Law and Development: **In Focus**

SPRING 2013
ISSUE 3

In this issue

Development, human rights and the law

Recognising and realising the right to water

Indigenous peoples' collective property rights

Save the Children on the rights of the child

Protecting the *rights* not to be trafficked

Law and Development: **In Focus**

The idea of human rights has always been controversial. Its history is rooted in revolution, revolt and protest.

Over time it has lost little of its edge. Today, across the world proponents and detractors – with equal passion – use rights-language as either a call-to-arms for change or decry it as a barrier to true justice. We should expect nothing less. Tension is inherent in human rights, as the different rights of different people are not always easy – or indeed possible – to reconcile.

In this context of tension, the law and lawyers have a critical role. The law acts both as the ultimate standard for the protection of rights and to provide a framework for balancing rights in conflict, while lawyers and judges act as advocates and arbiters for and between rights-bearers. The law adds codification and clarity; it seeks to resolve the tension as satisfactorily as possible.

Over the last decades, organisations seeking to eradicate world poverty (whether governments, NGOs or international bodies) having increasingly seen development through the lens of human rights. They have posited that the best route to securing development lies through the realisation of rights, and the realisation of rights through development. The law's central role is as true for such an approach to development as it is in a domestic context, as this issue of Law and Development: In Focus explores. In it our contributors highlight: what happens when international commitments to rights are not translated into domestic implementation; how strategic litigation can be used to force states to protect rights; how legal structures can stand in the way of prosecuting rights violations and how the legal understanding of rights must be sensitive to context.

The fact that explicit recognition of rights in law and policy does not automatically translate into reality is well-known to those working in the field of international development. Governments endorse UN agreements, targets and policies without effectively implementing them at the national level. In his article on the right to water, the ODI's Peter Newborne explores the contrasting experiences of the UK – where access to water is not recognised as a human right in law, but exists de facto – and Burkina Faso – where it is recognised, but not realised. In our interview with Solomon Sacco from Interights the theme is taken a step further by exploring the practical role lawyers can have in holding governments to their rights duties through strategic litigation. Sacco has a stark message about the role of lawyers. The failure to realise rights in developing countries, he says, is due in part to poor structures and a lack of resources, but it is also a matter of prioritisation. As such, future progress on realising rights will depend on lawyers in domestic jurisdictions working effectively in collaboration with affected communities and civil society organisations to force change.

In her article on the rights of the child and introducing Save the Children's new campaign on sexual exploitation in conflict zones, Ashley Jones examines instances where legal structures can actually form part of the barrier to the realisation of rights in developing countries. Using examples from Afghanistan, Sudan and the DRC, she demonstrates how victim-unfriendly procedural and legal requirements can lead to situations where, for example, only 2% of rape reports lead to prosecution, leaving children's rights unprotected. Nor is it only legal processes that can lead to the failure to realise rights; it can also be our fundamental misunderstanding of those rights in a new context. Carla Clarke of Minority Rights Group International charts how our legal conception of the right to property has had to shift over time to accommodate the collective rights of indigenous peoples.

Just as the concept of human rights was born out of controversy, the rights-based approach to development is not without its critics. In any case, whether as the central ambition of eradicating poverty or as a tool to push development forward, it is clear that when it comes to realising the rights of the most vulnerable people on the planet – those living in extreme poverty – lawyers have a central role to play.

Yasmin Batliwala
Chief Executive A4ID
yasmin.batliwala@a4id.org

A4ID at a glance

45
legal partners committed to using law to support international development

A global network of over
40,000
lawyers from Europe, US, Africa, India Middle East and Australasia

More than
452
development organisations and social enterprises able to access free legal advice

1,227
projects circulated to our legal network

Projects have impacted on
114
countries

Free legal advice worth more than
£25 million
provided to those furthering the aims of the Millennium Development Goals

A growing group of legal and development professionals, keen to explore how they can work together to combat global poverty

A4ID would like to thank our all our contributors for their assistance in producing content for this newsletter.

Cover image: Robin Wyatt

All roads lead to... the realisation of the right to water

Peter Newborn

Since the 2010 passing of UN resolutions confirming the right to drinking water (and sanitation) as a human right under international law, the focus has been on the steps taken by individual countries to 'progressively realise' the right to 'accessible', 'affordable', 'safe' and 'sufficient' water[1].

Comparison of the status of the right in two countries illustrates the different roads, and roadblocks, to the realisation of that goal.

Burkina Faso

In Burkina Faso - one of the countries which voted in favour of the UN General Assembly resolution – the 2001 national water law explicitly recognised the right to water, and national water policy added that, as regards access to drinking water, "the different categories of population must be treated equitably"[2]. In practice, however, the water ministry has been found by the research project led by the Overseas Development Institute-ODI, commissioned by Water Aid, to have omitted from its contract with the national water company the performance targets and incentives needed to encourage the company to extend access to low-income households in slum areas. Currently, a key cog in the institutional and legal machinery for making progress towards the right is missing. In Burkina, therefore, despite explicit recognition in law and policy, the right to water has yet to translate into reality.

The UK

The UK was, meanwhile, one of those countries that abstained from the UN vote. As a result, however, of a 1999 law[3], water companies are obliged to maintain supply to residential dwellings in England and Wales (all those occupied as sole or principal homes), alongside hospitals, care homes, schools and others premises delivering key public services. In the words of the relevant government department (Defra): "water is essential for life and health and it cannot be right for anyone to be deprived of it simply because they cannot afford to pay their bill". Access to domestic water is thereby protected, though not as a human right: legal protection to household water supply has been accorded by a different route - a term implied by statute into the contracts between water companies and their customers[4]. Calls to extend the scope of human rights to healthcare, education and other socio-economic rights have so far been unsuccessful . And, in the current political climate where the scope of rights and their interpretation by judges are being challenged by government departments, the inclusion of domestic customers in the above 1999 legislative provision might potentially be vulnerable to repeal.

While, therefore, it may be that 'all roads will lead to … realisation of the right to water', experience shows that many such roads may be long and some are likely to be winding. •

Further comparative case studies would usefully shed light on the progress towards realisation of the human right in different countries - the different ways by which the various pieces in the puzzle - policy, legal and regulatory, institutional, economic/financial and technical - may be put in place, and especially not forgetting the political 'glue' required to maintain them. Firms/organisations wishing to contribute to compiling such comparative case studies are requested to contact the author at: p.newborne.ra@odi.org.uk.

Peter Newborne is Research Associate to the Water Policy Programme at the Overseas Development Institute-ODI, based in London. Before working in international development, Peter practised for 10 years as a solicitor in Paris and the City of London.

Image © Robin Wyatt

[1]The key components of the human right set out in UN General Comment no.15 (2003).
[2]Respectively, Article 2 of the Water Policy Management Act and La Politique Nationale de l'Eau from 1998.
[3]Water Industry Act 1999, in an amendment to Section 61 of the 'WIA' 1991.
[4]On the contractual form, see: Newborne, P. (2004), 'Right to Water: Legal Forms, Political Channels', ODI Briefing Paper.
[5]Adding social rights to the 1998 Human Rights Act was considered in a March 2009 Green Paper.

Interview

Securing the right to education through strategic litigation

Solomon Sacco is a Zimbabwean lawyer who works for Interights, a human rights litigation centre litigating on human rights cases. They take cases on economic, social and cultural rights (particularly rights to health and education), security and rule of law, and equality.

Do you see strategic litigation as an important development tool or as a last resort?

I think that strategic litigation is an important advocacy tool to achieve social change but it is only one among a number of different strategies that can be used. Often other strategies such as publicity campaigns and social mobilisation are more effective in bringing attention and political action to an economic and social rights issue. Even where litigation is initiated this is usually as part of a wider campaign. So instead of a last resort I would say that strategic litigation should be part of a wider strategy.

What steps can you take to ensure that strategic litigation will be effective in protecting education rights where states have not yet accepted the justiciability of socio-economic rights?

There are sometimes other domestic ways in which economic and social rights can be enforced, through discrimination litigation for example, or through the use of administrative law remedies. Where none of these remedies provide protection in an individual case it would usually be possible to take a case to the regional level, to the African Commission or Court on Human and Peoples' Rights.

How do you approach states where there is no precedent of bringing cases on the right to education to court?

There is very little precedent generally on the right to education. We try to encourage the use of comparative and international law so we would provide national lawyers with case law from international and national jurisdictions on education law where possible but otherwise on economic and social rights more generally as well as on equality and non-discrimination. First cases on the right to education should often be on the immediate obligations, particularly the non-discrimination obligation. We would therefore encourage domestic lawyers to build up national jurisprudence by starting with non-discrimination cases and developing the courts' understanding of the issues.

> ***"…instead of a last resort I would say that strategic litigation should be part of a wider strategy."***

What approach does Interights take to ensure that the likelihood of a successful outcome is as high as possible?

One of the most important aspects of strategic litigation is case selection. This may have some effect in preventing an unsuccessful result. Otherwise public information campaigns and other forms of advocacy are crucial in ensuring that public perception is in favour of the case as this can have an impact on the way courts decide in new cases.

When states are not ensuring access to education, is this mainly because they are unable or unwilling?

My opinion is that it is usually a matter of priorities within governments. Thus education may be less prioritised than the military. Even where education does receive a large percentage of the national budget there may be a failure within national policies to prioritise the interests and rights of vulnerable groups such as the poor. Government plans and policies often allocate the same if not more to the provision of education to wealthier children as they do to disadvantaged children. In other words there is a failure to develop and implement human rights-informed policies.

If states are unable to provide access to education due to a lack of resources, what chance will there be of redress even if a case is successful?

There are opportunities to receive international assistance towards the realisation of economic and social rights and national decisions to the effect that a state is failing to ensure enjoyment of the right to education may be a useful advocacy tool for that government when it seeks international assistance. Even where there are resource constraints it may be possible for litigators to identify areas where the problems are more to do with failure to prioritise the right to education rather than an absolute lack of resources. In such instances it is perhaps best to emphasise the obligations to ensure basic enjoyment of the right by all and therefore argue for particular attention to the most vulnerable in society.

> ***"…public information campaigns … can have an impact on the way the court decides…"***

How do you see the use of strategic litigation to promote social and economic rights developing in the future?

Hopefully there will be a number of developments – both procedural and substantive. When the protocol to the optional protocol comes into force there will be a new forum at the United Nations to enforce economic and social rights. This should improve understanding of state obligations around minimum core obligations, particularly as these interface with the reasonableness review, which has been incorporated into the optional protocol. National courts in countries like South Africa and Kenya will be asked more complicated questions, such as the content of the obligations inherent in the immediate obligation to provide primary/basic education. A lot will depend, however, on progressive lawyers in domestic jurisdictions developing effective litigation strategies in collaboration with affected communities and civil society organisations. •

Image © Robin Wyatt

Indigenous peoples' collective right to property

Carla Clarke

The right to property has not had an easy ride as a human right both on philosophical and ideological/political grounds. It is there in Article 17 of the Universal Declaration of Human Rights, but it failed to find its way into either the International Covenant on Civil and Political Rights or the International Covenant on Economic, Social and Cultural Rights. Members of the Council of Europe struggled with its scope such that it is to be found in Protocol 1 to the European Convention on Human Rights rather than in the Convention itself. American and African states at least fared better, including the right to property in their principal regional human rights instruments directly alongside the right to life and the right not to be tortured. Controversies surrounding the right have ranged from who are the right holders (Article 1, Protocol 1 of the ECHR refers to "every natural or legal person") and whether the right can be individualistically justified (particularly in wealthy societies), to the restrictions to which the right can legitimately be subjected.

Absent from those earlier (and, in some quarters, still continuing) debates, were questions around the right to property as a collective right. Despite this, for indigenous peoples, with their tradition of communal property and collective ownership, their right to property has gained increasing recognition and protection in recent years, at least at the level of standard setting. While ILO Convention no 169, adopted in 1989, is the only legally binding international instrument focussing on the rights of indigenous peoples, the UN Declaration on the Rights of Indigenous Peoples (2007) (UNDRIP) is viewed by many as containing elements which are approaching the status of customary international law. Behind this move to greater protection lies recognition of the fundamental nature of the relationship between indigenous peoples, their traditionally occupied land and its resources. This relationship was captured by the Inter American Court of Human Rights in its landmark case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua where the Court accepted for the first time that the right to property included the right of indigenous peoples' to their communally held property:

> *"Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations"*

Since the Awas Tingni case the IACtHR and, more recently, the African Commission on Human and Peoples' Rights, have further refined the duties states must uphold if any restrictions on the right are to be lawfully justified. They incorporate, inter alia, requirements of effective participation of the community, benefit-sharing and the carrying out of prior environmental and social impact assessments.

Unfortunately, actual implementation of the above standards and of tribunal decisions lags behind their promulgation. The situation of the Maya in Belize provides a stark example of this. The Belize government was one of the 143 governments which voted in favour of the UNDRIP. Furthermore, in a case brought by the Maya before the Inter American Commission on Human Rights, the Commission found in 2004 that Belize had violated the Mayan's right to property by the failure to demarcate and title their traditional lands and by granting logging and oil concessions over the same. Subsequently, in two domestic cases of 2007 and 2009, the Supreme Court of Belize, essentially reiterated the findings of the Inter American Commission and ordered, inter alia, that the Belize government abstain from any acts (including expressly the granting of oil concessions) that might affect the existence, value, use or enjoyment of the lands of the Maya without their informed consent. Notwithstanding all these factors in the Mayan's favour, at the end of 2012 a Texan-based oil-company secured from the government of Belize a concession for oil exploration following only minimal consultation with the affected Maya communities.

Even as the legal protection provided to indigenous peoples' right to property increases so too do the threats to such a right, given indigenous peoples' occupation of lands which are often rich in natural resources and the largely unspoilt manner in which they have conserved their habitats. Ensuring respect for and enforcement of laws regarding indigenous peoples' right to property therefore requires a multi-pronged approach of which litigation is but one tool besides others such as advocacy, campaigning, education, capacity building and even direct action. Whether the Maya of Belize and other indigenous peoples will succeed in upholding their rights in a world where the mindset of the dominant players is that their land and its resources are commodities to be bought and sold remains very much to be seen. •

Carla Clarke is currently legal cases officer at Minority Rights Group International. Further analysis of the situation facing indigenous peoples and minorities and their natural resources can be found in MRG's State of the World Report 2012, available at http://www.minorityrights.org.

Image © Gwenn Dubourthoumi/IRIN

Women's rights and development: an exemplar of the rights-based approach

Eva Okunbor

The reciprocal relationship between development and realising human rights is perhaps nowhere better exemplified than by women's rights. Women play a vital role in poverty alleviation, which they are only able to do fully if they are empowered to by being granted basic rights. The advantages gained from realising a woman's rights to basic goods, education, political access and protection, etc. create positive ripple effects that help to ensure their children's education, reduce the rate of child mortality, increase the economic productivity of the communities in which they live, and more.

The inherent equality of the genders and the positive relationship between achieving actual equality and development is broadly accepted at the international level. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted by the General Assembly in 1979 and ratified by an overwhelming majority of states is often described as an 'international bill of rights for women' and recognises the fundamental "equal rights of men and women". Likewise, at the 2005 session of the UN Commission on the Status of Women (CSW), former UN Secretary-General Kofi Annan stated that "there is no tool for development more effective than the empowerment of women". Two of the Millennium Development Goals (MDGs), goal 3 - to promote gender equality - and goal 5 - to improve maternal health - are explicitly linked to women; and gender equality is mainstreamed into all the goals with the expectation that they are achieved in a non-gender discriminatory way.

But whilst the role of women in development is recognised at an international level, the global failure to make a step-change in gender equality – typified by the woeful steps towards achieving MDG 5 – demonstrates a disconnect with actual progress. In this way, it demonstrates the fundamental difference, challenge and controversy of the rights-based approach to development. For it is not enough following a rights-based approach, to simply accept at an international level or in a donor country that the genders are equal and seek to 'improve the lot' of women; a true rights-based approach sees legal, social and attitudinal domestic change as a necessary condition of progress.

The recent developments in India represent a good example of how this change may look in practice. The Indian government ratified CEDAW in 1993, showing its international commitment to the rights of women. However, even before the 2012 gang rape and subsequent death of a 23-year of student in Delhi, the prevalence of discriminatory attitudes, institutionalised and exacerbated by a lack of access to justice, demonstrated a domestic disconnect with the principles underpinning CEDAW. While some practical and positive steps in empowering women had been taken in the country – through women's roles in microfinance, for example – their full capacity to both claim their rights and contribute towards combating poverty remained unfulfilled. The tragedy of the 2012 case and subsequent domestic outrage has provided pressure for legal change – such as the criminalisation of marital rape – in the country, however, that may lead to the fuller realisation of women's rights. In this way, the fundamental shift in attitudes (or at least a recalibration of the dominant socio-political view) towards women is driving forward progress.

Experiences such as India present a glimpse of the necessary steps that need to be taken for international development and help us to consider how those steps could be taken outside the context of a response to a national tragedy. As the MDGs' 2015 deadline approaches, the global experience of the disconnect between international commitments and the actual realisation of women's rights in-country must be considered if the post-2015 agenda is to more effectively achieve gender equality in order to drive development. •

Image © Robin Wyatt and PCI India

Our impact

Working to realise women's rights with Equality Now

An update on how our work is contributing to the global fight against poverty.

The issue

Every March on International Woman's Day (IWD) the world comes together to celebrate the economic, political and social achievements of women across the world. However, despite the progress made, the fact remains that human rights of women and girls is still a major global issue, including in the developing world. This year's theme for IWD was "A promise is a promise: Time for action to end violence against women." The theme has of course been a major topic in recent times given the huge outcry and call for legal reform in the aftermath of the Delhi gang rape case in 2012.

The organisation

Equality Now, an A4ID development partner, works for the protection and promotion of the human rights of women and girls around the world including calling for the repeal of all laws that discriminate against women. Whilst discrimination against women is partly a consequence of cultural norms and practices, it is also a legal issue. Legal discrimination against women can take many forms; gender neutral laws, the inadequate enforcement of laws and lack of access to justice.

A major step was taken to address discrimination against women in 1995 when 189 governments attended the UN's Fourth World Conference on Women in Beijing. This resulted in a document called the 'Platform for Action' which called for concrete action to enhance the advancement and empowerment of women all over the world e.g. the revocation of all remaining laws that discriminate on the basis of sex. At the 'Beijing+5' review meeting in 2000, governments set themselves a target date of 2005 to achieve this. However, this goal has still not been met.

Equality Now is working to push governments towards meeting the goal by documenting and seeking the repeal of a large number of explicitly discriminatory laws covering everything from citizenship to employment, inheritance to divorce.

As part of this work they produce regular reports highlighting a representative sample of laws around the world that discriminate against women. They also provide input into various reports as an NGO stakeholder, including a report prepared by the Office of the High Commissioner for Human Rights on how the UN deals with discriminatory laws through its various mechanisms

The project

Equality Now approached A4ID seeking support in their work. Through our pro bono lawyers from the DRC, Ecuador, Burma, Somalia and Tunisia A4ID was able to ensure that crucial legal research relating to discriminatory laws in their countries was conducted. Access to local lawyers was essential for this project as these individuals had in-depth expertise and the ability to comment on country-specific issues. This was used to supplement the desk-based research carried out by Equality Now.

Equality Now described the legal research assistance as invaluable. The organisation used it also where it could to directly feed into international legal mechanisms: the Committee on the Elimination of Discrimination against Women (CEDAW) individual country reviews, and the UN Human Rights Council's Universal Periodic Reviews. •

Image © Kate Holt/IRIN

The *rights* not to be trafficked: a legal overview

Jennifer Button

Throughout the world, trafficking in human beings is the means through which a number of reprehensible activities are carried out, the common characteristic of all being that the victims are treated as merchandise, "owned" by their traffickers, with no regard for their human rights and dignity.

Trafficking is not the same as human smuggling. While the latter may also include human rights abuses, it is essentially a situation in which persons voluntarily pay a fee in order to be transported to a destination, at which point they are left to their own devices.

In reality, of course, human trafficking and human smuggling frequently overlap, as vulnerable persons who are smuggled into a country often find themselves in situations which result in their being trafficked.

Over the last century the international community has put in place a large number of international instruments with provisions that relate to human trafficking, including the International Labour Organization (ILO) Conventions on Forced or Compulsory Labour, Abolition of Forced Labour and Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, and the UN's Conventions on the Rights of the Child, the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery and the Elimination of All Forms of Discrimination against Women.

However, the current principal international instrument dealing with human trafficking entered into force less than a decade ago. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children [the "Protocol"] - a protocol to the 2000 UN Convention against Transnational Organized Crime - entered into force on December 25, 2003. As of February 28, 2013, it had 117 Signatories and 154 Parties.

"Trafficking in Persons" is defined in the Protocol (Article 3) as:

"[…] the recruitment, transportation, transfer, harbouring or receipt of persons, by means *of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person,* for the purpose of exploitation*" (emphasis added)*

Exploitation of the victim, which is the purpose of trafficking, includes:

"[…] at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs" (Protocol, Art. 3)

A central goal of the Protocol is to have countries enact domestic legislation to criminalize trafficking in persons and related offences, prescribe appropriate punishment, and give priority to the investigation and prosecution of trafficking offences. In 2009, the United Nations Office on Drugs and Crime ["UNODC"], which has a Global Programme against Trafficking in Persons, developed a Model Law against Trafficking in Persons in order to support country-level efforts to develop or amend national legislation so as to implement the Protocol provisions.

While progress has been made legally to identify and prohibit trafficking, the complex, dynamic and global nature of the crime means that enforcement is far from simple. UNODC's first Global Report on Trafficking in Persons and the ILO's "Global Estimate of Forced Labour", both published last year illustrate the nature of the problem. For instance, the UNODC Report recognizes the fact that whilst human trafficking is widespread it does not always involve moving persons across great distances or even into other countries. So, while, between 2007 and 2010 victims of 136 different nationalities were detected in 118 countries worldwide, almost half of victims detected were trafficked across borders within their region of origin. Some 27 per cent were trafficked within their country of origin. The motivation for trafficking was also identified as heterogeneous, from sexual exploitation (58 per cent of all trafficking cases) to forced labour (36 per cent), begging (1.5 per cent) and even trafficking for the removal of organs (detected in 16 countries).

As such, the Global Plan of Action to Combat Trafficking in Persons adopted by the UN in 2010 urges the international community not only to take steps to prevent trafficking and to prosecute trafficking offenders, but also to protect and offer assistance to victims of trafficking. This latter goal has in turn prompted the creation of the United Nations Voluntary Trust Fund for Victims of Trafficking in Persons, which as well as supporting on-the-ground humanitarian and financial aid, enlists the vital legal support the victims of trafficking inevitably require. Despite progress, it is clear that the role of lawyers in helping to tackle human trafficking is not over yet. •

Jennifer Button is legal council to the Government of British Columbia

Image © Kirsty Siegfried/IRIN

Rights of the child: legal reform to help protect children from sexual violence in conflict

Ashley Jones, Save the Children

"I want to tell the world that we need peace - stop the war. We need to make sure children and women are protected. People who rape need to be arrested." - Félicité, aged 13, who was raped in DRC[1]

Rape and sexual violence in conflict are clearly outlawed by international criminal, humanitarian and human rights laws, as well as most national laws. Nevertheless these horrific crimes remain endemic in many conflicts all over the world – from DRC to Afghanistan to Colombia to Somalia – and perpetrators are rarely brought to justice.

The UK Government has committed to using its G8 presidency in 2013 to raise awareness of the issue and campaign for stronger international and national action, including through its Prevention of Sexual Violence Initiative. On 10 April, Foreign Ministers will come together to decide what action to take.

In the lead up to this meeting, Save the Children will publish a report highlighting that children constitute a significant proportion of survivors of sexual violence in conflicts, in some cases the majority. Consequently it is key that efforts to prevent, protect and respond to sexual violence recognise and include the gender- and age-specific needs and vulnerabilities of survivors.

Girls in particular are disproportionately affected, with rape having disastrous consequences on their future lives, health and livelihoods, often condemning them to a life of exclusion and poverty. Some are forced to marry their attacker, ostracised or rejected by their family and community as a result of perceived "dishonour". They may be expelled from school, especially if they fall pregnant as a result of the rape. Although less apparent, sexual violence against boys is more common that we think, and because of the stigma against homosexuality in many countries, reporting levels for boys are even lower.

In our upcoming report, Save the Children will propose a holistic approach to combatting sexual violence against children, requiring broad action to empower children and communities, change social norms, reform laws and institutions and deliver comprehensive child-centred services. We will be calling for increased political priority and funding for preventing and responding to sexual violence on the ground in conflict-affected countries, including ensuring that funding for protection of women and children (including from sexual violence) is considered as essential, life-saving and part of every humanitarian response.

So how can legal reform help to protect the children from these terrible rights infringments, if at all? Clearly, increasing the prosecution of offenders is essential. Of 14,200 reports of rape registered in South Kivu between 2005 and 2007, for example, only 2% of perpetrators were brought to justice.[2]

States need to ensure their national criminal laws are compliant with international law standards, and criminal justice systems are made accessible and effective to encourage reporting and increase prosecution rates. This includes ensuring that justice is accessible and sensitive to the needs of child survivors through the inclusion of child-friendly justice mechanisms and procedures, and ensuring that sufficient medical and psychological support and protection services are available.

Evidentiary and procedural barriers to prosecutions for rape and sexual violence – both within and outside of conflict - need to be identified and removed. An extreme example is Sudan, where many judges require four male witnesses to testify that the rape took place to secure a conviction. Any rigid approach to the prosecution of sexual offences, such as requiring proof of force or physical resistance, also risks leaving certain types of rape unpunished.[3]

Even where national laws are in line with international law, customary laws or practice still prevail in many parts of some states to penalise survivors for adultery or homosexuality when they try to report the rape. In Afghanistan, for example, a comprehensive law criminalising all forms of violence against women, including rape, was introduced in 2009, yet in many parts of the country married women who have been raped are still subject to punishment for adultery.

Beyond reforming and enforcing criminal laws, however, equally important is using laws and policies to address discriminatory gender attitudes, social norms and other underlying causes of sexual violence. Discriminatory laws relating to child marriage, statutory rape, domestic violence and sexual exploitation, for example, help to perpetuate a culture where sexual violence is tolerated. In too many countries, rape or violence within marriage is not considered wrongful, a rapist can escape criminal liability by marrying their victim and child marriage and exploitation is widespread.

Unless such norms are addressed in stable conditions, then the disruption and breakdown of social order during conflict will inevitably continue to lead to increased levels of sexual violence when a conflict begins.

Save the Children welcomes the UK Government's initiative, but to be successful it must go wider than increasing the number of prosecutions and it must tackle the root causes of sexual violence. Law reform is only one aspect of wide ranging international and national action that is needed, but it may be an essential stepping stone to achieving long-term improvements for survivors and future potential victims of sexual violence in conflict.

Save the Children's report, plus a more detailed analysis of law reforms to help prevent sexual violence, will be available via the A4ID website when they are published. •

Ashley Jones is a lawyer and policy adviser for child survival at Save the Children

Image © Francesca Tosarelli/Save the Children

[1] Forthcoming Save the Children case study, 2013
[2] UNDP: Trust Fund Factsheet for the UN Fund for Action against Sexual Violence
[3] This was recognized by the European Court of Human Rights in M. C. v. Bulgaria (Application No. 39272/98) Judgment of 4 December 2003, para.148-187

our impact

Removing legal barriers to reproductive health services with IPPF

An update on how our work is contributing to the global fight against poverty.

The issue

A lack of access to sexual and reproductive health services is both a major cause and consequence of living in poverty. A denial of sexual and reproductive health rights is often a manifestation of harmful social and cultural practices that engender violence against women and result in socially imbedded gender inequality. Denial of these rights has consequences not only for women but also for young people of both sexes as a lack of access to contraceptives results in the spread of HIV/AIDS and other sexually transmitted diseases and can lead to unwanted pregnancies, unsafe abortions and the denial of an education and the opportunities that this entails.

The UN Convention on the Rights of the Child is an international instrument, binding on all states that ratified it, which sets out the basic human rights that children everywhere are entitled to. Article 5 of the Convention sets out the concept of the "evolving capacity of the child". This concept recognises that as children get older they acquire greater agency and thus can gradually take on more and more responsibility over their own lives. One area where this concept can be applied to but still remains difficult to define is with regard to the area of sexual and reproductive healthcare. Numerous countries have in place laws which can impede young people's access to sexual and reproductive health services. Such laws include those centred on parental consent, age of consent, confidentiality laws and also health insurance laws that require parents to be notified of the cost and details of services obtained by their dependents. These laws can be argued to run counter to the "evolving capacity" concept in the UN Convention as they deny young people the agency to take decisions regarding their own sexual and reproductive rights.

The organisation

The International Planned Parenthood Federation (IPPF) is a global network of 152 Member Associations working in 172 countries which advocates for sexual and reproductive healthcare rights for all. It also runs 65,000 service points worldwide which deliver sexual and reproductive healthcare services to local communities.

The project

The IPPF is concerned that ignorance of the laws that relate to the evolving capacities of young people has a detrimental impact on the implementation of children's rights. The organization approached A4ID with a request for research to be carried out to identify laws and policies that directly or indirectly impede young people's access to sexual and reproductive health services in 28 jurisdictions. Lawyers from A4ID's legal partners, including DLA Piper, Mayer Brown and Vertex Chambers have been engaged to produce research that will be used to develop a free online database which will help in-country health professionals provide services within the scope of the national laws of each country. The research will also be used to identify laws which have a negative impact on peoples sexual and reproductive rights and IPPF hopes to use the information to develop advocacy (and potentially litigation) strategies for legal and policy reform at the national level. In this way it aims to encourage states to act in line with international human rights standards and the corresponding obligations that these entail. •

Image © Guy Oliver/IRIN

Briefing

Antigoni Mathianaki

The rights-based approach to development

The human rights-based approach to development fundamentally rests on the notion of duty rather than charity. In other words, it upholds the idea that all human beings are born with inalienable and indivisible rights that it is the duty of responsible institutions (states etc.) to realise and seeks both to build the capacity of rights holders to claim their rights and duty bearers to fulfil their obligations.

This move represents a clear shift from the traditional humanitarian "welfare model", which valued political neutrality and focused on the immediate alleviation of 'needs' through the provision of external aid such as disaster relief. Instead, the human rights approach attempts to directly address the root of the problem, by identifying the absence or violation of human rights as both a cause and an effect of poverty. At the practical level, this will not always mean that the approaches differ dramatically in delivery; a rights-based approach, for example, does not preclude the delivery of disaster relief, but will rather see the aid as essential to realising rights and will be conscious, in the provision of aid, of the full range of rights.

> ***"The human rights-based approach to development rests on the notion of duty rather than charity"***

While the first formal recognition of human rights at an international level is contained in the UN's 1948 Universal Declaration of Human Rights (UDHR), the complementary relationship between human rights and international development was not fully and formally recognised at an international level until 1993 with the Vienna Declaration and Programme of Action (VDPA). Since then, donor governments, NGOs and development programmes have been gradually incorporating the human rights model, seeing it as a better way to create sustainable development and encourage self-determination in developing countries while also reducing dependency on external agents and foreign aid. The shift requires development professionals to view human rights as intrinsically and instrumentally relevant to their work, rather than just a side-show. Organisations like Oxfam and CARE have adopted rights-based approaches as part of their commitment to tackle the underlying structural causes of poverty, while the establishment of the UN Millennium Development Goals uniquely exemplifies the paradigm of human rights-driven development. •

Business and human rights: the law firms' role

Andrine Skjelland

The corporate role in human rights has been a topic of debate for many years. The discussions about the role of law firms in this matter have been no less heated (if not always within firms themselves) and have only intensified since the endorsement of the UN Guiding Principles on Business and Human Rights (UNGPs).

The UNGPs were endorsed by the UN Human Rights Council in 2011. They equipped businesses with a set of internationally accepted standards for their role in respecting human rights and remedying negative impacts where they occur. Brought together by former UN Secretary-General's Special Representative for Business and Human Rights, John Ruggie, the principles elucidate the state's duty to protect human rights, corporate responsibility to respect, and the need for access to remedy. The standards, though internationally accepted, are not legally binding.

Since A4ID published its discussion paper on the UNGPs in 2011 – which can be found on the Resource Centre on our website – several large firms have begun to consider how they can adopt a 'Ruggie-compliant' approach, recognizing that while they might not be legally binding, they may have legal consequences in the future. To take forward our work on the UNGPs and to further push forward the debate, A4ID will be running a series of Knowledge Groups looking at the practical application of the UNGPs over the coming months in advance of publishing our report on law firms and business & human rights. •

Visit our website for more information about our upcoming events on business & human rights.

Image © Robin Wyatt

Tax: a human rights issue

Aderonke Gbadamosi

Tax avoidance – exploiting legal loopholes to reduce or eliminate tax liability is a hot political topic. Yet the language used to describe tax avoidance in the ongoing debate is most often either couched in economics (taxes avoided are described as 'lost revenue') or in simple terms of fairness (tax avoiders are described as not paying their 'fair share'). Tax is rarely described as a human rights issue – but it should be.

In a recent Economist article (16/02/2013), Christian Aid estimates that developing countries are denied over £100 billion in corporate tax every year. This is public revenue that could have been used in welfare oriented investments. This impedes the realization of the economic and social rights contained in the Universal Declaration of Human Rights for individuals in these countries.

The right to development, adopted by the General Assembly by resolution 41/128, is an alienable Human Right that is being eroded by tax evaders. This right cannot be realized when states are denied revenue streams to appropriately formulate national development policies that improve the wellbeing of their population.

Since it is widely estimated that tax avoidance costs developing countries revenues equivalent to the total amount of aid received, a structural adjustment of the tax system will be essential for them to both development and fully become aid independent. Seeing the need for this structural adjustment as a question of human rights should only redouble our resolve to see it happen. •

To further explore the development impact of tax avoidance, sign up for our Knowledge Group on Wednesday, 24 April 2013 from 08:15am to 09:30am. The event will be hosted by Ashurst, and breakfast will be provided.

Image © Kate Holt/IRIN

Show your support

We believe in the power of the law to bring about global changes. That is why we are committed to ensuring the law is used as a tool in the fight against poverty.

Without the protection of rights, access to justice, good governance and the rule of law, sustainable international development will not be possible. Without the law poverty will continue to remain prevalent.

The law and lawyers have a vital role to play in making sure the world is fairer and that everyone, no matter where they live, has the opportunity to build a better life.

If you share our ideas and support our work, then join us as an A4ID member.

Our members allow us to continue our work to provide free legal advice to all those working towards the eradication of poverty. They support our desire to engage the international legal community in creating innovative legal solutions that meet long-term development needs.

To join A4ID as a member please visit *www.a4id.org/membership*

About A4ID

A4ID brings together the legal and development professions to gain maximum impact in achieving international development and ending poverty.

Acknowledgements

A4ID would like to thank humanitarian, development and CSR photographer and communications-for-development specialist Dr Robin Wyatt for his kind donation of several photographs to this edition of Law & Development: In Focus. You can find more of Dr Wyatt's photographs, including for purchase, and join his mailing list at www.robinwyatt.org/photography.

We would also like to thank Reed Smith LLP for their support which includes printing this magazine, accommodation, advice and being a highly active member of our legal partners network.

ReedSmith

Contact us

Website: www.a4id.org
Email: info@a4id.org
Telephone: +44 (0)20 3116 2799
Find us on Facebook
Follow us on Twitter @a4id

Advocates for International Development, a company registered in England and Wales under number 05907641, is a company without share capital and limited by guarantee. Its Registered Office is at The Broadgate Tower, 24th Floor, 20 Primrose Street, London, EC2A 2RS. Advocates for International Development is a charity registered with the Charity Commission under registration number: 1118565 (in England and Wales).