and (v) better promotion and  
 effective protection of human rights.



**Implementation structure: UNDP Project in Sri Lanka**

815 The Ministry of Constitutional Affairs and National Integration (MOCA) is the executing  
 agency for this nationally executed Project. The project included the government,<sup>16</sup> civil

<sup>16</sup> Including Ministries (Ministry of Constitutional Affairs and National Integration and the Ministry of Justice); Authorities (Police; Prisons; Legal Aid Commission; Human Rights Commission); and Departments (Divisional Secretariats).



820 society<sup>17</sup> and other actors,<sup>18</sup> as partners. The implementation structure comprised of a project support office, a project steering committee, and regional committees (local working groups). The latter included a number of project partners mentioned above and enabled customisation of programmes to meet local needs and conditions.

The project strategy comprised the following key elements:

- 825 (i) adoption of a “human rights based approach”;  
(ii) an integrated approach, including all actors in the justice sector;  
(iii) a ‘top down’ and a ‘bottom up’ approach to project management;  
(iv) flexibility to respond to the special needs of a country in transition; and  
(v) achievement of sustainability through changes in policy and practice.

830 In furtherance of the above, the programmes undertaken included Legal Documentation and Mobile Clinics, Legal Aid Service Desks, Legal and Human Rights Awareness, and Support to the Prison System.

835 The Mobile clinics, presently operating in the eastern region, bring together different departments in once place to offer services such as birth and death certificates, ID cards, motorcycle licences, land registration, legal aid etc. The village heads are also present on the day of the clinics to provide the necessary confirmation of details for the paperwork, and the clinic provides supporting services such as passport photographs free of charge.

840 The free legal aid service desks were set up in collaboration with partners, including, the Legal Aid Foundation. At the interim review in December 2006, 20 desks were supported by the project. 6 of these covered the tea-estate sectors, 4 were in the conflict affected eastern province and 1 in Jaffna.

845 Awareness raising programmes take steps necessary to identify and reach out to the most-disadvantaged or hardest to reach groups in the areas of operation. These programmes involving civil society partners, with necessary knowledge of local issues and conditions.

850 Under the Prison Support System, the project works closely with the Inspector General of Police and the Commissioner General of Prisons, to inter alia develop a comprehensive prisons database system in Colombo’s largest prison where there is as yet no accurate record of pre-trial detainees and inmates. Further, the project supports initiatives to ensure (i) provision of attorney during questioning by the police; and (ii) regular visits by  
855 the Legal Aid Foundation Coordinator to the closest prison to provide services to inmates and their families. Further, a sub-committee has been recently been established within government to focus on human rights and the police force.

860 The project was initially launched as a three year project in August 2004, but will now be extended through to December 2008 in order to utilize unspent funds and complete ongoing initiatives. This will lay the foundations for a longer term project which will be developed during 2008. However, during the extension, the objectives devised in the initial project have been reduced to the following three:

<sup>17</sup> Including CBOs (Sarvodaya Movement); NGOs (Sarvodaya Legal Services Movement; Centre for the Study of Human rights; Bar Association of Sri Lanka; Legal Aid Foundation of the Bar Association of Sri Lanka); and INGOs (UNDP).

<sup>18</sup> Including Judicial Service Commission; Sri Lanka Law college; Faculty of Law, University of Colombo; and Department of Legal Studies, Open University of Sri Lanka.



- 865 • specific and targeted measures undertaken to address pressing national challenges in access to justice facing vulnerable groups, including but not confined to people living in the north and east, IDPs, families of disappeared/abducted persons, female headed households, people being detained in the criminal justice system, estate sector workers and victims of gender based violence;
- 870 • provision of Legal aid services to vulnerable groups; and
- promotion of human rights and human rights-based approaches through the project

### 2.4.3 Outcomes

- 875 As indicated above, the achievements of the Project include:
- Development of the mobile clinics.
  - Establishment of legal aid and legal services desks.
  - Establishment of legal and human rights awareness programmes.
  - Development of the prison database system with resultant improvements in the
- 880 delivery of legal services to prison inmates.

However, these Project outputs have made only modest contributions to the anticipated outcomes and to the Project objectives. For that to happen, 2 key aspects of the Project design must be given prioritized attention:

- 885 • Undertaking of the comprehensive justice sector assessment which is a key strategic intervention of the Project.
- Undertaking a systematic approach to applying a human rights-based approach to all aspects of the Project.

### 890 2.4.4 Analysis of Successes/Constraints

While some of the project objectives have been achieved, various reviews and an evaluation point to several short-comings of the project - particularly the gaps in establishing a baseline and incorporating the voices of claim-holders in designing and implementing the project, the limited civil society involvement, the limited engagement with the Ministry of Justice, the limited guidance from and accountability of the management arrangements.

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The United Nations Development Assistance Framework (UNDAF) for the period of 2008-2012 has identified “effective and efficient structures and mechanisms in place and operational to provide access to justice and redress mechanisms” as one of its outputs. The UNDAF and the CPD have identified some disadvantaged groups that the UN plans to work with, namely the conflict-affected and IDPs, the estate sector workers, and survivors of gender-based violence. The project will re-orient its approach so that it focuses on promoting access to justice for these groups in particular.

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In addition, a baseline survey and a comprehensive assessment using participatory methods can help map out the capacity gaps of duty-bearers and claim holders and identify the main access to justice issues facing the poor and disadvantaged throughout the country. The results from this assessment will provide a solid baseline against which to design a longer term project, and establish a comprehensive monitoring and evaluation framework for the sector.

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915 Cognizant of the change in the situation on the ground and the need to focus on  
facilitating access to justice to disadvantaged groups, the UNDP Equal Access to Justice  
has several challenges that it needs to focus on in the next year of implementing the  
project:

- Focus its interventions on disadvantaged groups - conflict-affected groups, IDPs,  
estate sector workers, pre-trial detainees, female-headed households and victims  
of gender based violence.
- 920 • Promote human rights based approaches through/within the project
- Ensure the effectiveness of the legal aid services provided
- Conduct mobile legal and documentation clinics in conflict affected areas
- Develop capacities of community-based duty-bearers

## 925 2.4.5 Lessons Learned

Use of regional committees or local working groups, involving local partners could enable  
customisation of programmes to meet local needs and suit local conditions, enabling  
more effective implementation. Steering Committee with high profile members may assist  
in promoting initiatives and pushing the project initially but such high profile members do  
930 not seem to find sufficient time to even meet, leave aside guide and track the initiatives.

## 2.5 ISLAND COURTS, VANUATU

### 2.5.1 Problems/Challenges

935 As noted above, there are many barriers to accessing the courts for the majority of the  
population in Vanuatu. Vanuatu is a least developed country and the average income is  
very low, but court filing fees and lawyers are expensive. Vanuatu only gained  
independence in 1980, and the legal system has been adopted from the colonising  
powers. As a result many people are unfamiliar with how the legal system works. This  
940 lack of familiarity is compounded by low levels of functional literacy in English, which is  
the predominant language of the law, and limited physical presence of the courts and  
other legal services in Vanuatu. Vanuatu has about 60 inhabited islands, however the  
Supreme Court only has a presence in the two urban centres, and police and lawyers are  
also largely concentrated in these centres.

945 Customary law is part of the legal system,<sup>19</sup> and there is a constitutional requirement that  
*'Parliament shall provide for the establishment of village or island courts with jurisdiction  
over customary and other matters and shall provide for the role of chiefs in such  
courts.'*<sup>20</sup> This requirement should help to address problems that may arise from lack of  
familiarity with courts, geographical barriers, language and cost barriers.

950 Additionally, all land ownership in Vanuatu is determined by custom,<sup>21</sup> and it is a  
constitutional requirement that *'The Government shall arrange for the appropriate  
customary institutions or procedures to resolve disputes concerning the ownership of  
custom land.'*<sup>22</sup> In 1983, in response to these constitutional requirements, Parliament  
955 passed the *Island Courts Act* [Cap 167]. Justices in the Island Courts are people who are  
knowledgeable in custom, and decisions are made by 3 justices sitting together. No  
lawyers are permitted in the Island Courts and there are no strict rules of evidence.

<sup>19</sup> Constitution, Article 95(3).

<sup>20</sup> Article 52.

<sup>21</sup> Article 74.

<sup>22</sup> Article 78(2).



Island Courts were warranted to have jurisdiction over land matters and a variety of minor criminal and civil matters.

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By the mid-1990s it became obvious that the Island Court system was failing. Whilst eight courts had been warranted, the majority of these were inoperational. Complex procedures that were modelled on those of the western court system made use of the Island Courts difficult. The courts were warranted to apply criminal and civil law (rather than custom law), but the justices had no training and experience in these areas. 100% of land disputes held by the Island Courts were appealed to the Supreme Court, thereby defeating the constitutional requirement that land disputes be determined through customary institutions or procedures.<sup>23</sup>

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## 970 2.5.2 Actions Taken

Two formal actions were taken to address the above problems:

1. Improving the functioning of the Island Courts, a project initiated by the Chief Justice, with funding support from AusAID.
2. Developing a new system for resolving land disputes, a project initiated by the government of Vanuatu, following calls for reform from a number of sectors, including the judiciary, and primarily funded by AusAID.

975

In addition the Malvatumauri, or National Council of Chiefs, in conjunction with the Australian Centre for Peace and Conflict Studies, has launched the Vanuatu Kastom Governance Project, which aims to develop the skills and knowledge of chiefs in order that they can resolve disputes in custom without any need for recourse to state-sanctioned dispute resolution.

980

**Improving the Island Courts:** From 2002-2005, with small (**check dates**), following the appointment of justices and court clerks to the inoperational courts, training of island court justices and court clerks was undertaken. This training covered both in the laws that the Island Courts administer, and in the processes. In 2005 a series of rules were made. The *Island Courts (Supervising Magistrates) Rules 2005* provided guidance on the role of Supervising Magistrates, who oversee the operation of each Island Court.

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Supervising Magistrates now have guidance on how to select justices, with:

- (a) level of education and training;
- (b) business and administrative experience;
- (c) religious affiliation;
- (d) political affiliation;
- (e) standing in the community;
- (f) knowledge of custom; and
- (g) gender<sup>24</sup>

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all being factors to consider, as well as the need to have justices with 'a balance of gender and religious and political affiliations to provide independent and impartial judicial services...'<sup>25</sup> Supervising Magistrates now also have a specific role in reviewing and revising cases every 3 months. This acts as a safeguard against unfair decisions, without the need for parties to institute appeals. The Supervising Magistrates are also to ensure

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<sup>23</sup> Anita Jowitt, 'Island Courts in Vanuatu' (1998) 3 *Journal of South Pacific Law*  
[http://www.vanuatu.usp.ac.fj/journal\\_splaw/Working\\_Papers/Jowitt1.html](http://www.vanuatu.usp.ac.fj/journal_splaw/Working_Papers/Jowitt1.html).

<sup>24</sup> Rule 1(2).

<sup>25</sup> Rule 1(3).



1005 adequate training for justices and clerks, and to provide annual reports on the operation of the Island Courts under their supervision.

The *Island Courts (Court Clerks) Rules 2005* provide step-by step guidance on the procedures to be followed by clerks and the documentation required for each case.

1010 Finally the *Island Courts (Civil Procedure) Rules 2005* and the *Island Courts (Criminal Procedure) Rules 2005* provide simple rules to be followed. They are accompanied by clear forms, which help the parties and the court clerks to maintain correct documentation.

1015 Land disputes were removed from the scope of Island Courts, as experience had shown that they were not an effective body for dealing with these disputes.

1020 ***Developing Customary Land Tribunals:*** In 2001 the *Customary Land Tribunal Act* (CLTA) was passed. This Act aimed ‘to provide for a system based on custom to resolve disputes about customary land.’<sup>26</sup> Under the Act the country is divided into villages, custom sub-areas, custom areas and islands. Disputes will initially be heard by a single or joint village tribunal, that usually consists of the principal chief and two other chiefs or elders, although the principal chief may be excluded if he (or sometimes she) has a conflict of interest, or holds office in Parliament, municipal or local council, or in any political party. The council of chiefs is the body that decides the list of chiefs who are appropriate to hear any land dispute claims. Disputes can be appealed from the village level to custom sub-areas, custom areas and finally the island land tribunal. There is no further right of appeal.

1030 There are requirements for notice of disputes to be given, and fees are paid to have a matter heard in a customary land tribunal (CLT), but other than that the procedure for hearing claims is entirely customary. Land tribunals must produce a written record of their decision.

1035 The CLT awareness team travelled around the islands of Vanuatu promoting the law changes and on 10 December the CLTA came into effect.

### 2.5.3 Outcomes

1040 ***Improving the Island Courts:*** Whilst the reform of the Island Court system does not address how these courts can provide decisions in customary law, the changes do ensure that the Island Courts do function well as subordinate courts, and give more of the population access to the justice system. Six Island Courts are now operating. The supervision system ensures that the decisions of justices are consistent with human rights provisions, and with the written law.

1045 ***Developing Customary Land Tribunals:*** Whilst CLT committees, who are tasked with selecting chiefs who are eligible to hear disputes that come before the CLT have been established in some areas, and CLTs exist in some places, CLTs have not been formed in the majority of places.<sup>27</sup>

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<sup>26</sup> Section 1.

<sup>27</sup> Joel Simo, Report of the National Review of the Customary Land Tribunal Program in Vanuatu (2005) 34.



## 2.5.4 Analysis of Successes/Constraints

- 1055 **Improving the Island Courts:** This is a low-cost project that was driven by internal or local needs and wants. The chief Justice, Supervising Magistrates and Island Court personnel were all aware of the problems in the Island Courts. As a group they set the scope of the training programme, and suggested what was need in drafting the new rules. Vanuatu based consultants were used to do the training and drafting work. As a result there has been no resistance to the reforms.
- 1060 Having clear guidance for court personnel, particularly when they are not legally trained, is vital. The new rules provide this guidance. However, the actual personnel that have been appointed are also critical to the successful operation of the courts. In the Island Court system the role of the clerks in assisting complainants to file claims, and in assisting the court in its processes, is crucial to ensuring that the rules are implemented.
- 1065 A danger with the operation of Island Courts is that justices will be biased in decision making. Three justices hear each complaint which minimises this danger. The selection of justices to ensure that there is a balance of gender, religious and political affiliations and defining a supervision process that does not interfere with the day to day decisions of the justices, but which ensures that all decisions are reviewed have both been
- 1070 additional steps in minimising this danger.
- 1075 These successes all relate to operating a subordinate court that is applying introduced law in a forum that is not as formal as a court, and that adopts the more relaxed procedures that will be found in customary dispute resolution. However, the Island Courts do not have jurisdiction over “custom disputes”. This may not be a constraint - after all, on islands where custom operates, the existing customary dispute resolution mechanisms do not need the recognition of state law in order to recognised by the people as legitimate bodies. However, chiefs are concerned that their authority is being undermined by introduced law, and there is a danger that Island Courts could be seen as
- 1080 contributing to this undermining of chiefly authority, particularly if complainants who do not like the resolution of a dispute in custom then go “forum shopping” and take their dispute to an Island Court, hoping for a more favourable outcome. One way to minimise the potential dangers of forum shopping is to be careful that the selection of justices always includes important chiefs, and not just “people knowledgeable in custom”. This
- 1085 may also help the justices to use customary principles in deciding sentences, fines, and damages orders.
- 1090 Other constraints relate to resources. Six Island Courts are now operational. However, there are about 60 inhabited islands. The majority of Island Courts operate in locations where there are also Magistrates Courts. More courts, in a wider range of locations, are needed.
- 1095 There is also an issue in relation to criminal matters. The accused cannot be represented by a lawyer, although he or she may be assisted by a non-lawyer. This can lead to the accused not getting a proper defence. Further, the police lay the charge and control the prosecution. Although police are usually not legally trained, they are more familiar with the requirements of a criminal case. Accused frequently plead guilty, and there are reports that justices tend to prefer the case presented by the police. Supervising Magistrates, when reviewing cases, may find it difficult to correct any injustices,
- 1100 particularly if the accused has pleaded guilty, and so no evidence has been presented.



**Developing Customary Land Tribunals:** On paper the CLTA looks to be a success. It respects the customary dispute system, whilst at the same time creating a consistent system to be used in land disputes across the country.

1105

In practice the CLTA has not been so successful. There is considerable suspicion of the law from some people, who are afraid that it is going to weaken the customary land system and remove power from the chiefs. CLTs ultimately give a final ruling as to ownership, and customary law does not necessarily ever give a final decision. Further, chiefs can be prevented from hearing a dispute if there is a conflict of interest, although impartiality is not a feature or necessary requirement of customary adjudication. These things do slightly alter the nature of custom and customary dispute resolution. However, there are also chiefs who support the system and see it as a way of enhancing custom.

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These views (either suspicion or support) depend, in part, to the amount of awareness a particular community has had. Another important factor is that communities who are most suspicious of the CLTA feel that they were not adequately involved in the making of the law. Land ownership is a very sensitive issue in Vanuatu and there is general suspicion of state law. These factors combine to lead to a belief that the CLTA, as a piece of state law in which the local community had little involvement, is a device for weakening custom or removing land from its rightful owners.

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In some areas there are disputes about who are the rightful chiefs. These disputes also hinder the formation of CLTs, and can lead to suspicion of the CLTA, which may be seen as a device for legitimising certain peoples' authority, whilst undermining the authority of others.

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The fees for taking a dispute to a CLT are also fairly high, and are determined based on the number of days a complaint takes. This can put parties at a disadvantage, and limit access of people with little money.

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### 2.5.5 Lessons Learned

**Improving the Island Courts:** This initiative has been very successful in part because the problems and solutions were developed locally. As a result there has been little suspicion of the initiative.

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It is important to appoint key personnel carefully. In relation to Island Courts, court clerks are critical to the effective day to day running of the courts, and their appointment largely determines the success of any individual court.

1140

Clear simple rules that help the justice, court staff and parties to know exactly what their roles and obligations are are vital to the effective operation of a dispute resolution body that essentially operates as a community court. A system of supervision to ensure that human rights are upheld is also necessary.

1145

The approach taken in reforming the Island Courts creates a possible avenue for the greater blending of state law and customary law. Whilst the Island Courts have not taken up this challenge yet, the structures that are in place allow for further development to increase the harmony of these two legal systems.

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**Developing Customary Land Tribunals:** The most important lesson to be drawn from the CLTA experience is that, in order for there to be a successful blending of state law



1155 and customary law in relation to resolving disputes over sensitive areas, there  
must be wide consultation. Any blending of state and customary law changes both  
systems. Historically customary law is usually subjugated to state law, so people who  
operate under customary law are likely to be suspicious of any change that is seen as  
being “imposed”, even if that change is being done with honest intentions. In order to  
avoid this, laws that aim to blend state and customary law into new, more appropriate,  
1160 institutions for resolving disputes, need to be developed in response to local demand,  
and in close consultation with the customary authorities.

### 3.0 SYNTHESIS ANALYSIS/EVALUATION OF EXPERIENCE

#### 3.1 KEY QUESTIONS/KNOW HOW

1165 To be constructed once we have the lessons learned from each case study drafted.  
Some of the themes that have emerged so far are:

- Monitoring the progress and building on these reforms in respective countries;
- Need for periodic internal and external evaluations and correction of lacunae/errors in system;
- 1170 • Again, as in the Manila Declaration, strive not just for increasing access to justice but to accomplish a 21<sup>st</sup> century civilisation grounded on the rule of law and access to justice for all citizens.
- Need to lay foundation for the project in the country - creating awareness of need for such project and selling the idea to concerned authorities, funding, initial training personnel, absence of requisite structure and infrastructure in the judicial system et al
- 1175 • Challenges in educating people of different socio-economic backgrounds, designing programs and judicial access systems that can be accessed by such people.
- 1180 • There is no single jacket program/solution. Imperative to identify the difficulties and needs in each country/region and tailor appropriate programs/solutions.
- Sustainability.
- Right and access to information and justice
- Societal benefits of empowering people
- 1185 • Beneficial effects on other institutions in the country

#### Implementation Framework

- Examination of situation
- Examine demand - access to justice issues (horizontal/vertical, women, locational access) identified locally.
- 1190 • Examine judicial attitudes/bias as an element of access to justice - judges embedded in their social backgrounds and interests.
- Examine supply - and results.
- Strengthening of rights
- 1195 • Strengthen education/legal aid, right and access to information
- Integrating and developing administrative infrastructure
- Implementation framework design ought to consider the strengths and weakness of the overall system in the country - e.g. long-term use of local government/administrative offices and kiosks for distributing forms, documents, court material and information leaflets on accessing justice.
- 1200 • Securing non-discrimination, inclusion and participation in judicial processes.



- Ensuring transparency, accountability and effectiveness in judicial processes.

1205 **ANNEX ONE****A1.0 COUNTRY CONTEXT BACKGROUND: VANUATU****A1.1 COUNTRY CONTEXT**

1210 Vanuatu,<sup>28</sup> formerly known as the New Hebrides, is a collection of over 80 islands  
located in the south western Pacific. There are 12 main islands although the population  
is dispersed widely, and during the last national census, in 1999, 65 islands in the  
country were inhabited.<sup>29</sup> It has a population of approximately 210,000 people. About  
99% of the population is indigenous ni-Vanuatu. Vanuatu has two urban areas, Port Vila,  
the capital, located on Efate and Luganville to the north, located on Espiritu Santo. It is  
1215 estimated that eighty percent of the population lives in rural areas.

1220 Vanuatu has an unusual colonial history, having been colonised jointly by France and  
England in an arrangement known as the Condominium.<sup>30</sup> On gaining Independence in  
1980 Vanuatu adopted or inherited various features from both colonial powers. In  
particular a dual education system, one French and one English, exists. In addition to  
these two languages a pidgin language, Bislama, is widely spoken. The linguistic divide  
between Francophone and Anglophone speakers tends to create social and political  
divides. This is further complicated by the large number of indigenous cultures. Whilst  
the indigenous population is broadly Melanesian, over 100 linguistically distinct cultures  
1225 exist in Vanuatu.

1230 Kinship ties remain strong and custom provides the basis for social ordering, particularly  
outside of the urban areas. The importance of custom is reflected in the legal system.  
Whilst the legal system operates as a common law system complete with an adversarial  
court system, the rules applied within the legal system are a combination of locally made  
legislation and judicial law, adopted English law, adopted French law and indigenous  
customary law.<sup>17</sup> Further, all land in Vanuatu is owned by customary landowners,  
although land can be leased in order to allow for “modern” land dealings.<sup>18</sup>

1235 Vanuatu is on the United Nations list of least developed countries.<sup>31</sup> Since Independence  
Vanuatu has experienced erratic growth of gross domestic product (GDP). One of the  
reasons for this is that agriculture, which is one of the mainstays of Vanuatu’s economy,  
is vulnerable to natural disasters such as cyclones and droughts. Changes in  
international prices for Vanuatu’s exports, most notably the declining price for copra,  
1240 have also affected GDP. Political instability has also resulted in mismanagement and  
hindered growth.<sup>32</sup>

<sup>28</sup> For general information on Vanuatu see Lamont Lindstrom, ‘Vanuatu’ in Melvin Ember and Carol R. Ember (eds) *Countries and their Cultures Volume 4* (2001) 2391.

<sup>29</sup> Vanuatu National Statistics Office, *The 1999 Vanuatu National Population and Housing Census Main Report* (2000) 16.

<sup>30</sup> The Condominium was established by the *Anglo-French New Hebrides Convention 1906*.

<sup>31</sup> United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States <http://www.un.org/special-rep/ohrrls/ldc/list.htm> (Accessed 6 July 2006).

<sup>32</sup> See Cynthia Ala & Philip Arubilake, ‘Chapter 1: Domestic Economy’ in Simeon Athy & Ferdinand van der Walle (eds), *20 Years of Central Banking in Vanuatu* (2000) 12 for an overview of Vanuatu’s national economy. See also David Cowen, Alexander Wolfson & Jian Ming Ni, *International Monetary Fund Vanuatu Country Report* (2002) available online at <http://www.imf.org/external/pubs/cat/longres.cfm?sk=16224> (Accessed 27 July 2006).



1245 This weak economic performance is mirrored in Vanuatu's weak human  
development performance. In terms of human development in 2005 Vanuatu was in the  
bottom of third of medium development countries on the United Nations human  
development index, with a rank of 118. Whilst increasing life expectancy rates indicate  
that health care is improving, access to health care, water and sanitation are issues,  
particularly in rural areas. Functional literacy is estimated to be 30% for women and 37%  
for men.

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## A1.2 JUDICIARY AND THE COURTS

1255 The *Constitution* is the supreme law of Vanuatu. As noted above, on Independence  
Vanuatu adopted British and French laws as the basis of the legal system, and also  
stated that customary law is part of the law.<sup>33</sup> Locally made legislation has largely  
superseded legislation and local case law is supplementing English principle of common  
law.

1260 Vanuatu operates an adversarial court system. The main courts are the Magistrates  
Court, Supreme Court and Court of Appeal. These are supplemented by the Island  
Courts. Customary land tribunals, with no right of appeal to the western-style courts, also  
exist.<sup>34</sup>

1265 The Magistrates Court has jurisdiction in most civil matters where the amount claimed or  
the subject matter in dispute does not exceed VUV1,000,000. This amount is increased  
to VUV2,000,000 in landlord and tenant cases. The Magistrates Court also has  
jurisdiction over some family matters and can hear uncontested petitions for divorce or  
nullity of marriage and claims for maintenance not exceeding VUV1,200,000. It has  
criminal jurisdiction over any offence for which the maximum penalty does not exceed 2  
years imprisonment, and can also hear appeals from the Islands Courts.

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1275 The Supreme Court has unlimited jurisdiction in all criminal and civil matters, except for  
disputes involving customary ownership of land and hears appeals from the Magistrates  
Court.

1280 The Court of Appeal has jurisdiction over appeals from the Supreme Court. A panel of 3  
or 5 judges constitutes the Court of Appeal. Judges are a combination of those from the  
Supreme Court and judges from overseas, with judges from New Zealand, Fiji, Solomon  
Islands and Australia being used in recent years. It usually sits two times per year.

The appointment of judges in these three courts is done by the Judicial Services  
Commission in accordance with the Judicial Services and Courts Act 2000. This Act also  
empowers the Commission to remove judges for a variety of reasons, including  
misconduct. Court personnel are also governed by this Act.

1285 Island Courts are semi-formal courts that were established in accordance with the  
constitutional requirements that 'Parliament shall provide for the establishment of village  
or island courts with jurisdiction over customary and other matters and shall provide for  
the role of chiefs in such courts.'<sup>35</sup> Justices in the island courts are laypeople. They must  
be knowledgeable in custom, and at least one of them must be a custom chief from

<sup>33</sup> Article 95.

<sup>34</sup> For more information see Jennifer Corrin-Care, Tess Newton and Don Paterson, *Introduction to South Pacific Law* (1999) 323-328.

<sup>35</sup> Article 52.



- 1290 within the territorial jurisdiction of the court. Disputes are heard by 3 justices sitting together. The jurisdiction of each court is determined by its particular warrant, although no island court can deal with civil claims (other than land claims) of more than 50,000 vatu, or impose criminal sanctions of more than a 24,000 vatu fine or 6 months imprisonment.
- 1295 The courts are not bound by formal rules of evidence and lawyers are not allowed to participate in island court hearings. Appeals against decisions of an island court can be made to the Magistrates Court.
- 1300 The ownership of land in Vanuatu is determined by custom, and the Constitution requires that 'the Government shall arrange for the appropriate customary institutions or procedures to resolve disputes concerning the ownership of custom land.'<sup>36</sup> Until 2001 customary land disputes were heard by the Island Courts, with appeals going to the Supreme Court. In 2001 the Customary Land Tribunal Act (CLTA) established a system
- 1305 of tribunals for dealing with disputes relating to customary land ownership. Whilst the Supreme Court supervises customary land tribunals there is no right of appeal to the Supreme Court against decisions of land tribunals. The CLTA system uses chiefs as adjudicators.
- 1310 In practice the legal system as established by the state only has a noticeable presence in the urban areas and main "outer island" centres. Supreme Courts are found only in the urban areas of Port Vila and Luganville. Magistrates Courts are located in Port Vila, Luganville, Lakatoro (Malekula), and Isangel (Tanna). Island Courts are found at all of the centres that have Magistrates Courts, and also at Saratamata (Ambae - also known
- 1315 as Aoba), Pentecost and Sola (Vanua Lava).<sup>37</sup> Customary land tribunals have been established in some parts of the country.

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<sup>36</sup> Article 78(2).

<sup>37</sup> Phone conversation with Veronique Teitoka, Port Vila Supreme Court, 17 July 2006.



## A2.0 COUNTRY CONTEXT BACKGROUND: SRI LANKA

### A2.1 COUNTRY CONTEXT

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The Democratic Socialist Republic of Sri Lanka, formerly known as Ceylon, is a tropical island nation in the Indian Ocean, about 31 miles from the southern coast of India, with Colombo as its capital city. Its population is about 17.73 million according to the 2001 census. Sinhalese and Tamil are its official languages with English being spoken by about 10% of the population, particularly in Colombo. It has an area of about 65,600 sq. km., divided into 9 provinces. It is a member of the United Nations since 14th December 1955. Its GDP per capita is estimated to be US \$ 4,600 as of 2005, taking into account the purchasing power parity and its literacy rate is 92%, with almost 99% of children entering 1<sup>st</sup> grade.

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It has a long colonial history, first being under Portuguese influence in the coastal areas since the early 16<sup>th</sup> century, but the Portuguese were replaced by the Dutch in the mid 17<sup>th</sup> century. The British in turn ejected the Dutch in the late 18<sup>th</sup> century and finally brought the whole island under British rule in 1815, after defeating the king of Kandy, last of the native rulers, thereby creating the Crown Colony of Ceylon. It regained independence on 4<sup>th</sup> February 1948 as the Commonwealth of Ceylon. It was thereafter declared a republic on 22<sup>nd</sup> May 1972 (to check) and renamed as the “Free Sovereign and Independent Republic of Sri Lanka” and subsequently renamed to the “Democratic Socialist Republic of Sri Lanka” in 1978.

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Ethnically, the Sinhalese people comprise approximately 81.9% and ethnic Tamils comprise about 9.4% of the total population. The Moors, which is an ethnic group, tracing its lineage to Arab traders and immigrants from the Middle-East, comprise about 8% of the total population. Also, there are other smaller ethnic groups, such as the Burghers, who are of mixed European descent and the Malays, from South-East Asia.

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The ethnic Tamils have been categorized into two groups, the first being those whose ancestors migrated from India in ancient times and who are called as the “Sri Lankan Tamils” and comprise about 4.3% of the total population. The second group comprises Tamils who were brought from India by the British colonists to work as indentured labourers on estate plantations and stayed back post-independence. The latter comprise about 5.1% of the total population. However, the 2001 census doesn't include Tamils in rebel held areas, outside government control.

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Tensions have been simmering between the ethnic Sinhalese and Tamils since independence by the mid-1970s calls arose for an Independent Tamil state, called Tamil Eelam, in northern and eastern Sri Lanka, which had a predominantly Tamil population and in 1977, the Tamil United Liberation Front, espousing separatism, won all the seats in Tamil areas. On the other hand, the Liberation Tigers of Tamil Eelam (LTTE) chose violent means in this quest and over 65,000 people have been killed since fighting erupted in 1983, albeit with short periods of truce and has taken a toll on the human rights and economic situation in the country. Additionally, the Tsunami that hit the South East Asian region on 26<sup>th</sup> December 2004 killed over 32,000 people and displaced 443,000 in Sri Lanka.

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It has a Republican form of Government, with universal suffrage and the minimum age of voting being 18 years. The legislature, called the Parliament, comprises of 225 elected representatives elected for 6 year terms at periodical general elections through a system



1370 of proportional representation. The executive branch consists of the President who heads a Cabinet of Ministers, and who is directly elected by the people for a six-year term and a maximum of two terms. The Prime Minister and the Cabinet Members are appointed by the President from among the Members of Parliament.

## 1375 **A2.2 JUDICIARY AND THE COURTS**

In view of its colonial history and ethnic composition, the legal system in Sri Lanka is a mixture of English Common Law, Roman-Dutch, Sinhalese, Muslim and customary law.

1380 The judicial system in Sri Lanka comprises of the Supreme Court, Court of Appeal, Provincial High Courts, District Courts, Magistrate's Court and Primary Courts, in that Order of hierarchy.

1385 The Supreme Court consists of the Chief Justice and not less than six and not more than ten other Judges.<sup>38</sup> Appointment of all Judges of the Supreme Court and Court of Appeal is by the President,<sup>39</sup> following approval by the Constitutional Council upon a recommendation made to the Council by the President.<sup>40</sup> Judges hold office during good behaviour and cannot be removed except by an order of the President made after an address of Parliament, supported by a majority of the Members of Parliament, has been presented to the President for removal on the ground of proved misbehaviour or incapacity.<sup>41</sup> It is the highest and final superior court of record and is empowered to exercise: jurisdiction in respect of Constitutional matters,<sup>42</sup> jurisdiction for the protection of fundamental rights,<sup>43</sup> final appellate jurisdiction,<sup>44</sup> consultative jurisdiction,<sup>45</sup> jurisdiction in petitions relating to election of President, relating to the validity of a referendum and appeals from Orders/judgments of the Court of Appeal in other election petitions,<sup>46</sup> jurisdiction in respect of any breach of the privileges of Parliament,<sup>47</sup> and jurisdiction in respect of other matters which Parliament may by law vest or ordain.

1400 The Court of Appeal consists of the President of the Court and not less than six and not more than eleven other Judges.<sup>48</sup> The provisions on appointment and removal of judges are same as applicable to the Supreme Court. Jurisdiction is ordinarily exercised in Colombo but the Chief Justice may from time to time direct that sittings be held in any judicial zone or district.<sup>49</sup> It is empowered to exercise jurisdiction in: appeals from the High Court in the exercise of its appellate or original jurisdiction,<sup>50</sup> as well as appeals from any court of first instance and any tribunal or other institution, sole and exclusive cognizance by way of appeal, revision and restitution, power and authority to inspect and examine records of any court of first instance,<sup>51</sup> jurisdiction to grant and issue according

<sup>38</sup> Article 119, Constitution of the Democratic Socialist Republic of Sri Lanka, dated 16<sup>th</sup> August 1978 (hereinafter the Sri Lankan Constitution).

<sup>39</sup> Article 107, Sri Lankan Constitution.

<sup>40</sup> Article 41C, Sri Lankan Constitution.

<sup>41</sup> Article 107(2), Sri Lankan Constitution.

<sup>42</sup> Articles 120 to 125, Sri Lankan Constitution.

<sup>43</sup> Article 126, Sri Lankan Constitution.

<sup>44</sup> Articles 127 and 128, Sri Lankan Constitution.

<sup>45</sup> Article 129, Sri Lankan Constitution.

<sup>46</sup> Article 130, Sri Lankan Constitution.

<sup>47</sup> Article 132, Sri Lankan Constitution.

<sup>48</sup> Article 137, Sri Lankan Constitution.

<sup>49</sup> Article 146, Sri Lankan Constitution.

<sup>50</sup> Article 139, Sri Lankan Constitution.

<sup>51</sup> Article 145, Sri Lankan Constitution.



1410 to law, writs of certiorari, prohibition, procedendo, mandamus and quo warranto,<sup>52</sup>  
jurisdiction to grant and issue writs of habeas corpus,<sup>53</sup> jurisdiction to grant Injunctions,<sup>54</sup>  
and jurisdiction to try election petitions in respect of the election of Members of  
Parliament.<sup>55</sup>

1415 The High Court consists of not less than ten and not more than Forty Judges.<sup>56</sup> Further,  
Provincial High Courts may be appointed, to which Judges are appointed by the Chief  
Justice from among Judges of the High Court.<sup>57</sup> Judges are appointed by the President  
on the recommendation of the Judicial Service Commission made after consultation with  
the Attorney General. Judges are removable by the President and are subject to  
disciplinary control by the President on the recommendation of the Judicial Service  
Commission.<sup>58</sup> The High Court has Original as well as Appellate (and revisionary)  
Jurisdiction.

1420 District Courts are established under the Judicature Act, No. 2 of 1978 for each of the 54  
judicial districts. Every District Court is a court of record and is vested with unlimited  
original jurisdiction in all civil, revenue, trust, insolvency and testamentary matters other  
than such matters as are assigned to any other court by Law. Appeals from judgments,  
decrees and orders of the District Court lie to the Court of Appeal. All Judges of the  
1425 District Courts are appointed by the Judicial Service Commission which is also vested  
with the power of dismissal and disciplinary control of the Judges.

1430 Magistrate's Courts are established under the Judicature Act, No. 2 of 1978 for each of  
the 74 judicial divisions. Every Magistrate's Court is vested with original criminal  
jurisdiction (other than in respect of offences upon indictment in the High Court), and is  
ordinarily empowered to impose sentences up to a fine of Rs. 1,500 and/or 2 years  
rigorous/simple imprisonment unless power is vested in the Magistrate's Court to  
impose higher penalties by special provision. Appeals from convictions, sentences or  
1435 orders of Magistrate's Courts within a Province lie to the High Court of the Province. All  
Magistrates are appointed by the Judicial Service Commission which is also vested with  
the power of dismissal and disciplinary control of the Judges.

1440 Primary Courts are established under the Judicature Act, No. 2 of 1978. There are seven  
Primary Courts functioning in Anamaduwa, Angunukolapelessa, Kandy, Mallakam,  
Pilessa, Wellawaya and Wennappuwa. In the other divisions, the Magistrate's Courts  
exercise the jurisdiction of the Primary Courts. A Primary Court is vested with the  
following jurisdiction to entertain: suits where the debt, damage, demand or claim does not  
1445 exceed Rs. 1,500, suits for enforcement of Bye-Laws of Local Authorities and matters  
relating to recovery of revenue of such Authorities, exclusive criminal jurisdiction in  
respect of offences prescribed by the Minister by Regulation, and offences in violation of  
provisions of any Act or subsidiary legislation in respect of which jurisdiction is vested. A  
revision of an Order made by a Primary Court could be made to the High Court of the  
Province. All Judges of the Primary Court are appointed by the Judicial Service  
1450 Commission which is also vested with the power of dismissal and disciplinary control of  
the Judges.

<sup>52</sup> Article 140, Sri Lankan Constitution.

<sup>53</sup> Article 141, Sri Lankan Constitution.

<sup>54</sup> Article 143, Sri Lankan Constitution.

<sup>55</sup> Article 144, Sri Lankan Constitution.

<sup>56</sup> Article 111, Sri Lankan Constitution and Section 4, Judicature Act, No. 2 of 1978.

<sup>57</sup> Article 154P, Sri Lankan Constitution.

<sup>58</sup> Article 111, Sri Lankan Constitution.