

**Standing Committee on Victim Assistance  
and Socio-Economic Reintegration**

**Parallel Programme**

**Legislation and Policy**

**Presentation**

**by**

**Kirsten Young**

**Landmine Survivors Network**

The key question I will focus on is: *Can strengthening legislation and establishing sound public policies really make a difference in countries with few resources to implement policies and ensure compliance with laws?*

I would suggest that this question can be divided into two parts:

1. Can strengthening legislation and establishing sound public policies really make a difference to survivors and other victims of landmines?
2. Assuming the answer is yes, can this make a difference in all countries, including those countries that have few resources?

This next slide seeks to show how I see these two questions in visual form.

What this cartoon does is put into question how international law can really be enforced.

International human rights law in particular is often criticized for only creating paper rights.

Does this mean that the Disability Rights Convention opened for signature less than one month ago, or that the 153 countries that have agreed to article 6(3) of the Mine Ban Treaty (MBT) think that this is not worth the paper they are written on?

The immediate response to this cartoon is that international human rights law is by its very nature implemented at the national level. This means that once a country agrees to be bound by a treaty it is not the UN, other international agencies or non-governmental organisations that implement it, but rather each sovereign state. Governments and their civil society allies get involved in standard setting processes because they think it will make a difference by creating a standard that all countries are accountable to. Group or issue specific treaties are negotiated because some areas necessitate greater guidance or as is the case with disability, simply not seen as a human rights issue.

But what is the relevance of these international standards for countries with few resources?

More often than not, these are countries where there laws do not exist, or the laws are discriminatory, or there is no mechanism to access it or my particular favourite, oh yes laws do exist they are just not implemented.

The bullet points I have placed on the other side of the cartoon are based on a story that someone once told me that puts these questions into a stark reality.

It is a story of a woman living in a mine-affected country, a country which is on the least developed list (14 of the 24 VA countries meet this category), who had no ability to move, on her mat in her hut all day, dependent on her community to feed her, taken advantage of physically and sexually by members of the community as she cannot physically fight back.

The person telling me the story asked me what good are rights to her? A tough question, but this story is a story of many people and it is our responsibility to make those rights meaningful to this lady and the unquantifiable number who share her story.

The next slide diagrams the nature of problem that I hope to illustrate with this story.<sup>1</sup> What law and implementing policy seek to resolve are:

1. The problem of substance, that is, the content of the law. This might mean that the law lacks certain elements or simply perpetuates inequality. In either case, the law inadequate or discriminatory. One current example is that disabled people cannot qualify for certain professions. In this case, the strategy developed would emphasise on changing the content of the laws and policies, abolishing or amending discriminatory laws, or developing new laws. The resource question is interesting here, would it cost the country anything to abolish laws that prevent people with disabilities holding certain professions?
2. The problem of institutions that uphold and implement the law, that is, the structure of the legal system and how justice is administered. Strategies developed to address this problem should emphasize creating or changing the structure so that they are both accountable and responsive and accountable structures. For example, addressing corruption.
3. The problem of attitudes and behaviors, that is, the culture of the law. The problem is based on the way those who administer the law, as well as those subject to the law, have been conditioned to view the law. Such views can range from accepting discriminatory laws, policies and practices to basic lack of awareness about the law. The culture of the law reflects the extent to which the country thinks that the issue is important. Strategies developed to address this tend to emphasize the empowerment of people through increased awareness of their rights and through their active engagement.

Now the resource question, the answer lies in a further question, do the country and the authorities involved think it is important? Legislation is one indicator of the importance an issue is given, policy implementing that legislation is another indicator. For example, one of the VA countries has decent employment legislation promoting equality for people with disabilities. However, the regulations required to implement that legislation have never been passed. The first is an indicator of importance, the second, an indicator of not important.

The highest legal indicator is the Constitution, and the next example I will give is a decision by a constitutional court in a country emerging from a history of egregious human rights abuses. The Constitution calls for the protection of economic and social rights. In this case, the country was receiving free antiviral drugs for a period of two years. The Ministry of Health's programme to use these drugs excluded pregnant mothers who were HIV positive. The drug was widely available in private health care facilities, but not through state hospitals, which serviced poor communities. The courts told the Ministry of Health to go back and plan better.<sup>2</sup> The government had three months to develop a detailed blueprint of how it intended to plan to include this excluded group. The court's decision also focused on attitudes by ruling that training be given to counsellors.

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<sup>1</sup> The diagram is taken from *Women's Human Rights Step by Step Strategy Workbook*, Margeret Schuler, Women, Law & Development International, 2002.

<sup>2</sup> Indivisibility does not mean that in working out policies in a context of limited resources it is impermissible to prioritise certain types of claims over others. Prioritisation is inevitable. However, the prioritisation must reflect reasonable use of the resources available and it must demonstrate that reasonable steps are being taken towards the progressive realisation of rights in a comprehensive manner, as required under article 2 of the International Covenant on Economic, Social and Cultural Rights. The process of prioritisation must also adhere to principles of non-discrimination, equality and participation, principles which would disallow trade-offs that result in injustice and violation of basic rights.

This decision was only possible because the Constitution, the courts, and the stakeholders who brought the case thought the right to life, the right to equality and the right to the highest attainable standard of health were important. This case demonstrates three further points:

1. This approach reaffirms the approach in the Final Report for the Nairobi Review Conference, providing that “Victim assistance does not require the development of new fields or disciplines but rather calls for ensuring that existing health care and social service systems, rehabilitation programmes and legislative and policy frameworks are adequate to meet the needs of all citizens — including landmine victims.”<sup>3</sup>

2. Human rights law recognizes that certain rights, such as economic and cultural, do have resource implications. To address this, while simultaneously ensuring that such rights are not ignored, the principle of progressive realization has been developed. This means that governments are not obligated to implement these rights immediately (except in a non-discriminatory way), but have to a) take immediate steps, and b) take reasonable steps to move as expeditiously and effectively as possible towards that goal.

As this case shows, the goal is to remedy inequalities in the law’s application (or if necessary the law), policies and programmes. The remedy is about ensuring that the interests of all sectors of society are incorporated into the decision-making process. Priorities may need to be made, but these will have to be justified, and in no case discriminatory.

3. Human rights law also recognizes that certain countries face severe resources constraints. But these countries are not left off the hook, they need to use the resources existing within the State and those available from the international community through international cooperation and assistance.

In this legal case, the international cooperation had different elements:

- The free provision of the drugs to the government
- The legal resource centre that brought the case (on behalf of aids activists and 150 doctors) is a recipient of development aid
- The legal resource centre has a joint project with a bar association in another country. This bar association provides technical assistance, such as research and legal advice.

The new Convention calls for all development aid to take be disability inclusive. This is strong standard to use, and a strong message to send.

It is not just about changing law and policy, but reframing how things are done in a rights-based approach. This approach requires inclusion, so a chance to influence the priority setting, participation, so the target group or stakeholders have a responsibility to collaborate and use the processes available, empowerment, education and capacity-building, transparency and accountability, right to information and structures to hold authorities accountable and non-discrimination. This is where the rights-based approach is unique, it does not seek to impact the greatest number of people, which often means the most marginalised groups fall outside the resource pool. But rather everyone has a right to access the resources and you had better explain why if there has been exclusion.

To conclude, the key question is: does the country think it is important? If yes, then something will be done, if no, then there will be a resource commitment void.

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<sup>3</sup> Nairobi Review Conference, 2004, Final Report, para. 65.