

UNDERSTANDING WOMEN'S ACCESS TO JUSTICE¹

A Briefer on Women's Access to Justice

Constant Exclusion: Status of Women's Access to Justice in the Philippines

Women victims of violence experience various difficulties and barriers in accessing justice. Studies have attributed the existence of these barriers to law and to society's construction of women and of women's issues. There is a need to look beyond legal measures and into the interplay of politics, economics, and culture in women's access to justice in cases of violence. Looking alone at the existence of laws protecting women, the availability of legal aid and counsel and at the process of adjudication and enforcement as a frame for access to justice for women victims of violence would be limiting. It would fail to address the subordinated and subjugated identities of women in law and in society. It would fail to account the structural inequalities between men and women, the systemic and historic disadvantaged position of women, the culture of impunity in cases of VAW, and the prevailing gender bias and system of patriarchy that continue to persist in the judicial system and in society.

By the laws' and the legal processes' constant exclusion of women's varied experiences, and by the society's continued failure to recognize the serious nature of violence against women, thereby promoting a culture of impunity, the experiences of women continue to be undermined and rendered invisible. The responses to violence against women remain confined to elements of the crime and to laws of procedure and evidence, refusing to delve into the realm of women's real concern vis-à-vis the political, economic, and cultural aspects of access. Vis-a-vis furthermore, to woman's development as a whole.

Adopting a feminist frame, and viewing violence against women as a product of a hierarchal system of oppression, the access to justice framework herein developed views access to justice as beyond mere access to legal resources and multi-disciplinary support services, it goes beyond court victories such that even when a case is decided in favor of the woman, the question as to how such success effectively improves and empowers the woman (economically, politically, culturally) can and will be posed as part of the process. It also aims to look into the development of women as whole, not only as seen in the country's development agenda and economic laws for women, but also in actual and effective adopted programs and policies. In this sense, it aims to go beyond the question of sufficiency of laws and the legal system to social change and reconstruction.

Legal Response and Beyond: Framing women's access to Justice

The recognition of women's rights and a rights claim approach has been one of the forerunners of the feminist movement. The rights claims energized the women's movement and started the conversation. Women's rights have been necessary for the political development of women, particularly because they combat the privatization of women's oppression. However, rights, although vigorously fought for, cannot perform the task of social reconstruction. Schneider² notes the common theme of feminist critiques, which this research likewise adopts, in developing a feminist framework for access to justice:

¹An excerpt from the research on "*Mapping and Analysis of Domestic Legal Remedies to issues of Violence against Women (VAW)*" undertaken by the Women's Legal and Human Rights Bureau (WLB) and supported by the UN Women (then UNIFEM) in 2010. WLB is a member of Philwomen on ASEAN, a network of women's rights advocates and organizations in the Philippines that critically engage and promote women's rights in ASEAN. ²Schneider, Elizabeth. *Dialectic of Rights and Politics*. Feminist Legal Theory Foundations. Page 523

“In the women’s movement, a wide range of feminist activists and commentators have participated in a broad critique of rights analysis, both on theoretical and practical levels. A common theme of these critiques has been the need to strengthen legal challenges for equal rights while at the same time not limiting our vision to narrow conception of rights. We need to continue to strive for a political strategy that expresses a politics and vision of social reconstruction sensitive to women’s real concerns. Legal strategy must be developed, in the context of political strategy. It should attack formal doctrinal barriers which inhibit the recognition of interconnectedness of women’s oppression and look at the particular factual context of discrimination in shaping legal responses.”

Existence of legal remedies and mechanisms alone cannot be made to measure women’s access to justice when the circumstances of access remains to be affected by factors not only inside the legal system, but outside it. With the aim of attempting a more responsive framework on access to justice by women victims of violence, the women’s access to justice framework was developed. The inception of this framework began in a regional consultation in Bangkok conducted by the Women’s Legal Bureau. The framework is divided into two parts: a) elements of access to justice, and b) the enabling environment necessary for access to justice.

The elements of access to justice and the enabling environment for access to justice must both be present for access to justice for women to exist. Access is not confined to access to the legal system (substantive, normative, procedural) as it includes access to multidisciplinary support services as well, taking into account women’s active participation, agency, and empowerment in the overall process; their specific needs for immediate protective orders and the circumstances of access which lie beyond the law and the legal system e.g. the cost of litigation and other geographic, political and economic factors affecting women’s resort to the process. It likewise takes into account the necessary political, economic, social and cultural contexts and conditions which enable and empower women to access justice in cases of violence

Justice looks into women’s substantial and critical participation in the process, women’s empowerment and non-oppression, the eventual elimination of patriarchy and structural inequalities between men and women in the political, economic, social and cultural domains which are the root causes of VAW. It aims for a more strategic, comprehensive and long-lasting shifts in the conditions of women in society ---their enjoyment to and entitlement to full development ---made manifest by women’s political and economic empowerment, and in a culture that accords full respect for women’s inalienable, indivisible human rights, putting an eventual end to women’s subjugation and subordination.

Elements of Access to Justice:

For access to justice for women victims of violence to be effective and responsive to the needs and experiences of women, all of the elements discussed below must co-exist, and must be situated in the context in which violence and discrimination occurs. The elements discussed below must likewise be accompanied by an enabling environment, as will be further discussed in the next section.

Adequate Remedies: making remedies work and respond to women’s needs

Adequacy is the appropriateness and sufficiency of a given remedy to address the right violated. For a remedy to be considered adequate, three factors need to coexist: a) the *de jure* and *de facto* existence of remedies; b) the availability of such remedies, and c) their affordability.

De jure and *de facto* existence of remedies pertain to, *first and foremost*, the existence of laws or substantive domestic legislation which protect women against violence, these legislations, must not only be in accordance with the International Human Rights standards, but must also be capable of addressing the various types of violence that may be directed against women. *Secondly*, this presupposes the existence of mechanisms and institutions that enable women to seek redress in the event of the violation of their rights. This includes existence of well funded formal legal system (such as the police, the prosecution service, the courts), informal systems (such as the Barangay Justice System or traditional councils), and the existence of multi-disciplinary support services (such as counseling, psycho-social, shelters, and medical support etc). It likewise includes the availability of competent and gender-sensitive professionals providing both legal and non-legal aid (medical, psycho-social) including the duty bearers, primarily the conciliators, Barangay officials, the police, the prosecutorial service, and the court personnel. Women's freedom and protection from violence must be incorporated in the development program of the country, trickling down to all levels. *Third*, the laws of procedure and the rules of evidence followed in these institutions must be gender sensitive and anti-oppressive.

Availability, as a factor of adequacy, pertains to the questions of information, non-discrimination, geography, and language. For a remedy to be considered available to the woman seeking the same, information on her rights, on the remedies available, and the institutions and procedures involved must be made accessible to her by the state's institutions and duty bearers. Such remedies must be available to women without discrimination/exclusion on the basis of race, gender, class etc. Another consideration of availability would be geography, the distance of state institutions and mechanisms from a woman's abode that hinder a woman's attempt to access justice; just as language, could also prove as a barrier to women whose native tongues differ from the language of duty bearers in the legal system.

Affordability takes into account the economic factor of accessing justice. A remedy cannot be adequate and in fact could prove to be ineffective when the same is too costly and expensive. It covers the cost of litigation from filing and docket fees, to attorney's fees, to the cost of transportation, of gathering of evidence, as well as indirect costs of litigation. Another aspect of affordability would be the opportunity cost of litigation, which looks into the costs which may not be measured monetarily but are nevertheless part of the consequences of litigation e.g. effects to a woman-survivor's employment and productivity, or even the fact that woman's employment, or the idea of women working remains in part to be culturally unacceptable. Affordability as an element must likewise be viewed in the context of available legal aid mechanisms and the requirements to qualify therefore, the poverty threshold in the country, household expenditures, and the current labor conditions of women which in turn indicate women's capacity to access redress.

Acting for and her behalf: Women's Critical engagement and participation

Foremost in Feminist Discourse is women's substantive participation and critical engagement in processes and experiences affecting her. In a Criminal Justice System where the State prosecutes in behalf of the People of the Philippines, the offended party, the woman, is undermined ---rendered invisible and caught in the web of the legal system, with the State prosecutor acting in her behalf and the judge adjudicating her case as if she was a mere subject of the law and the legal system.

In women's access to justice framework, the woman's participation in the decision making with respect to her case is one of the foremost considerations. It includes her critical visibility in the overall process through meaningful substantive participation. Her decision to (or not to) resort to alternative dispute settlements or informal systems, her decision to avail of a specific remedy over the other, must be given consideration by lawyers, and other duty bearers of the legal system. The process, with women's active

participation becomes empowering, with the woman able to act for and on her behalf in the claiming of her rights.

Three levels of inquiry are looked upon to measure women's participation: *first*, whether she is aware of her rights under domestic and international law, *second*, whether the legal system and the duty bearers, give active, meaningful, and visible participation on the women in the pursuit of her case, and *third*, whether, the process, as a whole provides empowerment to a woman in having engaged with the system.

Addressing Impunity: An effective and accountable legal system

Competent, impartial, independent and gender-sensitive legal system and duty bearers and women's active participation in the process are parts and parcels of effectiveness. It pertains to the effective, speedy and immediate enforcement of the fruits of the processes, and the delivery of the same to the woman-survivor. It also includes the existence of immediate protective measures and the existence of monitoring oversight on the part of state and non-state actors to further facilitate and improve women's access to justice. It serves the purpose of addressing impunity and attaining the purpose of the law in deterring and preventing violence against women.

Protective measures in the form of Temporary Restraining orders or Injunctions are part of effectiveness. Often, in cases of VAW, the incarceration of the accused, or the compensation for the violence, may not be the immediate concern of a woman-survivor, but the need to immediately protect herself and her children from further abuse and violence. Monitoring oversight, on the other hand relates to the effectiveness of the entire legal system as it provides for a mechanism for the legal system and duty bearers to continually correct past mistakes. This effort of self-correction must include the solicitation of women's participation in the process, particularly women-survivors of violence who have previously engaged with the system. This element also provides for the active involvement of women's organizations in continually monitoring the functioning of the legal system and holding it accountable as to its adherence to principles of nondiscrimination.

Legitimacy: Strengthening the Legal Culture in cases of violence against women

This element focuses on the transparency, accountability, and credibility of the legal system and the duty bearers and to the political will of the State to address violence against women. the legitimacy of the legal system requires that the same is effective in addressing and responding to VAW. It presupposes that the system is not corrupt and that it sends the unequivocal message that VAW shall be prosecuted and punished and that justice for women-survivors shall be served.

Towards a new attitude: Cultural shifts in viewing violence against women

Changes in attitudes, as used in this framework refers, *first*, to the change in the practices of state actors and organs as a result of the women's case and the collective action of women's groups in support of it. It also includes looking into the long term effects of the changes in practices i.g. how they translate into changes in the attitudes of duty bearers resulting to the ideological/cultural shifts in the values, perspectives, and consciousness of state actors and organs in the handling of violence against women cases and in addressing the systemic discrimination of women with the end of achieving full development rights of women. *Secondly*, it looks into the changes in the practices and attitudes of women's organization (collective consciousness) which lead to lobbying by these organizations for more responsive legislations and policies addressing violence against women. This element then is two tiered, first, it looks into how a particular woman's case changes the practices and attitudes of the duty bearers and the legal system in general, and

second, how the same case, affects the collective practice and attitude of women's organizations, leading them to lobby before the state in the formulation of laws and policies more responsive to the experiences and needs of women.

The Context for Access to Justice

Having laid the necessary elements for women's access to justice, this section discusses at length concepts relating to the context which must co-exist with the above discussed elements in order for women's access to justice in cases of violence against women be truly present.

The enabling environment for access to justice are provided in the framework; they are, as with the elements above discussed, interrelated and interconnected. *First*, is compliance with Human Rights norms and observance with due diligence of state obligations, *second*, the existence of democracy and women's substantial citizenship; *third*, the empowerment of women's political and economic position in society, and their full right to development by addressing structural inequalities; and *fourth*, recognition of the interrelatedness, interconnectedness, and compounded nature of VAW, and *fifth*, strengthened international and regional advocacy and struggle against VAW. These elements will not be discussed individually but developmentally, building on the interrelation and interconnectedness of one concept/context to another.

In opposition to questions on whether law by itself can achieve concrete political gains for women, Frances Olsen stressed that "law is a complex social practice and some feminists gains have and will continue to be achieved in the legal arena³". The women's access to justice framework adapts this view of the law and the legal system. It can be a source of oppression for women. Yet, it can also be the source of liberation. The same holds true with legal processes and frameworks. They can further inculcate unfounded myths and biases on women, or they could liberate women from such biases, through effective legal reforms, working inside out and outside in.

Harnessing the law: State Accountability on Human Rights obligations and the Due Diligence Standards

From this bifurcated view of the law, Human Rights standards then, may be harnessed to further women's human rights. This necessarily includes the use of constitutional guarantees and international norms and standards and mechanisms to hold states accountable for their actions, to expand the core content of the guaranteed rights, and to make the system more responsive and effective.

The State's obligation under international instruments require observance with due diligence. By due diligence, States are required to undertake all measures to promote and fulfill said rights. Due diligence entails a more comprehensive response at different levels of intervention, from individual women, the community, the State and transnational levels. The due diligence standard should: a) focus on State obligation to transform the societal values and institutions that sustain gender inequality while at the same time effectively respond to violence against women when it occurs, and b) examine the shared responsibilities of State and non-State actors with respect to preventing and responding to violence and other violations of women's human rights.⁴

The above mentioned measures of compliance with the due diligence standards necessarily presupposes the existence of ***democratic governance*** within the state and of woman's ***active and substantive citizenship***. This means that the State takes upon itself the responsibility and the obligation of upholding its

³ Olsen, Frances. *Feminist Critique of Rights Analysis*. Feminist Legal Theory: Foundations. Temple University Press. Philadelphia, 1993. page 492. ⁴ Supra page 7

international obligations, not merely by ensuring the enjoyment of women of their rights, but also the creation of a society and an environment conducive for women's enjoyment and exercise of said rights.

An enabling environment for women to access justice would be that which grants substantive equality to women in the enjoyment of their rights as provided in international covenants. An enabling environment would be one that respects, promotes, and fulfills the civil, political, economic, social and cultural rights of women. Where the structural imbalance between men and women are addressed and taken beyond the realm of law into social, economic, and cultural spheres.

In looking into the State's compliance of human rights standards, it must be stressed that attention be directed to the state's effort in complying not only with its obligations in relation to women's civil and political rights, but also to the often neglected and taken for granted economic, social and cultural rights of women. This would then shed light to the many barriers experienced by women in terms of social and economic rights (ESCR), barriers that would remain unarticulated should the ESCR be relegated as secondary rights.

Contextualizing Structural Imbalances: Women's Political and Economic Empowerment and right to development

As much as the rights based approach seeks the *de jure* and *de facto* exercise of women's rights, a discourse on the actual exercise of women's rights and especially on an environment which enables access to justice in the violation of said rights must include a discussion the structural imbalances existent in society and how these imbalances are addressed.

The international bill of rights treat the civil, political, economic, social and cultural rights as inalienable and indivisible, yet a hierarchy of rights still prevails. This private and public divide not only affects women's enjoyment of their social, economic and cultural rights as previously stated, it likewise affects the State's response to VAW and the value accorded to women's labor. *First*, as women have been traditionally relegated to the "private" sphere of home and family, the typical citizen has been portrayed as male, thus the dominant notions of human rights abuse have implicitly had a man as their archetype ----in effect, violations of women that occur between "private" individuals have been made invisible and deemed to be beyond the purview of the state⁵. *Second*, the gender division of labour within public and private spheres supported by gender ideologies, hold women primarily responsible for unremunerated, and often invisible social reproduction in the family household. This private/public divide further creates inequalities in bargaining power between men and women⁶.

The context of women's political economic conditions constitutes the underlying circumstances of women's access to justice in VAW. The political and economic empowerment (or lack thereof) of women figures not only into the question of access e.g. the agency and economic capability of accessing remedies; but also on what constitutes justice. Women's economic and political independence and women's freedom from violence cannot be compartmentalized. Legal victories for women may be dampened, among others, by a political

⁵ Charlotte Bunch, Samantha Frost. Women's Human Rights: An Introduction. Accessed on 30 October 2009 at <http://www.cwgl.rutgers.edu/globalcenter/whr.html>

A/ HRC/ 11/6/ADD. 6 , 23 June 2009. "Promotion and Protection of all human rights, civil, political, economic, social and cultural rights, including the right to development" Report of the Special Rapporteur on violence against women its causes and consequences, with Addendum on Political Economy and Violence against women. Yakin Ertuk. Found at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.6.pdf> accessed on 17 October 2009

economic context that keeps women's labor in services, and under flexible/contractual arrangements, and women's wages low.

Acknowledging Compounded Reality: Multi-disciplinary strategies and response in women's access to justice in VAW

Intersectionality recognizes the often multiple and overlapping forms of discrimination experienced by women victims of violence in their attempts to access justice. Different entry points of discrimination should be recognized, generalizations, and categories avoided in recognition of the diverse lived experiences of women. In recognizing the various ways and the various grounds in which discrimination may manifest, categorization of women's experiences are avoided and the possibility of diversity, acknowledged as well as the compounded and interrelated forms of oppression that women may be subjected to.

In the determination of an enabling environment in VAW, the law and the legal system's response to VAW should be challenged by pushing its boundaries. The methods of law, law making and law enforcement should be challenged to take into account women's diverse experiences: conscious of the gendered axis of VAW and conscious of the different experiences of individual women.

Strengthening the Collective Struggle: Women's Network and Regional Advocacy

The last in the enabling environment for access to justice in VAW calls for the strengthening of regional advocacy by women's groups, and the strengthening of women's network. NGO's, particularly women's groups play a crucial role in lobbying for the recognition of women's rights; in the monitoring of the accessibility and the enforcement of said rights; as well as in the identification of gaps in the recognition and implementation of said rights. A strong national and regional network of women's groups and organization, through consultations and sharing of expertise and researches in various fields concerning women, effectively call the attention of states to issues relating to women's rights and the respect, promotion, and the fulfillment thereof. In the call for a more responsive framework on access to justice, women's organizations and networks play a crucial role.

The history of women's struggle for rights and for space has always been a collective one, it has been a struggle not only waged in the legal sphere, but in every space for recognition that women are able to avail of: articulating their issues, pushing the private into public and pushing the spaces and the boundaries accorded by law and by society for women. In this collective struggle, the State may be pressured and marshaled to exercise political will in the recognition and protection of the rights of women, the society is likewise educated about women's rights and women's issues as more and more, women are claiming spaces and rights, as equal participants in the shaping of the country's future. Indeed, a strong national and regional advocacy among women's groups and network, their collective voice and collective struggle is indispensable in the promotion of women's rights as well as in fostering an environment for accessing these rights within the formal and informal systems. ###

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