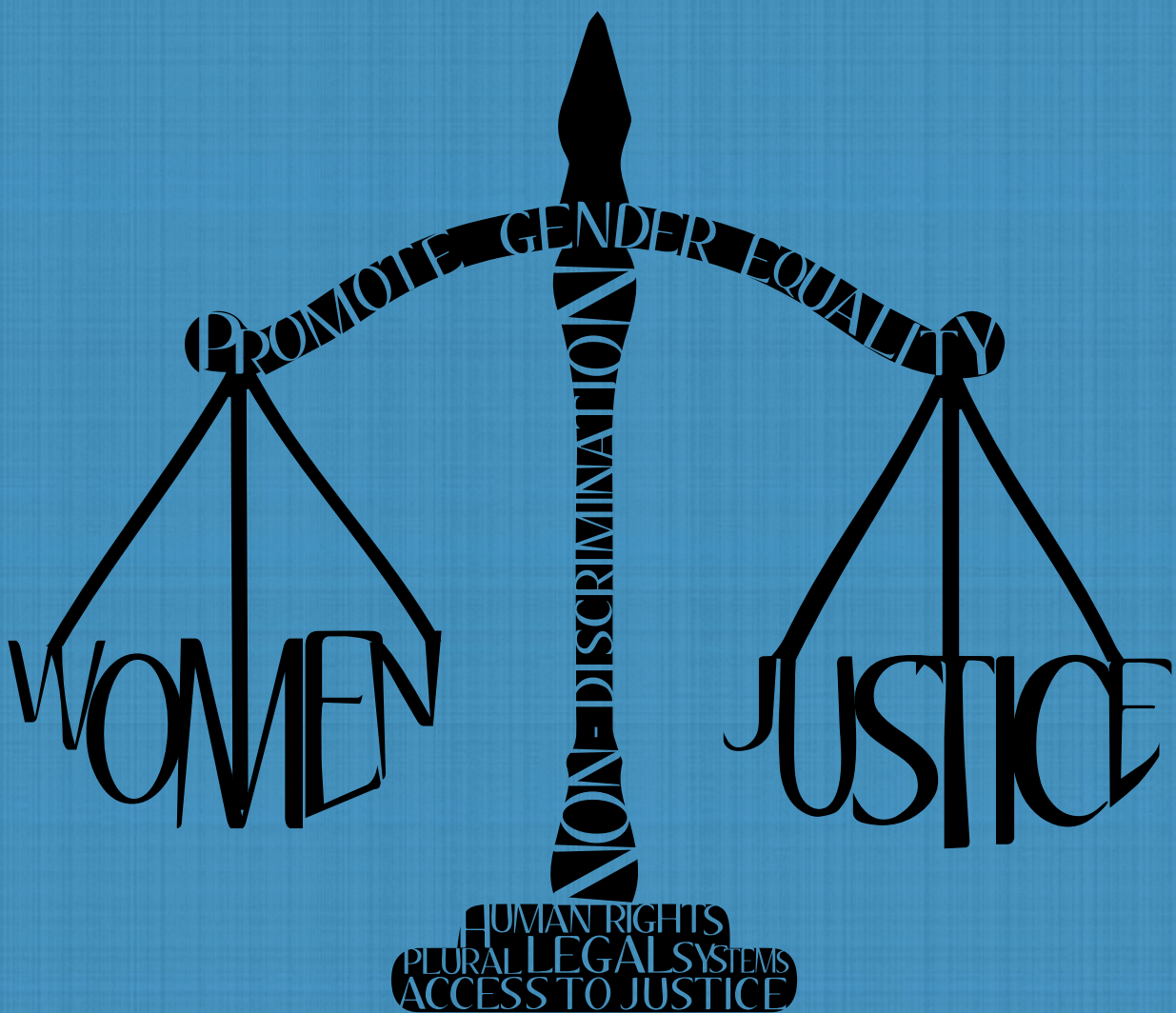


ACCESS TO JUSTICE FOR *women*  
IN PLURAL LEGAL SYSTEMS  
OF SOUTHEAST ASIA



UN Women is the UN organization dedicated to gender equality and the empowerment of women. A global champion for women and girls, UN Women was established to accelerate progress on meeting their needs worldwide. UN Women supports Member States in setting global standards for achieving gender equality, and works with governments and civil society to design the laws, policies, programmes and services required to implement these standards. UN Women stands behind women's equal participation in all aspects of life, focusing on the following five priority areas: increasing women's leadership and participation; ending violence against women; engaging women in all aspects of peace and security processes; enhancing women's economic empowerment; and making gender equality central to national development planning and budgeting. UN Women also coordinates and promotes the UN system's work in advancing gender equality.

## ACCESS TO JUSTICE FOR WOMEN IN PLURAL LEGAL SYSTEMS OF SOUTHEAST ASIA

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# Access to Justice for Women in Plural Legal Systems in South East Asia

## acronyms

AICHR	ASEAN Intergovernmental Commission on Human Rights
ASEAN	Association of Southeast Asian Nations
CAT	Convention against Torture
CEDAW	Convention to Eliminate All Forms of Discrimination against Women
CEDAW SEAP	CEDAW Southeast Asia Programme
CRC	Convention on the Rights of the Child
DLA	Developmental legal assistance
ECtHR	European Court of Human Rights
GE	Gender Equality
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
NGO	Non-governmental organization
NCIP	National Commission on Indigenous Peoples
OP	Optional Protocol
SEA	Southeast Asia
UDHR	Universal Declaration of Human Rights
UNDP	United Nations Development Programme
UN Women	United Nations Entity for Gender Equality and the Empowerment of Women (UN Women)
WHO	World Health Organization



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## about the author

Evalyn G. Ursua is a human rights advocate, litigator, researcher and academic. She has worked on women and children's rights issues in the Philippines for more than 20 years. She and two lawyer friends pioneered women's rights legal advocacy in the Philippines when they founded a women's legal resource advocacy group in 1990. Since then, she has engaged in test case litigation involving women's human rights as well as in education and training programs in communities and for women activists in various parts of the Philippines.

Ms. Ursua's policy development work included personally writing and co-writing proposed legislation on rape, abuse of women in intimate relationships and prostitution for non-government organizations and government agencies that legislators sponsored and became the basis of enacted laws. She also wrote a proposed law on divorce for a party list group which is still pending in the Philippine Congress.

Ms. Ursua also taught courses on gender and the law and on marriage and the family at the University of the Philippines College of Law and Department of Women and Development Studies in Diliman, Quezon City.

For her work in defending and promoting women and children's rights, she was given The Outstanding Women in the Nation's Service (TOWNS) Award for Women and Children's Rights Advocacy by the TOWNS Foundation, Inc. in 1998, during the Centennial Year of the founding of the Philippine Republic.

Ms. Ursua has a Bachelor of Laws from the University of the Philippines (Class Valedictorian, 1990), and a Master of Laws in Asian Legal Studies from the National University of Singapore.

## foreword

Women's access to justice is an essential component of the system of protection and enforcement of human rights. The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) speaks repeatedly of the need for states to ensure that law and administrative practices are non-discriminatory while advancing women's equal rights, opportunity and participation.

Despite ratification of human rights treaties, the reality for too many women is that justice remains out of reach. Even where gender-responsive laws exist, women continue to be denied justice because of deficits in the implementation of laws and their inaccessibility to women as a consequence of intersecting inequalities. This is especially true for women who are poor, women from racial and ethnic minorities, refugee and displaced women, women with disabilities and indigenous women.

In its flagship report 'Progress of the World's Women: In Pursuit of Justice' UN Women asserts a conceptual framework for strengthening women's access to justice. The report highlights the ways in which governments and civil society are working together to reform laws and create new models for justice service delivery that meet women's needs. These include the need to put gender equality at the heart of the Millennium Development Goal, support women's legal organizations, support one-stop shops and specialized services to reduce attrition in the justice chain, train judges and monitor decisions, implement gender-sensitive law reform and increase women's access to courts and truth commissions during and after conflicts.

Similarly, despite the legislative process to eliminate direct and indirect forms of sex discrimination, women in Southeast Asia are still confronted with many harmful and discriminatory practices without adequate redress from the administration of justice. Actors in the justice sector may be constrained by laws that are not gender-responsive and may themselves perpetuate rigid and restrictive gender roles and stereotypes in their decision-making. This challenge is compounded in countries where there are plural legal systems, a combination of constitutional, customary, community-based and religious judicial or quasi-judicial decision making. States are called upon to ensure that the functioning of these plural systems is in conformity with international treaty obligations.

The complexity of respecting the diversities of cultures as dynamic systems of beliefs and practices while transforming aspects that violate women's rights is a key concern of CEDAW. Article 5 calls on states "To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women." This concern was reiterated at the Regional Southeast Asia Judicial Colloquium on Gender Equality Jurisprudence and the Role of the Judiciary in Promoting Women's Access to Justice where the participants, judicial officers

## foreword

from Canada, Cambodia, Lao PDR, Myanmar, Philippines, Thailand, Timor-Leste and Vietnam stressed the need to value cultures while at the same time emphasized that culture, customary rules, religion and traditional practices should not be invoked as justification for violations of the rights and freedoms of women.

In an effort to better understand the functioning of plural legal systems, as part of the Regional Programme on Improving Women's Human Rights in Southeast Asia, - UN Women commissioned a preparatory paper to provide guidance as part of its Regional Research on Women's Access to Justice in the Plural Legal Systems in Southeast Asia. This was aimed at evaluating women's access to justice in the plural legal systems of Southeast Asia and determining how women's access to justice can be enhanced according to the standards of international human rights law.

This publication is intended to share an analytical framework for investigating plural legal systems from the gender perspective. It focuses on the broad spectrum of the legal orders, including those that are informal, not formally recognized, or not State sanctioned covering customary, indigenous, traditional and religious orders. UN Women hopes that this publication will be useful for states and non-governmental organizations working at the forefront of cases, making positive impacts on women's lives with useful working tools; and provide guidance for the regional research and to identify contentious issues within the region. This paper aims to feed into the bigger outcome of the research in enhancing Southeast Asia's regional processes that facilitates CEDAW implementation while surfacing the richness of Southeast Asia's legal plurality, and becoming a knowledge product for global advocacy. Moreover, the research aims to provide suggestions for practical interventions for the short term as well as recommendations to overlap the gap, for long term cooperation to improve access to legal aid and policy changes to advance the situation of women in the justice system.



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Bangkok, Thailand

February 2014



# Access to justice for women in plural legal systems of Southeast Asia<sup>1</sup>

## *A Guidance Paper*

This paper is part of the UN Women's efforts to provide guidance for its regional research project aimed at evaluating women's access to justice in the plural legal systems of Southeast Asia and determining how women's access to justice can be enhanced according to the standards of international human rights law. This paper defines the broad parameters of the inquiry, which can be detailed and refined further at the country level.

### A. Legal pluralism and Southeast Asia

1. The understanding and meaning of *legal pluralism* vary, depending on the form and social field of the legal plurality described. In one limited sense, legal pluralism refers to *state legal pluralism*, which means that different bodies of state law apply to different groups of the population within the state, depending on ethnicity, religion, nationality, or locality. However, other legal orders operate within the state alongside the official legal system, and these sometimes complement, conflict, or overlap with the latter. This is *also* legal pluralism. It describes the social reality that what some groups or communities recognize as law may not be state law, and the institutions or mechanisms that enforce that law may not be of the state or part of the official legal system. Scholars note that this concept of legal pluralism is not settled, owing to the lack of agreement on what constitutes law outside of state law.<sup>2</sup>

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1. Prepared by Evalyn G. Ursua for the UN Women (October 2013). This Paper integrates the comments and ideas from two workshops: the Peer Review Workshop on this Guidance Paper held on June 26-27, 2013 at Bangkok, Thailand and the National Workshop on UN Women's Research Guidance Paper on Women's Access to Justice in the Plural Legal Systems in Southeast Asia, August 20-21, 2013 at Quezon City, Philippines.

2. See Tamanaha 2009, p. 297.

2. This legal pluralism, broadly defined, exists in the countries of multiethnic and multicultural Southeast Asia, particularly Cambodia, Indonesia, Lao PDR, Myanmar, Philippines, Thailand, Timor Leste, and Viet Nam. The colonial histories of these countries and their diverse ethnic, cultural and religious formations predating colonization explain the development and character of their legal pluralism which has survived attempts at harmonization under a unitary state legal order in the colonial and post-colonial periods.
3. Legal pluralism in Southeast Asia takes various forms. In Lao PDR, customary practices of ethnic groups flourish and “remain a crucial source of law for many people” but there is no state policy on how those practices are to be treated within the state framework.<sup>3</sup> In Indonesia, the state recognizes the different provisions regulating marriage and divorce for each of the six official religions. Some states have incorporated religious<sup>4</sup> laws and courts into the official legal system.
4. The legal orders within legal pluralism may be categorized as *state*, *non-state*, or *quasi-state*, when the nation-state is used as the paradigm of the domestic political and legal order. *Non-state legal orders* could encompass a broad range of legal orders within the state’s jurisdiction, from indigenous norms and institutions in communities that continue to regulate relations and perform dispute resolution functions without state sanction, to the rule-making and enforcing power of corporations and universities, to community associations that engage in community regulation. Sometimes, the state legal order recognizes non-state legal orders or incorporates them into the justice system without assuming control over them. This is also referred to as a *quasi-state legal order*.<sup>5</sup>
5. The categories of state and non-state legal orders are not always clear-cut. They may overlap or their demarcation may be blurred. They also sometimes interact and cooperate with each other, either formally or informally. The non-state legal orders or mechanisms may be (a) not state-recognized and ignored, (b) not state-recognized but tolerated, (c) state-recognized but unregulated, (d) state-recognized and regulated, or (e) state-integrated as part of the formal justice system but with non-state personnel and using norms and procedures beyond state law.<sup>6</sup>
6. Bearing in mind that what exists in legal pluralism may not be a ‘legal order’ when compared to the paradigmatic state legal order, the examination may involve simply *state*, *non-state* or *quasi-state justice mechanisms*, referring to mechanisms used in a well-defined community for the resolution of disputes or the delivery of justice. *State justice mechanisms* are those established, maintained or operated by the state and its agents, or to mechanisms where state authority is directly involved in their creation, constitution, composition or accountability. On the other hand, *non-state justice mechanisms* are those existing in indigenous, customary or religion-based systems that operate independently of or autonomously from the state and have not been officially incorporated into the state justice system. Again, recognizing that the line

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3. UNDP 2010, p. 14.

4. UN Women 2011, p. 67.

5. UN Women 2011, p. 68.

6. See UN Women, UNICEF & UNDP 2012, pp. 35-36, 54.

between state and non-state justice mechanisms may sometimes be blurred and that there may be overlapping and interpenetration of state law and non-state law, the non-state mechanisms may be *quasi-state justice mechanisms*, that is, they are non-state mechanisms recognized by the state or incorporated into the state system but operating autonomously or semi-autonomously from the state. Quasi-state justice mechanisms may include those mechanisms that have state-determined procedure for appointments, or whose dispute resolution functions are recognized by the state and attached to the official justice system.

7. As a critical caveat, the categories of state, non-state, quasi-state legal systems or mechanisms may not capture the different strata of systems or mechanisms existing in communities of Southeast Asia, including in itinerant or mobile communities. Further, those state-centric labels may not capture the engagements by some communities with the state, or their relations to the state system. Others may prefer to use the labels of *formal* and *informal*, to refer to either justice systems or legal orders within legal pluralism, as one study does.<sup>7</sup> The term 'informal justice systems' has been used to refer to "dispute resolution mechanisms falling outside the scope of the formal justice system" or "to draw a distinction between state-administered formal justice systems and non-state administered informal justice systems."<sup>8</sup> It is important to bear in mind that these labels serve only as initial guide for the research. The findings of the research may surface the richness of Southeast Asia's legal plurality and provide further variations in, or lead to different, non-binary, or nuanced, categories.
8. It has been said that in the last several decades, there has developed a new legal pluralism that represents a global shift from the state as the central source of legal ordering.<sup>9</sup> This was brought about by the creation of transnational and regional organizations and their regulatory regimes, the integration of markets, and the development of international human rights law.<sup>10</sup> These developments have resulted in drastic changes in Southeast Asian countries, and have been met with resistance in some communities that have been adversely affected by the market-oriented development strategies pursued by the state. These changes pose threats and challenges to the social and cultural integrity and to the very survival of some communities. Intuitively, they impact on the informal or non-state justice systems of the legally pluralist communities of Southeast Asia.
9. Despite the creation of transnational and regional regulatory regimes, the international legal order has not abandoned the principles of state sovereignty and the formal equality of states. The state remains the central referent of any political and social ordering and in conceiving legal phenomena. Under international human rights law, the state is still the bearer of obligations to protect, respect, promote and fulfill the human rights of its citizens. Thus, the nation-state continues to be the site and focus of human rights activism.

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7. See UN Women, UNICEF & UNDP 2012.

8. Wojkowska 2006, p. 9.

9. Merry 2004.

10. Ibid.

## B. Human rights and the ASEAN

1. All the states of Southeast Asia except Timor Leste are ASEAN member states. Almost all have ratified the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), and the two Optional Protocols to the latter. Many have ratified the Convention against Torture (CAT), the Optional Protocol to the CEDAW, and the Convention on the Rights of Persons with Disabilities. Several have ratified the Optional Protocol to the CAT and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.
2. Despite this formal commitment to human rights treaties, serious human rights violations have been documented in the countries of Southeast Asia, including the highest prevalence of some forms of violence against women globally,<sup>11</sup> discrimination against women within marriage and the family, lack of access to basic health and other social services, denial of women's economic rights, and widespread poverty. The violations of women's human rights occur in political, economic and socio-cultural systems where majority of the population is poor. This poverty constitutes, shapes, and conjoins with the various structural causes and forms of oppression and injustice that women experience. It is foundational to women's lack of access to justice for the violations of their human rights. The power imbalances that are reflected or institutionalized in the justice systems – between the rich and the poor, between men and women, between rich men and poor women, between groups of different ethnicity and religion, among other polarities – are the foundations upon which women are denied access to justice.
3. ASEAN states generally view the implementation and enforcement of human rights as strictly a matter of domestic governance where the principles of sovereignty and non-interference rule supreme. ASEAN states practice non-intervention by refraining from making any comment on another state's action involving matters considered within its domestic jurisdiction, which include human rights issues.
4. The adoption of the ASEAN Charter<sup>12</sup> and the planned integration of the ASEAN countries into an ASEAN Community by 2015 present opportunities, challenges, and threats to human rights in general and to women's human rights in particular. As a positive development, the discourse within the ASEAN has moved away from the "Asian values" discourse of the 1990s when several ASEAN states insisted on taking a cultural and contextual perspective to human rights. Now, the ASEAN, as expressed in its Charter, aims "to strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of the ASEAN." Pursuant to its Charter, the ASEAN created in 2009 the ASEAN Intergovernmental Commission on Human Rights (AICHR), an inter-governmental consultative body of government representatives whose

11. WHO, Department of Reproductive Health and Research, London School of Hygiene and Tropical Medicine & South African Medical Research Council (2013).

12. The ASEAN Charter took effect on December 15, 2008.



mandate and functions include, among others, promoting and protecting human rights and fundamental freedoms within the ASEAN. It also created an ASEAN Commission on the Promotion and Protection of the Rights of Women and Children. It has adopted a Declaration of the Advancement of Women in the ASEAN Region (1988), a Declaration on the Elimination of Violence against Women in the ASEAN Region (2004), and several programs of action related to women's human rights. Recently, in November 2012, it adopted the ASEAN Human Rights Declaration, in which it reaffirms its commitment to the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and other international human rights instruments to which ASEAN members are parties. The ASEAN Human Rights Declaration states that it is intended to "help establish a framework for human rights cooperation in the region and contribute to the ASEAN community building process."

5. All these developments could result in increased engagement among governments and peoples within the ASEAN community, and could lead to progressive protection and promotion of human rights for peoples and women within Southeast Asia. On the other hand, the further opening up of markets as part of the ASEAN economic integration could result in more changes in production patterns, disruptions in socio-cultural life, and dislocations that could exacerbate poverty and social injustice among disadvantaged groups and communities, especially poor women and children. It could also worsen women's lack of access to justice.

## C. Global legal framework on access to justice

1. Access to justice is a human right.<sup>13</sup> It is "an essential component of the system of protection and enforcement of human rights". However, access to justice has different meanings. It may be defined narrowly, to signify an individual's right to bring a claim to a court or tribunal and to have that court or tribunal decide the claim. It could also refer to the right to be given legal aid when the individual does not have the resources required to avail of legal remedies. In a broad sense, access to justice also includes, as a critical element, the individual's right to have her claim decided according to substantive standards of fairness and justice.<sup>14</sup>
2. In international human rights instruments, *access to justice* as a term of art is not used. Nonetheless, the right of access to justice is clearly guaranteed. The 1948 Universal Declaration of Human Rights (UDHR) guarantees the *right to an effective remedy* before *competent national tribunals* for violations of human rights.<sup>15</sup> It declares further that "everyone is entitled in full equality to a *fair and public hearing* by an *independent and impartial tribunal*, in the determination of his rights and obligations and of any criminal

13. Francioni 2007.

14. *Ibid.*

15. Art. 8.

charge against him”.<sup>16</sup> The UDHR guarantees for the right to equal protection of the law,<sup>17</sup> the right to be presumed innocent in criminal investigations,<sup>18</sup> and the right to non-discrimination<sup>19</sup> are also related to the right of access to justice.

3. The International Covenant on Civil and Political Rights (ICCPR) guarantees the same rights and uses similar language. In Article 2 (3) thereof, each State Party undertakes: (a) to ensure that any person whose rights or freedoms as herein recognized are violated shall have an *effective remedy*, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) to ensure that any person claiming such a remedy shall have his right thereto determined by *competent judicial, administrative or legislative authorities*, or by any other *competent authority* provided for by the legal system of the State, and to develop the possibilities of judicial remedy; and (c) to ensure that the competent authorities shall *enforce such remedies* when granted. In Article 14, paragraph 1, “all persons shall be equal before the courts and tribunals” and that “[i]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”
4. In General Comment 13 (1984), the Human Rights Committee clarifies that all the provisions of Article 14 of the ICCPR “are aimed at ensuring the proper administration of justice, and to this end uphold a series of individual rights such as equality before the courts and tribunals and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law.” It further clarifies that paragraph 3 of Article 14 elaborates on the requirements of a fair hearing with regard to the determination of criminal charges, but that they are only minimum guarantees that may not always be sufficient to ensure the fairness of a hearing. The minimum requirements of a fair hearing under Article 14, paragraph 3 are: (a) prompt and detailed information, in a language the person understands, of the nature and cause of the charge against her; (b) adequate time and facilities for the preparation of her defense and to communicate with counsel of her choice; (c) trial without undue delay; (d) trial in the person’s presence, and defense of oneself in person or through legal assistance of her own choosing; information, if she does not have legal assistance, of this right; and free legal assistance, in any case where the interests of justice so require and when she has no sufficient means to pay for it; (e) examination of witnesses against her, and the presentation and examination of witnesses on her behalf under the same conditions as the witnesses against her; (f) free assistance of an interpreter if she cannot understand or speak the language used in court; and (g) the right not to be compelled to testify against herself or to confess guilt.
5. Applying the standards of effective remedy, the first Optional Protocol to the ICCPR exempts from the requirement of exhaustion of all available domestic remedies in filing communications under the Optional Protocol cases where “the application of the

16. Art. 10.

17. Art. 7.

18. Art. 11.

19. Art. 3.

remedies is unreasonably prolonged.”<sup>20</sup> In *KL v. Peru*,<sup>21</sup> the Human Rights Committee, in holding that the woman complied with the requirement of exhaustion of domestic remedies, said that there was no administrative or judicial remedy at the domestic level “functioning with the speed and efficiency required” to enable her to secure a lawful abortion on therapeutic grounds “within the limited period, by virtue of the special circumstances obtaining in such case.” It also referred to previous jurisprudence “that a remedy which had no chance of being successful could not count as such.”<sup>22</sup>

6. In the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), *the right to a remedy* is implied in Article 2 (c), which speaks of the obligations of States parties “[t]o establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the *effective* protection of women against any act of discrimination.”<sup>23</sup> For the remedy to be effective, the adjudication of a case must be fair, impartial, timely and expeditious.<sup>24</sup> Gender stereotyping, which often occurs in many prosecutions of gender violence and other gender-related cases, affects women’s right to a fair and just trial.<sup>25</sup> Saying that state responsibility extends to judicial decisions that violate the provisions of the CEDAW, the CEDAW Committee declared that “[t]he judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence, in general.”<sup>26</sup> Following the same standards set by the Optional Protocol to the ICCPR and the Human Rights Committee, the Optional Protocol to the CEDAW also specifies, as exceptions to the requirement of exhaustion of domestic remedies for a communication to be admissible, cases where “the application of such remedies is unreasonably prolonged or unlikely to bring relief.”<sup>27</sup>
7. In the European Union, access to justice as a right is understood to include *the right to a fair trial* and *the right to an effective remedy*, which are guaranteed under the EU Charter of Fundamental Rights,<sup>28</sup> the European Convention on Human Rights,<sup>29</sup> and the International Covenant on Civil and Political Rights.<sup>30</sup> Article 6 (1) of the European Convention on Human Rights, on the right to a fair trial, provides that “[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” The European Union Agency

20. Art. 5 (b).

21. Communication No. 1153/2003, HRC Views of 24 October 2005.

22. Citing Communication No. 701/1996, *Cesareo Gomez Vasquez v. Spain*, Views adopted on 20 July 2000, para. 6.2.

23. UN CEDAW Views adopted on 16 July 2010, para. 8.3, Communication No. 18/2008, *Vertido v. Philippines*, CEDAW/C/46/D/18/2008.

24. *Ibid.*

25. *Ibid.*, para. 8.4.

26. *Ibid.*

27. Art. 4.

28. Art. 47.

29. Arts. 6 & 13.

for Fundamental Rights considers the right of access to justice “not only a right in itself, but an enabling right in that it allows individuals to enforce their substantive rights and obtain a remedy when these rights are violated.”<sup>31</sup>

8. The European Court of Human Rights (ECtHR) has developed general principles in claims of violations of the right to a fair trial and the right to an effective remedy as constituting the right of access to justice. One is the principle that the European Convention on Human Rights is intended to guarantee “not rights that are theoretical or illusory but rights that are practical and effective.”<sup>32</sup> In applying this principle, it has held that the right to a fair trial is not effective “unless the requests and observations of the parties are truly ‘heard,’ that is to say, properly examined by the tribunal”<sup>33</sup> and unless judgments are adequately reasoned, as required by the nature of the decision and the circumstances of the case.<sup>34</sup> Another is the principle that the right of access to a court guaranteed by Article 6 (1) of the European Convention on Human Rights is not absolute, but may be subject to limitations. The state enjoys a certain *margin of appreciation* in regulating the right. However, the limitations (a) must not “restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired;” (b) must be in pursuit of a legitimate aim; and (c) must show “a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.”<sup>35</sup> Specific to civil claims, the European Court of Human Rights has declared it inconsistent with the rule of law and the basic principle of Article 6 (1) “if a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on categories of persons.”<sup>36</sup>
9. The UNDP has defined access to justice as “the ability of people to seek and obtain a remedy through formal or informal institutions of justice and in conformity with human rights standards.”<sup>37</sup> Accordingly, its conceptual framework for access to justice includes the following components:
  - (a) *a normative framework*, consisting of “laws, procedures and administrative structures in place and understood by claim holders and duty bearers;”
  - (b) *legal awareness*, which means that “claim holders are aware of the law and their rights under it and know what to do in case of a grievance;”

30. Arts. 2 (3) & 14; European Union Agency for Fundamental Rights 2011.

31. European Union Agency for Fundamental Rights 2011.

32. *Sabeh El Leil v. France*, no. 34869/05, 29 June 2011, citing *Aït-Mouhoub v. France*, 28 October 1998, § 52, Reports 1998-VIII; *Ajdarić v. Croatia*, no. 20883/09, 13 Dec. 2011, citing *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37.

33. *Ajdarić v. Croatia*, no. 20883/09, 13 Dec. 2011, citing *Dulaurs v. France*, no. 34553/97, § 33, 21 March 2000; *Donadze v. Georgia*, no. 74644/01, §§ 32 and 35, 7 March 2006; and *Dima v. Romania*, no. 58472/00, § 34, 16 November 2006.

34. *Ajdarić v. Croatia*, no. 20883/09, 13 Dec. 2011, citing *García Ruiz v. Spain* [GC], no. 30544/96, § 26, ECHR 1999-I.

35. *Sabeh El Leil v. France*, no. 34869/05, 29 June 2011, citing *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 59, ECHR 1999-I; *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, § 98, ECHR 2001-V; *Fogarty v. the United Kingdom* ([GC], no. 37112/97, § 33, ECHR 2001-XI; *Cudak v. Lithuania* ([GC], no. 15869/02, §§ 55, ECHR 2010-).

36. *Sabeh El Leil v. France*, no. 34869/05, 29 June 2011, citing *Fayed v. the United Kingdom*, 21 September 1994, § 65, Series A no. 294-B.

37. UNDP 2005, p. 5.



- (c) *access to appropriate forum*, which means that “claim holders seek remedies for grievances through appropriate mechanisms and grievances are received by duty bearer;”
  - (d) *effective handling of grievance*, which means that “duty bearers take necessary actions to provide remedies for a grievance;” and
  - (e) *satisfactory remedy obtained*, which means that “claim holders receive appropriate remedies, in line with human rights standards.” Involved in all these five components are the elements of monitoring, oversight and transparency.<sup>38</sup>
10. The UNDP also considers access to justice both as a fundamental human right, “a key means to defend other rights,”<sup>39</sup> and “closely linked to poverty reduction since being poor and marginalized means being deprived of choices, opportunities, access to basic resources and a voice in decision-making.”<sup>40</sup>
11. Since access to justice is “a key means to defend other rights” and “an enabling right” that “allows individuals to enforce their substantive rights and obtain a remedy when these rights are violated,” the enhancement of women’s access to justice is critical in eliminating discrimination against women, in promoting substantive equality, and in achieving the goals of the CEDAW.
12. The UN Women considers access to justice essential in achieving progress in the five priority areas it has identified for achieving gender equality: (a) increasing women’s leadership and participation; (b) ending violence against women; (c) engaging women in all aspects of peace and security processes; (d) enhancing women’s economic empowerment; and (e) making gender equality central to national development planning and budgeting.<sup>41</sup>
13. Consistent with these five priority areas, the UN Women has put forward a *substantive agenda* for pursuing justice for women that includes the following *critical components*:<sup>42</sup>
- (a) *a women’s human rights-centered legal framework*, which requires:
    - (i) ending explicit legal discrimination against women;
    - (ii) passing legislation that addresses gender-specific violations that have been traditionally considered personal or private (such as domestic violence);
    - (iii) expanding the limited protection given to women by existing laws (such as laws narrowly defining sexual violence or excluding spousal rape from the crime of rape);

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38. Wojkowska 2006, p. 30.

39. UNDP 2005, p. 5.

40. UNDP 2004, p. 3.

41. UN Women 2011.

42. UN Women 2011.

- (iv) prohibiting, through national legislation, cultural practices harmful to women and girls;
  - (v) extending legal protection and social benefits to specially vulnerable women, such as those in export processing zones, home-based work, or domestic work;
  - (vi) giving women equal legal rights to property which are critical to their economic rights and livelihood, such as the right to control or own land and to inheritance, and ensuring the implementation of those rights;
  - (vii) ensuring women's sexual and reproductive health and rights, which include giving women access to health care services and those related to family planning and addressing the unintended consequences of laws prohibiting and penalizing abortion;
  - (viii) providing full and sustained funding for the proper and adequate enforcement and implementation of gender-responsive legislation;
  - (ix) regular collection of data on women's rights violations to drive proper implementation of legislation; and
  - (x) adopting a holistic and integrated approach to designing laws and policies 'to drive effective implementation, to ensure substantive equality and fair outcomes to women,' in recognition of the interrelatedness of the structural and social barriers in the various aspects of women's lives to their achievement of substantive equality (e.g., the link between the gender pay gap and the gender division of labor in the family); and
- (b) *a gender-responsive justice chain that effectively and adequately implements gender-responsive laws, which requires:*
- (i) justice institutions and support agencies with clear gender-responsive mandates and procedures, including standardized protocols and rules on coordination, and adequate and sustained funding;
  - (ii) agencies with properly trained personnel and adequate resources that provide specialized services for women to address the social and institutional barriers they face, such as one-stop shops with women service providers, legal aid agencies, specialized courts (including mobile, domestic violence and family courts), women's police stations, and gender-responsive prisons;
  - (iii) clear accountability procedures and sustained monitoring of implementation of laws and protocols by agencies, including data collection, towards better implementation; and
  - (iv) gender-responsive policing and judicial decision-making.

14. In one study, the International Commission of Jurists adopted the following definition of access to justice:<sup>43</sup>

we conceive of access to justice with reference to human rights principles. We consider it to include the insurance that rights and their correlative legal protections are recognized and incorporated in law and the right to an effective, accessible and prompt legal remedy for the violation or abuse of rights. It entails the ability and empowerment to claim rights as legal entitlements, to seek accountability of those who transgress them and to turn to the law for viable protection and meaningful redress.

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43. International Commission of Jurists 2012, p. 8.

# Research Rationale

1. Past and present initiatives to enhance access to justice in Southeast Asia have focused on (a) providing legal aid for the poor, including poor women; (b) extending representation to collective interests of marginalized groups or sectors, such as women and children, indigenous peoples, the urban poor and migrant workers; (c) substantive law reform; (d) improving adjudicative procedures; (e) promoting alternative dispute resolution; (f) creation of special courts and other special mechanisms; and (g) capacity-building for judicial and quasi-judicial institutions. Some of these initiatives are part of broader rule-of-law promotion efforts. A number of NGOs have also focused on developmental legal assistance (DLA) instead of the traditional individual-focused legal aid which, in their view, does not contribute to either individual or group empowerment or to any structural change. DLA centers on community-based legal education and paralegal training programmes that are designed to create rights awareness among individuals, groups and communities, and thereby empower them to seek redress for rights violations and to work and mobilize for social reform and structural change. Until recently, access to justice programmes have focused only on state justice systems as the primary area of concern or referent.
2. The increasing inclusion of 'informal justice systems' or non-state justice systems in access to justice reform programs reflects a growing recognition of their significant role in legal regulation and dispute resolution in many societies. In some communities, indigenous, customary or religious justice mechanisms are the only mechanisms accessible to victims of rights violations. In others, they are chosen over state justice mechanisms. In others still, disputants selectively access state and non-state mechanisms depending on the dispute involved. There are assumptions that women prefer non-state over state justice mechanisms because accessing the former is not costly. It is also assumed that customary justice mechanisms are genuinely 'traditional' and representative of community values. The correctness of these assumptions has been questioned. It has been pointed out that women's choice of non-state mechanisms may be due to necessity and not out of genuine preference, customary justice mechanisms are generally male-controlled, interpretive authorities in communities are generally men, and the structure, character and practices of non-state mechanisms may have been shaped by the colonial or conflict experiences of communities.<sup>44</sup> Locally grounded research can expose these flawed assumptions and provide empirical basis for any programming involving non-state justice systems.<sup>45</sup>

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44. UN Women 2011, p. 73.

45. Ibid.



3. Existing data show that non-state justice mechanisms within indigenous, customary or religious traditions sometimes provide women some form of redress for rights violations. However, serious discrimination against women also occurs within some of these mechanisms, thereby perpetuating structural injustice against women and negating the gains that have been made within state justice systems.
4. Thus, even as state justice systems need to be reformed in order to address discrimination against women, non-state justice systems must also be scrutinized in how they address rights violations or acts considered harmful to women, how they substitute for state action on those violations (if they do), how they interact or interface with or are treated by the state, whether they conform to international human rights standards or perpetuate gender inequality and injustice against women in the name of religious dogma or cultural tradition, and how they can be promoted, if at all, as critical mechanisms for enhancing women's access to justice.

# Research objectives and parameters

1. The main objective of the research is to examine and evaluate women's access to justice in the plural legal systems of eight countries in Southeast Asia towards developing strategies for enhancing women's access to justice. The eight countries are Cambodia, Indonesia, Lao PDR, Myanmar, Philippines, Thailand, Timor Leste, and Viet Nam. The research will be directed at answering two main questions:
  - (a) *What does access to justice look like for women in the plural legal systems of Southeast Asia?*
  - (b) *How can an understanding of women's access to justice in the plural legal systems of Southeast Asia be used to inform strategies for enhancing women's access to justice?*
2. The examination of women's access to justice in plural legal systems in Southeast Asia will cover *state, non-state, and quasi-state legal orders* or justice mechanisms existing in well-defined communities, which are recognized and accepted as the legitimate sources of law and authority for conduct regulation and dispute resolution by members of the community, regardless of the legal order's relation to the state. A "well-defined community" may be confined to a territory or physical space, or defined by identity (e.g., by religion, culture, ethnicity, or sexuality) or political affiliation, among others, whether by ascription or self-ascription. Some itinerant or mobile populations may qualify as a well-defined community. Well-defined communities by political affiliation may include social or mass movements. Sometimes communities overlap and the issues they face intersect with those of other groups and communities (given multiple identities and self-ascription).
3. In answering the research questions, a number of sub-questions have to be answered as aspects of the problem of women's access to justice. Some of those questions are:

### A. What is access to justice?

1. The conceptions of access to justice discussed above came largely from the practice of state justice systems and international human rights institutions. Communities have their own notions and articulations of justice as part of their social practice of law. Women in communities may have their own conceptions and practices of access to justice given their distinct grievances and experiences in navigating (or not) both state and non-state justice systems. Thus, it is critical to engage women users and non-users of state and non-state justice systems toward a conceptualization of access to justice that is not prescriptive. Women's perspectives should be the starting point of any study on women's access to justice, and women's active participation is essential to the process of developing programs that seek to enhance their access to justice.
2. A community's concept and practice of justice may be integrally linked to the concept of mutual obligations of the members of the community, articulated in such statements as "to enjoin what is good and forbid what is bad/evil," or "what is not shameful," or "what does not put the community at risk." Justice may also be what brings peace to the community. Sometimes there may be contestations between women's individual claims for justice and community values. Women need to be empowered to engage with the community's notions and practice of justice as well as with the construction and distilling of knowledge in their customary, indigenous or religious tradition towards being full participants in the evolution of the norms and processes of the tradition. At the same time, it is also important to explore how collective justice is related to women's notions of justice and their struggles for their own empowerment. Constructive practices of justice should be given the same attention in the research as discriminatory or harmful ones. The concept of restorative justice or its equivalent in the community may also be explored.
3. The sense of civility and decency in an indigenous or customary justice system may be different from that in a community-based state justice mechanism (e.g., the *Katarungang Pambarangay* mechanism in the Philippines) found in the same community. There are also negative notions of justice in communities, such as when people believe that justice is only for the rich, or that it is inefficient, slow, and corruptible. Frustrations with the justice system may be expressed in common expressions like "*ipasa-Diyos na lang*" (Leave it to God).
4. Some of the questions that may be included in this inquiry are:
  - (a) What are the *elements* and *indicators* of access to justice for women? What kinds of systems, structures, and mechanisms are essential in women's access to justice? What structural changes are needed to enhance women's access to justice?
  - (b) What *normative standards* should be used in evaluating non-state justice systems? What are the obligations of non-state justice systems under international human rights law? Who decides whether the norms of a non-state justice system are just or appropriate for women?

- (c) Where do we *locate* the question of access to justice for women? Is it purely in the state justice systems, or must we include as well non-state justice systems that resolve disputes? Whose function is delivery of justice? Is it the state's exclusively? Or is the function shared by non-state justice systems? What are the implications of this for state obligations and accountability?
- (d) Are there 'indigenous' or tradition-based conceptions of 'rights' and 'justice' in the community? Or conversely, 'injustice' and 'wrongs'? Are there community principles that embody these conceptions, or traditions that communicate values or standards of justice? What are the linguistic expressions of these conceptions in the local language? Are there other cultural expressions of these conceptions?
- (e) Who should define justice? What standards must be used? How are women involved in developing standards for justice in the community? Is seeking justice the burden of the individual or victim? Is it a community concern? Why? Does conflict happen between the rights of the community and the rights of individuals, particularly of women? How are these conflicts resolved?
- (f) What is the relation of access to justice to the concept of justice? How does 'access to justice' relate to 'social justice'? Is access to justice simply access to a mechanism of justice without regard to the substance of rules that are implemented or to the end result of the process? Is access to justice about procedure, or substantive results, or both? Is the result of using the legal process a defining factor in women's conception of access to justice?
- (g) Is there a set of goals that should be served by access to justice? Do we measure access to justice in how it actually reduces (if at all) social disadvantages or in how it amplifies or accentuates social inequalities? Is access to justice or lack of it a measure of social inequalities? Can a system of justice function effectively and deliver justice despite existing social or structural inequalities?

#### *B. Are the state legal framework and justice chain gender-responsive?*

1. State justice systems sometimes fail to adequately respond to violations of women's human rights and women's particular needs for various reasons. The legal framework of the state may not be gender-responsive, such as when the laws themselves are discriminatory or do not recognize the rights of women or do not provide adequate and effective remedies. Social and institutional barriers also prevent women from accessing the state legal system. Those barriers include discriminatory practices and attitudes within justice and law enforcement agencies, lack of support services, the use of language that is not understood by users of the process, the high cost of litigation, and geographical distance of agencies.
2. Legal pluralism provides another dimension to the problem of women's access to justice. State legal pluralism in Southeast Asia usually involves different sets of state laws and justice mechanisms for different groups of people, depending

on their religion or ethnicity. Women generally suffer discrimination in this legal pluralism since laws based on cultural or religious identity often have unequal rules for men and women. This is especially true in laws governing marriage and the family, involving rights to enter into marriage, divorce, support, child custody and property. Some states use this differentiation based on cultural and religious identity to justify reservations to the CEDAW provisions on equal rights in marriage and the family. This differentiation effectively denies women justice for violations of their human rights, exacerbates their poverty, and restricts their political participation in the public sphere.

3. It may also be that the state legal system requires women to go through alternative procedures that do not necessarily serve their needs or interests. This may happen when state law requires women to submit their complaints to alternative dispute mechanisms as a prerequisite to accessing the court process, which could lead to inappropriate conciliation or settlement of gender-specific complaints such as domestic violence. In some cases, mediation or conciliation happens as a matter of institutional cultural practice within state dispute mechanisms even without a state law sanctioning or requiring it.
4. Evaluating the state legal framework and justice chain will involve the examination of the following areas:
  - (a) Form and structure of government, and the system of state governance, from the national to the local level, including its system of accountability;
  - (b) State justice system and its institutions, including (a) any specialized agency that handles gender-related cases, (b) their composition, powers, functions and rules of procedure, and (c) their relationship to the other institutions in the system of governance (i.e., in terms of checks and balances, including independence, appointments, and accountability);
  - (c) Alternative dispute resolution mechanisms in the state justice system, whether court-annexed, court-integrated, or community-based, including the general scope of their competence, the gender-related cases included within their competence, rules of procedure, and system of enforcement and implementation of decisions;
  - (d) Language policy in the state justice system, including the system of translation and interpretation, if any, for minorities and persons with disability;
  - (e) National framework and programmes on access to justice or justice reform, if any, including education and training programmes for justice system actors and community-based and public awareness programs;
  - (f) National human rights institutions and their mandate and programs with respect to access to justice, particularly of women;



- (g) System or program on free legal aid, if any, including availability of government prosecutors and public defenders in criminal trials and legal representation in civil claims, including those involving economic rights;
- (h) State-sponsored psycho-social and legal services for women and children who are victims of gender crimes or abuse;
- (i) Laws and policies related to non-state justice systems, including the application of gender equality, non-discrimination and equal protection legal provisions to them;
- (j) Laws and policies related to human rights in general;
- (k) Significant laws, policies, and jurisprudence or case law related to women's human rights, including:
  - i. formal legal equality and non-discrimination law or policy (as a constitutional policy or statutory norm);
  - ii. legal guarantees of political, civil, socio-economic and cultural rights;
  - iii. legal rights in marriage and the family, including property ownership, use and control, and inheritance;
  - iv. statutes related to gender-specific abuses (e.g., gender-based violence);
  - v. case law involving women's human rights (in any area), including illustrative cases of women's right of access to justice; and
  - vi. public interest litigation involving women that is pending before the courts.
- (l) Views and recommendations of human rights treaty bodies, including the CEDAW Committee, that are relevant to women's access to justice in the country;
- (m) Available oversight mechanisms to monitor the implementation and enforcement of laws related to gender equality, women's human rights and access to justice;
- (n) Issues, problems, and gaps related to the foregoing, as well as recommended areas for reform;
- (o) Availability of legal remedies within the state justice mechanism (e.g., constitutional challenges or test litigation) for any of the issues, problems, and gaps identified above.

### C. What is law in non-state legal orders?

1. Clarifying what constitutes law outside of state law, and its sharp distinction from social norms (as a form of social control) is part of the research inquiry in Southeast Asia's plural legal orders. As one socio-legal scholar asks, "where do we stop speaking of law and find ourselves simply describing social life?"<sup>46</sup> One scholar offers a definition of law that centers solely on its dispute resolution function: "a body of regularized procedures and normative standards, considered justiciable in any given group, which contributes to the creation and prevention of disputes, and to their settlement through an argumentative discourse, coupled with the threat of force."<sup>47</sup> Another, Tamanaha, offers what he calls a non-essentialist approach to identifying and delimiting law: "Law is whatever people identify and treat through their social practices as 'law.'" He proposes to examine the social practice of the community to identify from the body of social norms those that are considered law by the community. This would require a social practice that is sufficiently shared by the community where the "meaning and (material) activity are inseverably connected, giving to the manifestation of what is 'law'."<sup>48</sup>
2. If law is a social practice, understanding women's access to justice in plural legal systems can be understood by examining the social practice of 'law' in communities. It will show us what constitutes law to people, the source of its authority and legitimacy, its dispute resolution mechanisms, how those mechanisms function, their normative standards, and how the system of legal regulation is maintained. A community's social practice of law is a dynamic process that also evolves, and may be influenced by external factors such as the mass media.
3. The social practice of law may reflect a gender power structure and other hierarchies. For example, in some communities, male traditional leaders and religious scholars wield power over norm-setting and other decision-making processes. The construction and distilling of knowledge, including of what is customary, has to be examined in how it has excluded women.
4. Cultural or social norms are involved in the social practice of law in both state and non-state mechanisms. Sometimes this results in practices that are harmful or discriminatory to women under international human rights standards. Even the application of state law may be infused with the dominant cultural norms in the community. For example, while rape is considered a crime under state law, the accepted cultural practice in many communities is to marry off women rape victims to their rapists to avoid social embarrassment for the victim and punishment for the rapist. Forced marriage and kidnapping of women for marriage is also accepted in some cultures. Getting married or securing a divorce,

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46. Sally Merry, cited in Tamanaha 2000, p. 298.

47. Boaventura de Sousa Santos, cited in Tamanaha 2000, p. 302.

48. Tamanaha 2000, pp. 302, 313-314.

even in domestic violence situations, is a family decision in some communities, thereby subordinating the individual woman's welfare to what is considered the overall welfare of the family.

*D. What state and non-state justice mechanisms exist in the community? How do they work? How are they linked, if at all?*

1. State justice mechanisms may not actually be present at the level of the community. In such a case, non-state justice mechanisms, where they exist, sometimes assume the function of dispute resolution and justice delivery.
2. Still, state and non-state legal or justice systems do co-exist and function side by side in some communities, and they sometimes cooperate to settle conflicts in the community. For example, in one Muslim community in the south of the Philippines, a murder trial was suspended upon motion of the National Commission on Indigenous Peoples (NCIP), a state agency, in order to allow the parties to settle their conflict through a non-state justice mechanism. The court granted the motion, and the parties later submitted an amicable agreement involving payment of 'blood money,' which the court approved. The court eventually dismissed the criminal case. In this example, the NCIP was critical in enabling the state-non-state interface.
3. The benefits that women are able to secure from using non-state justice mechanisms must be examined as well as the disadvantages. While non-state mechanisms (e.g., mediation, arbitration, and tribal councils) may appear to be more accessible to women than state mechanisms in terms of cost, language, geography and the users' familiarity with customary law, their effectiveness in delivering justice still has to be studied. Non-state justice mechanisms may, in fact, be less accessible to women when the normative rules or standards they apply are male-defined morality (or normalcy), or when they are not open to address women's gender-based needs and experiences.
4. Studies on non-state justice systems document the various ways that non-state systems reflect patriarchal social norms, perpetuate gender inequities, and keep women disempowered. Sometimes, customary and religious legal norms deprive women of rights and protection that they would otherwise enjoy under state law. Examples include the unequal inheritance practices under traditional rules in Cambodia.<sup>49</sup> Discrimination against women is also linked to and exacerbated by the practice of child marriage,<sup>50</sup> which continues in the eight Southeast Asian countries, either as a state-sanctioned practice under exceptional circumstances or under state-enacted religious law,<sup>51</sup> or as part of a cultural tradition.

49. UN Women 2011, p. 70.

50. Ibid.

51. UN Data.

5. Since many cultural and religious traditions put greater emphasis on social cohesion and harmony than on individual rights, women may be denied redress for rights violations when they access non-state justice mechanisms. In some cases, no relief can be obtained at all from a customary or religious legal system, particularly when it does not provide sanctions for acts of violence against women.<sup>52</sup> Women are then left with the choice of accessing the state legal system, where it provides a remedy, or not accessing any state justice mechanism at all, especially when they are confronted with social and institutional barriers.
6. The questions that may be pursued in this area include:

#### *State mechanisms*

- (a) What state justice mechanisms are found in the community? If none is found in the community, where can they be found? Is their location accessible? How has location affected the filing of complaints or the resolution of disputes?
- (b) Do the state justice mechanisms apply to all, or do they apply only to a particular religious or ethnic group?
- (c) Are women familiar with the state justice mechanisms and how they operate?
- (d) What are the advantages, if any, of state mechanisms over non-state mechanisms?
- (e) What problems have women encountered with state justice mechanisms?
- (f) What beliefs or attitudes of the actors in the state justice system have adversely affected women who have accessed or tried to access the mechanisms?
- (g) What factors (personal, social, or institutional) have prevented women from accessing state justice mechanisms?

#### *Non-state mechanisms*

- (a) Is there any non-state institution or mechanism in the community that resolves disputes?
- (b) Is the non-state justice mechanism part of a religious or customary legal tradition?
- (c) How was this mechanism created? What is the source of its authority and legitimacy?
- (d) Who constitutes and controls the mechanism?

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52. UN Women 2011, p. 69.

- (e) Are women represented in the mechanism? Is there any barrier to women's participation or representation in the mechanism?
- (f) To whom is the mechanism accountable?
- (g) What kinds of disputes are brought before this mechanism? May women bring gender-specific cases or complaints for resolution here?
- (h) Why do parties or women bring their disputes to this mechanism?
- (i) What rules, oral or written, govern the non-state mechanism? Who made those rules? Are the rules responsive to women's needs or to violations of women's rights?
- (j) How does the mechanism resolve disputes?
- (k) What is the participation of the disputants in the process?
- (l) What results or forms of resolution can be expected from the mechanism, especially in gender-specific cases (e.g., domestic violence)?
- (m) How are the resolutions implemented or enforced? What are the problems in the implementation or enforcement of the resolution?
- (n) How does the community view dispute resolution by the non-state mechanism?
- (o) What are the advantages, if any, of choosing the non-state mechanism over the state mechanism?

#### *Links*

- (a) Does state law allow the non-state mechanism to resolve disputes? If yes, what disputes, particularly gender-specific disputes, are allowed? If yes, how does the state reinforce (or negate) the dispute-resolution function of the non-state mechanism? If no, what does the state do when the non-state mechanism resolves disputes?
- (b) What is the difference, if any, in how state and non-state mechanisms resolve gender-specific disputes?
- (c) How does the non-state justice mechanism relate to the local system of governance?

#### *E. What are women's conceptions of rights and violations? What are their experiences as users (or non-users) of justice mechanisms?*

1. For women to access a mechanism for justice, there has to be a grievance for which a remedy is sought. Some cultural or social beliefs hold legitimate certain acts or experiences that otherwise would be considered harmful or violations under international human rights law. Sometimes women themselves do not perceive any harm in their social experiences.



2. The research has to provide spaces for women to share and reflect on their personal experiences in using or not using state and non-state justice mechanisms; to articulate why and how they brought their grievances to a justice mechanism; to evaluate their experiences with the processes that were followed, the rules or norms that were applied, and the results that were achieved; and to identify and examine the political, economic and socio-cultural barriers or factors that affected their decisions not to pursue rights claims or redress for violations or harmful experiences in state and non-state justice mechanisms. Women have to participate in identifying their needs and determining the action that should be taken to enhance their access to justice.
3. Women with disabilities have specific access-to-justice issues and experiences that have to be considered in the research. Procedural accommodation (e.g., using interpreters) is one requirement for persons with disabilities to have access to justice, which is specified under the Convention on the Rights of Persons with Disabilities. Some barriers to accessing justice for women with disabilities may be reflective of society's view of disabilities as pathological. This view is institutionalized in state law and its institutions, resulting in the deprivation of persons with disabilities of legal capacity, personal agency, and rights.
4. Some of the questions that may be pursued in this area are:
  - (1) What *specific experiences* are perceived or identified by women as violations of their rights or as harmful to them, but considered by other people in the community as non-violations, not harmful enough to be addressed, or not harmful to women at all? What accounts for the differences in perception or identification? Is state law or cultural tradition a factor?
  - (2) If women perceived those *specific experiences* as rights violations or as harmful to them, what action did they take to address or seek redress or relief for the violations or harm?
    - a. If no action was taken, what accounted for the decision not to take action? Who or what was influential in the decision not to take action?
    - b. If action was taken but it did not include accessing any justice mechanism, whether state or non-state, what accounted for the decision not to access the mechanisms?
    - c. If action was taken involving accessing a mechanism, whether state or non-state, what accounted for the decision to take action and the choice of mechanism? Who or what was influential in the decision to choose a particular mechanism?

(3) Is any of the following a problem for women in the community?

- » domestic violence
- » sexual assault or rape
- » sexual harassment or other forms of abuse at work
- » general safety for women in public places
- » freedom of movement, including choice of residence
- » restrictions on choice and availability of paid work
- » discrimination in wages
- » property ownership
- » use of or control over land, property, or income
- » inheritance
- » access to public services
- » access to or availability of health care services, including those related to family planning and medicines
- » abortion
- » HIV/AIDS
- » decision-making within marriage or the family, including decisions related to children, fertility management, reproduction, sexuality, entering into marriage, and divorce
- » sexual orientation or gender identity
- » disability
- » citizenship

If yes, please explain why it is a problem for women in the community.

(4) What other problems or issues do women face in addition to those mentioned above?

(5) Which of the issues or problems identified may not be brought for redress or resolution by either the state or non-state justice mechanism? Why?

- (6) Is there any women's issue or problem that the community considers a 'private' matter and therefore not a legitimate concern of the justice system, whether state or non-state?
- (7) For those who accessed a state or non-state justice mechanism:
  - a. What was the woman's objective in accessing the process?
    - i. How was this objective defined or identified, or who defined this objective?
    - ii. Who decided on what right to claim, what remedy to pursue, and what mechanism to access?
    - iii. How much participation did the woman have in decision making?
    - iv. Did the woman understand her rights and the process she had to go through?
  - b. What experiences did the woman have in accessing the process and remedy chosen?
    - i. What factors affected the woman's access to the mechanism (e.g., cost of access or poverty, language, education, ethnic, religious or other identification, availability of support services)?
  - c. Did the woman pursue the chosen remedy to the end?
    - i. If yes, what factors facilitated it? If no, what factors hindered her from pursuing the process to the end?
  - d. Did the woman receive any psycho-social and legal support in the course of accessing justice?
    - i. What kind of support did she receive and from whom/ where?
    - ii. Was the support adequate and effective?
    - iii. How did the kind and quality of support she received affect the pursuit of her claims?
  - e. Were legal professionals (i.e., lawyers, prosecutors and judges) involved in the process?
    - i. How did the legal professionals affect the woman's access to justice?
    - ii. What factors affected or constrained the legal professionals' delivery of justice?

- f. If a state mechanism was involved, how did the state actors in the mechanism facilitate or hinder access to justice? What factors constrained the state actors in performing their roles in justice delivery?
- g. Were the rules and processes of the mechanism sensitive or responsive to the context and circumstances of the dispute? Did the rules and processes encourage participation?
- h. What was the result of accessing the mechanism? Did the woman achieve her objective? Did the woman receive the relief she sought? If no, why?
- i. Was the resolution implemented or enforced? What facilitated its implementation or enforcement? What prevented its enforcement or implementation?
- j. How did the woman receive the result? How did the community receive the result? How did other women receive the result?
- k. Did the experience of access encourage or discourage repeat access by the woman or access by other women?
- l. Was the result an affirmation of cultural norms? Was the result transformative of conventional views or norms?
- m. What cultural controls or norms that exist in the community encourage, reinforce, discourage, or prevent women's access to dispute resolution mechanisms (whether state or non-state)? What cultural controls or norms contribute to or negate the effectiveness of access? What cultural processes, if any, provide women remedies in lieu of access to the state or non-state dispute resolution mechanisms?
- n. What factors or forces in the community facilitate or hinder the effective delivery of justice for women by the state or non-state mechanism?

*F. What issues and problems in the community are related to access to justice?*

1. Access-to-justice issues cannot be isolated from broad structural and development issues affecting communities and women. Poverty, unemployment, lack of access to and control over economic resources, lack of social services, land-grabbing and struggles for control over land, and environmental destruction have direct bearing and impact on women's access to justice.

2. Generally, when civil and political rights are involved, the issues related to access to justice are straightforward. In contrast, access to justice to secure economic rights is problematic. Economic rights are generally not justiciable, while indigenous, customary or community-based legal mechanisms have no power to decide over community resource allocations. For example, how can marginalized groups use any justice mechanism, whether state or non-state, to obtain access to basic services (e.g., education) or resources (e.g., land and credit)? Accessing a justice mechanism to secure economic and social rights may also be impossible for itinerant or mobile groups who are denied basic social services because they are not considered part of the legitimate population (e.g., the Badias in the south of the Philippines).
3. The questions that may be asked in this area include:
  - (1) What problems does the community face as a whole? How do these problems affect the community? In what specific ways has the community (or sections of it) coped with the problems or with the effects of the problems? What action, if any, has the community taken to address the problems? Are the problems 'problems of access to justice'? Why?
  - (2) What factors in the community affect the promotion of women's human rights in general and their access to justice in particular?

#### *G. How could women's access to justice be enhanced?*

1. The questions that may be asked in this area include:
  - (1) How should the state relate to non-state justice systems? Should the state support non-state justice systems? Should the state integrate into the official justice system non-state justice mechanisms when they are perceived to be effective? Should non-state justice mechanisms be allowed to operate independently? Should the state circumscribe their functioning? What are the implications for women and communities of state engagement with non-state justice systems?
  - (2) What conditions must exist for women to have access to justice? What needs must be addressed to promote women's access to justice?
  - (3) What changes or reforms are needed for the justice system to be responsive to women's needs?
  - (4) In the case of a customary or religious or non-state justice mechanism, what kind of intervention is needed to improve the mechanism?
  - (5) What needs of women (political, socio-cultural, economic, etc.) are not being addressed by the justice system? How do these needs affect women's access to justice?



- (6) What could be done (by women, groups and institutions within the community) to address the needs identified? What steps must be taken to address these needs? How can these efforts be sustained?
- (7) What can women do to make the justice mechanisms responsive to their situation and needs?
- (8) What resources are needed to undertake the steps or the action identified?

# Methodology

The research methodology will have to be worked out by the different research teams involved. However, whatever methodology is selected will have to serve the objectives of the research and the two main research questions.



# Some research considerations

1. The study of women's access to justice in Southeast Asia should take note of lessons from the histories of the countries in the region, both in the colonial and postcolonial periods. The impact on the poor and the disadvantaged, including women, of the colonial and postcolonial transplantation and imposition of laws and efforts to achieve a unitary state legal order should weigh in on any study on state and non-state justice systems.
2. Concerns have been raised regarding the effectiveness of direct interventions to make the normative rules of state and non-state justice systems conform to international human rights standards. It has been pointed out that without any general social acceptance or corresponding engagement with deeper processes of social change, formal changes in laws are ineffective in changing social behavior. Further, there is concern that interventions in traditional or customary legal systems may disrupt the fluid, dynamic and flexible nature of customary law and its dispute resolution function, which provides 'considerable space for contestation and adaptation,' and may actually reduce the spaces where women can engage in constructive contestation to advance their rights.<sup>53</sup> Formalizing traditional or indigenous non-state justice systems may also prejudice the effectiveness of these systems. These concerns must be taken into account both in the study of women's access to justice and in developing programs to enhance women's access to justice.
3. Advocating women's human rights in the context of religion and culture presents challenges. In conducting research, it is critical to have sensitivity and respect for the cultural norms and values of the community. The principles and standards of the Women's Convention may still be used to underpin any community-based advocacy, but its effectiveness would require invoking community values that are commensurable to human rights principles and standards, or finding the dynamic equivalence of human rights in the cultural or religious tradition, or identifying areas of convergence and compatibility. Communities have to be engaged in critically examining their own

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53. Chopra & Isser 2012; see, for example, UN Women 2011, p. 72.

norms and practices and be capacitated to address by themselves those that are discriminatory or harmful to women.

4. In studying non-state justice or legal systems, it is also critical to surface how the community protects women. Closely examining a culture may reveal practices that may be consistent with the Women's Convention or human rights standards, even if the language used is different.
5. Anecdotal cases of individual experiences on the ground, which may not capture the complexities of the culture and the context of the tradition involved, should not be used as bases to judge a culture or make generalizations about its character.
6. Local community experiences might not be considered authoritative or legitimate for forming generalizations because they may appear too particular or micro. Also, recording the unwritten, ad hoc and undocumented decisions and processes of non-state systems poses dangers such as misinterpretation, distortion, misappropriation and fixation that may corrupt the integrity, character or nature of the processes. It is also critical to consider that existing data and knowledge in the community may have come from mostly male sources or experts, excluding women's experiences and knowledge. The research should take this into account so as not to distort the significance of available data.
7. Protocols and ethics in conducting research and in using the research output should be set in place and observed. These considerations should underpin the choice of methodologies. The community's ownership of the knowledge gathered must be considered.

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