



UN General Assembly Side Event

PUNISHING THE POOR: EXPLORING MEASURES IN SOCIAL POLICY THAT PENALISE, SEGREGATE, CONTROL OR UNDERMINE THE AUTONOMY OF PEOPLE LIVING IN POVERTY.

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The Open Society Justice Initiative uses law to protect and empower people around the world. Through advocacy, research, technical assistance and litigation, the Justice Initiative promotes human rights and builds legal capacity for open societies.

As a human rights law reform organization, we welcome Ms. Sepulveda's new report focused on a rights-based approach to penalization and poverty. Much of our work addresses the laws and practices which "cause, exacerbate or perpetuate poverty," undermine the rights of poverty-stricken individuals, and render those most marginalized in society even more vulnerable. Our programs on pretrial justice and legal empowerment of the poor respond to some of the critical problems identified in the Special Rapporteur's new report. Today, I will expand upon two pressing concerns raised in the report, highlight two of her key recommendations and suggest four additional recommendations of our own.

On any given day, approximately three million people are in pretrial detention around the world. The majority of them are poor. Many become even more poverty stricken as a result of their detention, whether through lost

income, lost jobs, or the requirement to pay bribes for basic services. Millions more have no access to legal assistance to help with problems they experience in their daily lives – such as being accused of a crime; being caught up in a dispute with their neighbor over land; or finding it impossible to access public services or benefits to which they are entitled.

The Justice Initiative works with governments and legal practitioners to help develop systems that allow low-risk detainees to be released with appropriate supervision pending trial. We support expanded legal aid services, to provide poor criminal suspects with access to lawyers. And, in a series of reports, we are documenting the impact of excessive pretrial detention and the ways in which it encourages torture and corruption while undermining socioeconomic development and public health. We have launched a Global Campaign for Pretrial Justice to promote alternatives to pretrial detention, early access to legal aid and open, transparent justice systems.

Our project on legal empowerment of the poor encompasses three main activities:

- (1) We create and run university-based law clinics whose students represent or advise the marginalized through work which instills a commitment to public service in a new generation of lawyers. We have helped establish more than 75 law clinics around the world—from Mexico to Mozambique, China to Nigeria;
- (2) We train paralegals to bring law and enhanced awareness of legal rights to people who would otherwise have no access to legal services. Our flagship program is based in Sierra Leone – a West African country ranked 11th from the bottom of the 2010 UN Human Development Index – where community-based paralegals, backed by a small team of public interest lawyers, deliver basic justice services to rural communities and bolster poor people’s power to protect their families, homes, and other possessions;

(3) Finally, we provide fellowships to lawyers, many of whom are from some of the world's poorest countries, to equip them with more tools and enhanced skills to better assist their communities.

Our experience in countries such as Mexico, Nigeria, Malawi, Sierra Leone and Ukraine, reinforces the value of a human rights approach to penalization and poverty issues. It demonstrates that simple, effective and low cost solutions exist to problems that loom large for many in extreme poverty. Two key areas in which we work are highlighted in Ms. Sepulveda's report: (1) access to legal assistance; and (2) excessive detention disproportionately affecting the poor.

ACCESS TO LEGAL ASSISTANCE

As the Special Rapporteur points out, a significant obstacle to breaking the cycle of penalization and poverty is the "inability of persons living in poverty to access legal assistance." This can further disadvantage the poor in their dealings with authorities in criminal, civil and administrative matters. Yet small amounts of practical legal help can make a difference – particularly when it comes to navigating often bureaucratic and otherwise inaccessible procedures, such as access to social security payments -- an area of particular importance for people living in poverty.

We have been working to address this issue in Ukraine, where we have established a network of 26 community law centers, which hold weekly mobile justice clinics in rural areas, and handle more than 2000 cases each month. The most common problem brought to the centers concerns social security payments. Poor pensioners often find government systems impossible to navigate without support. The centers help clients understand the procedures and complete often-burdensome paper forms.

Legal empowerment approaches allow the poor to negotiate complex government systems as they are, without the need for a high cost service and in a way that equips people with the skills and knowledge to help themselves. This should not, of course, relieve states of their obligation to change laws and practices

which unfairly burden the poor and make it more difficult to access benefits. But legal empowerment tools can provide solutions to pressing problems poverty-stricken individuals face on a daily basis.

EXCESSIVE USE OF PRETRIAL DETENTION

Moving to the issue of detention, persons living in poverty come into contact with the criminal justice system with disproportionately high frequency – leading to the excessive arrest, detention, and imprisonment of the poorest and most vulnerable. Bail conditions are often onerous, legal assistance is often absent or difficult to come by, and the personal costs to detainees are high in terms of health and even torture.

We've utilized three principal methods to address the negative consequences that excessive pretrial detention can have, particularly on the poor: working with governments to create supervised pretrial release systems; placing duty solicitors at police stations, and deploying paralegals to assist suspects.

1. SUPERVISED PRETRIAL RELEASE

In the state of Morelos in Mexico, more than 40 percent of prisoners are awaiting trial in overcrowded conditions, with jails bulging at 134% capacity. Judges deciding on whether to detain a suspect prior to trial often have little information at hand. Starting in 2009, we have worked with the Morelos state government to establish a program to manage supervised pretrial release. This project involves two components: evaluation and supervision. The evaluation component looks at the likelihood that the defendant will comply with the conditions of release. The evaluation is based on factors including community ties, the seriousness of the alleged offense, and prior record if any (such as a failure to appear in court). The supervision component provides defendants who are released pre-trial with information, guidance and support to assure compliance with the judges' conditions of release. The project has yielded discernible, if small-scale, results to date. We are currently in discussions with other governments in the Americas, as well as with other donors and civil society about replicating the program.

2. DUTY SOLICITORS

Meanwhile in Nigeria, prison overcrowding and pretrial detention are also severe problems. Approximately 80 percent of Nigeria's detainees are in pretrial custody. The average period of detention is 3.7 years. It is not unheard of for those accused of capital offenses to spend up to 10 years in PTD. Most suspects do not have access to legal representation. In 2004, we started work with a partner organization, REPLACE, to set up a duty solicitor scheme. Under the scheme, recent law graduates volunteer to be on call at designated police stations 24 hours a day, 7 days per week. These volunteers intervene when a suspect has no access to a private lawyer. They provide basic legal advice and follow up. And they show results. The project was able to secure the release of thousands of detainees in 2009 and 2010. And the duration of detention in the pilot locations has been reduced significantly, to 5-7 days as against a national average of 3.7 years.

3. PARALEGALS

Finally, in Sierra Leone and Malawi – two countries which are extremely poor, struggle with severe prison overcrowding, and have few lawyers to service their population – we have developed paralegal programs to provide legal aid to suspects. In Malawi, paralegals screen those arrested to promote the diversion of appropriate cases out of the formal justice system; provide legal assistance; educate suspects about their rights and procedures; and support suspects and their families by helping to locate witnesses and family members. Within a few months of the project starting in late 2009, paralegals had facilitated the release of 169 accused persons who might have otherwise automatically remained in custody. In Sierra Leone, a similar project has seen the release of 745 detainees facilitated in part by the work of the paralegals.

RECOMMENDATIONS

Our work leads us to support and expand on two of the recommendations in the Special Rapporteur's report.

1. First, we reinforce her call for States to “ensure quality legal aid for the poorest segments of society” - for criminal justice issues as a matter of priority, and for civil or administrative cases where possible as well. We further recommend support for pilot projects and other efforts by civil society, such as our local

partners, who are working to help poor people overcome barriers to empower themselves through the use of law – for example, through assistance in accessing social security benefits and helping detainees transition safely and swiftly through the pretrial justice system.

2. Second, the SR rightly encourages a human rights based approach to the use of excessive detention by states, noting that detention should only be used at times to meet a pressing societal need, in a manner proportionate to that need and in a way that does not disproportionately affect the poor. She makes three key recommendations to ensure that end:
 - a. Reviewing detention polices and legislation with the aim of removing discriminatory laws and practices affecting the poor
 - b. Enabling law enforcement officials to address the potential effects of detention in light of individual circumstances; and
 - c. Ensuring bail processes take into account the economic and social circumstances of people living in poverty. This latter recommendation would require giving meaning to the common refrain – often enforced in the breach – that persons should not be detained simply because they cannot afford bail.

We agree with the Special Rapporteur’s recommendations on this point – and would add the following additional recommendations to states grappling with these issues:

3. First, states should review not just detention laws, but all penal laws and processes which disproportionately impact the poor, such as criminal bans on loitering. In many states much can be done within the existing legal framework. Often, sound laws and policies exist – but they are applied unfairly or unequally, often because of inefficient administrative and management systems.
 - i. An example is in Sierra Leone. Managers at the family support unit of the country’s police – who handle criminal matters including rape and domestic violence -- are

based in the capital Freetown. They rarely visit or supervise counterparts dispersed across 40 offices around the country. As a result, victims of gender crimes in rural areas are more often deprived of law enforcement protection. Putting in place better administrative, management and incentive systems for law enforcement officials to apply law and procedures consistently would make an enormous difference to people living in poverty.

4. Second, while a review of discriminatory laws is important, governments should in general use arrest and detention powers more sparingly. This in itself would be of great benefit to those living in poverty who are disproportionately caught up in these practices. We have demonstrated through our duty solicitor, paralegal and supervised pretrial services efforts that creative, cost effective and safe alternatives to pre-trial detention can be found, consistent with public security and human rights.
5. Third, we encourage states to ensure that each person considered for pre-trial detention can be and is assessed in a manner which reflects each person's unique circumstances.
6. Fourth, states should consider alternatives to monetary bail such as rigorous screening, supervision and personal sureties for people who cannot afford to pay or for whom payment would send them into a greater spiral of poverty.

Discussions such as this one today are an essential first step to broadening the debate on this complex and under-addressed issue. Notwithstanding the daunting scale of excessive pretrial detention, inadequate legal aid, and outright legal exclusion of the poor, our work has shown that simple, low cost and effective solutions do exist. We would welcome the opportunity to discuss these possibilities further with States, donors and civil society.