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Legal Empowerment: Practitioners' Perspectives

**Edited by
Stephen Golub**

**Series Editor
Thomas McInerney**



International Development Law Organization
Organisation Internationale de Droit du Développement

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International Development Law Organization (IDLO)

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This book is dedicated to our friend and colleague, William Loris, one of the Organization's founders and Director-General since 2000. Early in his career Bill saw the tangible need in developing countries for assistance in realizing the rule of law in advancing development. His belief that law could make a difference to improving the lives of poor and vulnerable people has inspired IDLO staff, member parties, stakeholders, and partners around the world.

Bill's tireless dedication to IDLO and its mission over twenty-six years helped the Organization begin realizing its true potential to make substantial contributions to the rule of law and development.

As Bill completes his final term as Director-General, we hope to continue to draw inspiration from him and wish him continued success.

William T. Loris is the Director-General of the International Development Law Organization (IDLO). He is one of the three co-founders of the Organization. As Director-General, he has made the Rome-based IDLO one of the leading international partners in the development and peacebuilding processes in places like Afghanistan, Kosovo and Sudan and led the development of programs which support the multilateral trading system, the development of the investment climate in developing countries, the pursuit of the UN Millennium Development Goals and establishment and recovery of legal rights after major natural disasters. He is responsible for shaping the Organization's strategies and policies, for management of the Organization itself and for the mobilization of resources from public, private and philanthropic sources.

A Message from the Director-General



The concept of legal empowerment has become an important element of the development agenda over the past decade. While there remains no universal agreement as to where the bounds of the concept should lie, IDLO believes there are compelling reasons for including social as well as economic development in legal empowerment programming. Just as our understanding of development has broadened beyond a simple increase in GDP per capita, so too should we extend the scope of our efforts to support partner populations in pursuing their development objectives.

Legal empowerment programs that combine a strong economic focus with initiatives to develop the capacity of communities to use the law to claim and defend their rights in areas such as health, education and freedom from gender discrimination are an important component of IDLO's law and development work. This more expansive approach to legal empowerment maximizes the potential for law to improve the lives of the poor and disadvantaged populations whom IDLO and other development organizations seek to support.

This volume captures the collective experiences of legal empowerment practitioners working across the spectrum of this emerging field – in countries ranging from Bolivia to Malawi to Papua New Guinea, and in thematic areas including criminal justice, land rights and health. It also reflects IDLO's commitment to deepen the empirical knowledge base in the fields in which it works, and to deploy this knowledge in support of more effective programming. We hope that it will serve as a valuable resource for both practitioners and policymakers alike.

I would like to acknowledge the fine work of Stephen Golub in editing this volume, and also thank the IDLO staff that have worked very hard on this project over the past year, including Thomas McNerney (Director, Research, Policy and Strategic Initiatives), Erica Harper (Senior Rule of Law Advisor), Ilaria Bottigliero (Senior Researcher), David Patterson (Program Manager, HIV and Health Law Program), Chris Morris (Legal Research Officer), Francesca Pispisa (Publications Officer) and Julia O'Brien (Editing Consultant). We also express IDLO's gratitude to the contributing authors, whose willingness to share their experiences and insights have made this volume possible.

A handwritten signature in black ink, appearing to read 'W. T. Loris'.

William T. Loris

International Development Law Organization

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What Is Legal Empowerment? An Introduction

Stephen Golub

1. Questions and situations

What is legal empowerment? Why is it important? What research methods can ascertain and improve its impact? The chapters that constitute *Legal Empowerment: Practitioners' Perspectives* answer these questions to various extents and in various ways. The perspectives are offered by authors defined as practitioners by virtue of their full-time or part-time work with development agencies or related organizations. Taken as a whole, the book illuminates an emerging, potentially significant development field.

Here are examples (some of which are discussed or alluded to in the chapters) of the kinds of situations, actions and impact that characterize legal empowerment:

- A farmers' association helps its members gain greater control of their land, increasing their incomes.
- A local women's organization uses law and advocacy to combat domestic violence, enhancing the physical security and independence of wives in their area.
- Parents learn how to register the births of their children, ensuring their access to education later in life.
- A government public health program enables impoverished beneficiaries to understand and act on their rights to basic medical services, thus reducing infant mortality.
- A non-governmental organization (NGO) works with grassroots groups to gradually make traditional justice systems – the only law many rural poor can access, afford and understand – less gender-biased.
- Market vendors negotiate the right to operate legally and free of harassment, protecting their livelihoods.
- Paralegals (non-lawyers with specialized legal knowledge and skills that enable them to educate or aid disadvantaged people concerning law-oriented issues) help indigent defendants, often jailed unjustly or for years without trial, obtain fair hearings or their freedom.
- Minority groups, human immunodeficiency virus (HIV) victims or the urban poor partner with public interest lawyers to win judicial, regulatory or legislative victories.

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2. An overview of the concept of legal empowerment

Perhaps the most basic matter to understand about legal empowerment efforts is that they typically go by other names. The term was first coined in a 2001 Asia Foundation report¹ for the Asian Development Bank (ADB). It later achieved greater salience through a 2008 report² of the Commission on Legal Empowerment of the Poor (CLEP). But NGOs across the globe have in effect been undertaking legal empowerment work for decades – albeit with relatively limited funding. To a lesser degree, and typically not as their highest priorities, a host of multilateral development agencies and bilateral donors have supported or engaged in such work — although, like NGOs, often

describing the work in other ways. Thus, legal empowerment partly or wholly overlaps with initiatives that, for example, go under the rubrics of legal services for the poor, public interest law, alternative lawyering, developmental lawyering, social justice, social accountability, women's empowerment or strengthening the poor's land tenure security.

Yet another question could be asked: If such work has been around for decades, why the enhanced focus on it now? CLEP deserves substantial credit for raising the profile of legal empowerment. In addition, several other factors have started to broaden the range of development agency approaches to addressing how the law can best serve the poor and other disadvantaged populations. The many developments contributing to this trend include a greater appreciation of the importance of traditional justice systems, as well as the research and pilot projects of both the United Nations Development Programme and the World Bank's Justice for the Poor (J4P) program.

But what does the term "legal empowerment" mean? Even a casual perusal of relevant development literature turns up more than a dozen definitions and descriptions of the concept. Here are several:

- The aforementioned 2001 report by the San Francisco-based Asia Foundation defines legal empowerment as "the use of law to increase the control that disadvantaged populations exercise over their lives."³
- A 2003 paper for a Washington, D.C. policy institute, the Carnegie Endowment for International Peace, modifies the Asia Foundation definition to encompass "the use of legal services and related development activities to increase disadvantaged populations' control over their lives."⁴
- • A 2007 study by the London-based International Institute for Environment and Development, on protecting local resource rights with respect to foreign investment in Africa, states that "[e]mpowerment is the process whereby disadvantaged groups acquire greater control over decisions and processes affecting their lives. Legal empowerment is empowerment brought about through the use of legal processes."⁵ Lorenzo Cotula of IIED contributed a chapter to this book.
- A 2007 report produced for the U.S. Agency for International Development by the consulting firm Associates in Rural Development suggests that:

[l]egal empowerment of the poor occurs when the poor, their supporters, or governments – employing legal and other means – create rights, capacities, and/or opportunities for the poor that give them new power to use law and legal tools to escape poverty and marginalization. Empowerment is a process, an end in itself, and a means of escaping poverty.⁶

- Launched in Indonesia in 2007 as the first and largest UNDP legal empowerment initiative, the Legal Empowerment and Assistance for the Disadvantaged (LEAD) Project employs a functional definition, stating that the project's aim is "to increase access to justice across Indonesia through support to legal services, legal capacity development, legal and human rights awareness and related development activities for the poor and other disadvantaged groups."⁷ LEAD features a grant-making process through which the project awards funds to Indonesian NGOs. It also has been instrumental in helping the country's national planning agency set priorities and policies concerning access to justice.
- The aforementioned CLEP report emphasizes four "pillars" of legal empowerment. Three of the pillars are livelihood-oriented, involving property rights (mainly involving land), labor rights and (mainly micro and small) business rights. The fourth is an enabling framework constituting access to justice and the rule of law, with legal identity (for persons otherwise denied legal status, and thus certain rights and benefits) as a cornerstone. The report is not limited to these pillars, however. Consistent with the approaches and definitions described above, it describes legal empowerment more broadly as "a process of systemic change through which the poor and excluded become able to use the law, the legal system, and legal services to protect and advance their rights and interests as citizens."⁸

- In a 2009 paper summing up the World Bank's engagement with legal empowerment and access to justice, J4P official Vivek Maru, who has contributed a chapter to this book, "adopts as a working definition [of legal empowerment] the uses of law to bolster human agency."⁹ (The term "agency" has been defined as "the capacity, condition, or state of acting or of exerting power.")¹⁰
- The 2009 report of the United Nations Secretary-General to the U.N. General Assembly, "Legal empowerment of the poor and the eradication of poverty", echoes the Commission in a key respect, by defining legal empowerment as "the process of systemic change through which the poor are protected and enabled to use the law to advance their rights and their interests as citizens and economic actors."¹¹ It attaches importance to CLEP's four pillars. However, as discussed below, the Secretary-General's report takes an even broader view of legal empowerment. It assigns gender a more central role than does CLEP, for example. It also incorporates various additional goals, such as addressing how climate change impacts the poor.

3. The Secretary-General's report

The U.N. Secretary-General's report on legal empowerment is noteworthy because it stands as the most authoritative, detailed guidance on legal empowerment for the United Nations system and its institutions. It also carries weight as a resource for the U.N. member governments, their official aid agencies and the entire international development community. The evolving nature of the legal empowerment field means that the document is not the final word on the topic. But the report is nevertheless of considerable use for efforts to translate the concept into action. Its key features include the following:

An expansive view of access to justice. The report's concept of access to justice is not limited to judicial access, law enforcement agencies and the work of lawyers, as important as they are. For example, it also pays attention to paralegals, property issues and informal dispute resolution, reflecting a broad view of access. With respect to property, this embraces administrative law and processes, such as land titling. Informal dispute resolution includes the wide array of traditional justice systems that for many or most rural poor are the primary mechanisms that they use to settle conflicts within communities and families.

A political economy approach to access to justice. The report goes beyond capacity-building and technical assistance in considering what must be done to make justice systems more accessible. "Recognizing the fundamental importance of access to justice," it explains, "the operational framework of legal empowerment of the poor also focuses on the underlying incentive structures" of state justice institutions.¹² Thus, the report highlights the crucial issue of how justice institutions and the individuals staffing them can be influenced to do their jobs properly.

A broad view of poverty. The report goes beyond defining poverty as a matter of income and assets, or as living below a poverty line of one or two dollars per day:

Poverty is not simply the lack of material goods and opportunities such as employment, ownership of productive assets and savings. It is also the lack of intangible assets and social goods, such as legal identity, good health, physical integrity, freedom from fear and violence, organizational capacity, the ability to exert political influence, and the ability to claim rights and live in respect and dignity.¹³

This definition has important ramifications for legal empowerment of the poor, in that it embraces goals that are not simply a matter of financial well-being, as important as that is.

A social accountability dimension. The report also illuminates the links between legal empowerment and social accountability – that is, the ability of society and its citizens to hold government

accountable for service delivery and other functions. Consistent with rights-based development, it frames the matter in human rights terms:

A characteristic of virtually all communities living in poverty is that they do not have access, on an equal footing, to government institutions and services that protect and promote human rights – where such institutions exist in the first place. Often, they are also unable to adequately voice their needs, to seek redress against injustice, participate in public life, and influence policies that ultimately will shape their lives.¹⁴

A grassroots orientation. While mindful of the roles of governments, the Secretary-General takes the fundamentally bottom-up view that “legal empowerment fosters development through empowering and strengthening the voices of individuals and communities, starting at the grassroots and from within.”¹⁵ Thus, without denying the important roles that outside assistance can play, the crucial actors in legal empowerment are the poor themselves.

A civil society orientation. Consistent with this grassroots orientation, the report emphasizes the important roles of civil society in legal empowerment in particular and achieving development goals more generally:

Legal empowerment promotes a participatory approach to development and recognizes the importance of engaging civil society and community-based organizations to ensure that the poor and the marginalized have identity and voice. Such an approach can strengthen democratic governance and accountability, which, in turn, can play a critical role in the achievement of the internationally agreed development goals, including the Millennium Development Goals.¹⁶

This support for civil society goes beyond highlighting nongovernmental and community-based organizations, however. It extends to social mobilization, in that the report recommends that legal empowerment initiatives “should support social movements to strengthen the voice of the poor and marginalized people and safeguard their rights.”¹⁷

The central importance of gender equity. Making the point that “the vast majority of the adult poor are women”,¹⁸ the report arguably pays more attention to women’s rights than to any other legal empowerment focus. It accordingly recommends legal literacy, legal aid, legal reform and other initiatives that should be actively pursued in order to advance women’s legal empowerment.

Environmental priorities. In addition to focusing on land and other natural resources for their income/asset-increasing value to the poor, the report also places a premium on related environmental challenges and opportunities. Thus, “[l]egal empowerment can give poor people and communities the legal tools to proactively protect themselves from the effects of climate change, such as droughts, deforestation, desertification, sea-level rise and flooding. At the same time, legal empowerment can give poor people access to new climate financing opportunities such as the carbon markets.”¹⁹

The challenge of legal implementation. Near the outset of the report, the Secretary-General touches on the crucial issue of legal implementation – the need to enforce existing laws. The report accordingly points out that although “there are laws that protect and uphold the rights of the poor, they are often too ambiguous, cumbersome and costly for them to access.”²⁰

4. Core concept

A consensus emerges from the similarities shared by the various definitions of legal empowerment and the Secretary-General’s explication of it: Legal empowerment is broad and multi-faceted in nature; it does not consist of a single strategy and certainly does not constitute a magic pill for

alleviating poverty. Nevertheless, the consensus does suggest a core concept: Legal empowerment is the use of law specifically to strengthen the disadvantaged. The concept embraces legal empowerment's key elements:

- *"The use of law"* involves not just legislation and court rulings, but the many regulations, ordinances, processes, agreements and traditional justice systems that constitute the law for the disadvantaged. The livelihood issues highlighted by CLEP, for example, are handled through ministries and regulations more often than through courts and legislation. For the rural poor in many countries, village-based customary systems – which should be neither idealized nor condemned out of hand – represent the law far more than distant courts whose processes are incomprehensible or unaffordable.
- *"Specifically"* captures the reality that legal empowerment features activities and strategies that focus on the disadvantaged. Such efforts include legal reforms exclusively or mainly aiming to benefit disadvantaged populations. Even more crucially, they embrace legal services and other efforts that aim to have good laws actually implemented by or for the disadvantaged.
- *"Strengthen"* captures the empowerment aspect of the concept; increasing people's control over their lives. The term also reflects the fact that legal empowerment is both a process and a goal. As a matter of process, legal empowerment includes legal reforms and services that improve the bargaining positions of: farmers seeking secure land tenure; indigent criminal defendants pursuing due process; women battling domestic violence; and communities pressing for the delivery of medical, educational or other government services to which they are entitled. As a goal, it strengthens such populations in terms of their income, assets, health, physical security and/or, most generally, freedom. The essentially bottom-up nature of legal empowerment means that it aims to build such populations' capacities to act on their own, although without precluding the reality that often outside actors work directly with them to provide help. It should be further emphasized that "strengthen" is a relative term – given how protracted the process of change can be, the impoverished or marginalized may become stronger in only a slow, incremental manner, with setbacks along the way.
- *"The disadvantaged"* includes the poor, but also women, minorities, certain castes, indigent criminal defendants, victims of human rights abuses and other populations afflicted by discrimination or other injustices.

In seeking to reduce the concept to its key elements, this approach does not aim to be the last word on what constitutes legal empowerment. As a specific focus of inquiry, the field is still new; the meanings and nuances of legal empowerment are still emerging.

What legal empowerment is not

Part of the task of defining legal empowerment involves defining what it is not. If in fact one accepts that the work specifically aims to benefit the disadvantaged, there are many potentially worthwhile law- and development-oriented activities that do not qualify, as follows:

- Judicial administration reforms only indirectly aid the disadvantaged and serve many other ends as well; they accordingly do not constitute legal empowerment.
- Similarly, the impact of law reforms pertaining to contracts, property, foreign investment, bankruptcy and a host of other financial matters may trickle down to benefit disadvantaged populations, but do not specifically focus on them.
- Projects that offer incentives to landlords to abide by land titling laws, which could indirectly benefit impoverished farmers, target the landlords rather than the farmers. Even if worthwhile, such projects would not fall under the rubric of legal empowerment.
- In a related vein, efforts to promote more honest, transparent and accountable performance by government personnel do not specifically strengthen the disadvantaged, even if the disadvantaged stand to benefit.

- Perhaps most difficult, but still worth addressing, is the case where the government or an NGO may only be paying lip service to legal empowerment while ignoring or abusing the rights of women, farmers, low-income workers, indigent criminal defendants, minorities or other disadvantaged populations. Under such circumstances, crucial considerations can include the intent of the institution in question, its prior record in aiding or undermining the disadvantaged and the results that ensue.

Again, in a new development field, and even in many older ones, there is room for and benefits from healthy disagreement about what work does and does not fit into a definition. But it is necessary to start excluding as well as including certain approaches for the field to take form.

5. The chapters

The chapters of this book offer diverse perspectives on legal empowerment strategies, activities and research. The following comments on the chapters identify certain key features, without summarizing all of the many fine points the authors make.

In the opening chapter, Caroline Sage, Nicholas Menzies and Michael Woolcock demonstrate that justice for the poor – both the specific J4P World Bank program with which they are associated and, more generally, a far-reaching array of issues and activities – means far more than a narrow focus on courts and lawyers. Drawing on J4P’s research and related work concerning intra-communal conflict in Kenya, labor disputes in Cambodia and mining rights in Sierra Leone, they argue that the law constitutes more than government-approved rules and that justice for the poor goes beyond what development agencies call the “legal sector”. Their perspective is all the more noteworthy for emerging from the World Bank, an institution normally associated with a narrower view of the relationship between law and development.

Adam Stapleton’s perspective complements that of those three World Bank personnel by illuminating how the work of an NGO, the Paralegal Advisory Services Institute (PASI) in Malawi, goes against much conventional wisdom about development and how to build the rule of law. This conventional wisdom relies on lawyers and governments; further, it focuses on the Millennium Development Goals (MDGs) as setting priorities for development agency action. Yet, PASI, which evolved from a project started by the international NGO Penal Reform International and which has become a model for similar efforts elsewhere in Africa and even Bangladesh, instead relies on paralegals and civil society to aid indigent criminal defendants who languish in jail without trial. As Stapleton further points out, the combined effect of the MDGs (which give little attention to justice concerns) and the 2005 Paris Declaration on Aid Effectiveness (which donor personnel use as guidance in often concentrating funding in government hands) tend to counterproductively diminish donor support for the kinds of civil society efforts that can advance justice for the poor. (Ironically, subsequent to Stapleton writing the paper, PASI’s operations and the incarcerated defendants’ well-being suffered when the U.K. Department for International Development—which does merit praise for providing support—stopped funding the NGO directly and instead channeled assistance through Malawi’s government.)

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Both praising and critiquing CLEP, Tiernan Mennen’s chapter in turn complements Stapleton’s in key respects. He challenges conventional wisdom about the advantages of the state assuming justice delivery functions, for example, by asserting how the Bolivian government take-over of a promising community justice project has proven counterproductive (as in Malawi concerning PASI’s funding). In addition, as a complement to the case made by Sage and her colleagues, he argues for a broader approach to justice than that taken by the Commission, one that goes beyond livelihoods and economic opportunity (as important as he feels those are). Mennen further advocates such steps as engaging law students and young lawyers, working with community justice systems and recognizing the importance of paralegals and civil society in carrying out legal empowerment programs.

Vivek Maru provides an additional, and in some respects groundbreaking, view of legal empowerment by emphasizing the benefits of integration with social accountability projects, including the mutual learning of both fields. He cites, for example, the experience of the NGO Timap for Justice in Sierra Leone. He further draws on data from Uganda, indicating that where community groups, are enabled to understand and act on their right to monitor medical clinics' delivery of mandated services, infant mortality rates drop and other improvements ensue. This kind of legal empowerment-type intervention includes community scorecards and can improve health, education and other service delivery projects elsewhere. Maru further argues that legal empowerment-oriented organizations could learn much from social accountability research methodologies.

Ewa Wojkowska and Johanna Cunningham next highlight another emerging area for legal empowerment engagement – the operations of customary justice systems. Their chapter makes the common-sense but necessary argument that efforts to build access to justice for the poor should take into account the forums they most often use. Neither idealizing customary justice systems for their community roots nor condemning them as beyond possible improvement due to their rights-negating aspects – nor, for that matter, generalizing about systems that vary tremendously across the globe – they argue for approaches that decrease such systems' biases and increase their respect for human rights..

Jamie O'Connell probes yet another field that could benefit from greater attention to legal empowerment – transitional justice in the wake of dictatorships and violent conflicts. Analyzing a field that grapples with how societies should deal with the past, he addresses how to build for the future. He addresses, for example, the need for both one-time initiatives to help rebuild nations (such as constitutional provisions protecting the rights of disadvantaged groups) and longer-term efforts (such as paralegal legal aid programs). O'Connell additionally urges that transitional justice mechanisms such as Truth Commissions analyze and otherwise address the relationships between atrocities and disadvantage in a society.

Dan Manning in effect applies aspects of O'Connell's transitional justice analysis to a specific situation, post-conflict Bosnia and Herzegovina. A relatively small legal services NGO, Vasa Prava, has been contributing to restoring stability and prosperity through its work with impoverished, displaced and disenfranchised Bosnians. Manning highlights aspects of the NGO's work concerning housing, income, health care, social services, government accountability and legal reform.

Erica Harper addresses yet another kind of transitional justice situation – that of the Indonesian Province of Aceh after the end of many years of violent conflict, capped by the massive 2004 tsunami that devastated the area. Harper discusses an initial International Development Law Organization (IDLO) project to provide access to justice for women and other disadvantaged populations in a context where aspects of the legal system were being built or rebuilt from scratch. She also describes research techniques designed to start ascertaining progress and impact.

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In terms of information-gathering techniques, the chapter by Stephanie Willman Bordat and Saida Kouzzi complements Harper's as it portrays the plights of single mothers and their children born out of wedlock in Morocco and therefore lacking what CLEP identified as a cornerstone of legal empowerment: legal identity. As opposed to Harper's largely quantitative methods, Bordat and Kouzzi take a qualitative approach as they draw on their many years of gender-oriented work in the country and a series of interviews with NGO representatives, government personnel and single mothers. Their inquiries indicate that some strategies for aiding single mothers may not be welcome by the intended beneficiaries; that superficial indications of progress may in fact reveal problems; that pressing government officials to use unclear or unfair laws can prove counterproductive; and that law reform is needed to address a situation that parts of society might prefer to ignore. The point here is not that their methodologies or conclusions are necessarily flawless, but that in-depth familiarity with a society and qualitative inquiries can burrow beneath the surface of a situation in ways that complement quantitative data.

Nina Berg, Haley Horan and Deena Patel discuss women's inheritance and property rights as well as how advancing such rights can contribute to achieving the MDGs. They draw on research from Rwanda and Ethiopia in their analysis. The three authors argue for legal reform, legal implementation and resolution of conflicts between laws in ways that buttress gender equity and support for civil society's multi-faceted roles in these processes.

Hamid Rashid tackles a related but arguably even bigger issue in that it involves both women and men – how legal empowerment can contribute to land rights and the MDGs. He marshals a broad array of research to document the importance of protecting and expanding these rights to help reach a variety of goals. He particularly emphasizes access to land and the enhancement of tenure security as valuable processes. One of the many approaches he recommends for strengthening access and tenurial arrangements is participation, organization and advocacy by the poor.

Jeffrey Hatcher, Lucia Palombi and Paul Mathieu complement Rashid's overview of the importance of land rights by discussing a range of case studies compiled by the Food and Agriculture Organization of the United Nations (FAO) in African countries. Their chapter first articulates the importance of legal empowerment for securing land rights. It then discusses indications of impact drawn from those studies. The countries covered by these case studies include Niger, Madagascar and Mozambique.

In the next chapter, Lorenzo Cotula discusses a multi-country project coordinated by an international NGO, the International Institute for Environment and Development (IIED), which sometimes collaborates with FAO. The focus of IIED and its African partner organizations in this project is foreign investment in natural resources. More specifically, the thrust of the effort is to help Africans influence and benefit from such investment. Although it is too early to draw conclusions about the effectiveness of this legal empowerment initiative, the chapter discusses some initial insights and possible future steps.

The penultimate chapter, by Anne Grandjean, shifts the focus to a population that is sometimes not considered disadvantaged – children. The author discusses the work of the United Nations Children's Fund (UNICEF) concerning children's rights. It describes the Agency's projects concerning children's rights in Papua New Guinea, Nepal and the occupied Palestinian Territory. Grandjean addresses the decentralized, community-specific nature of these projects; their multi-disciplinary, multi-partner orientation, including engagement with civil society organizations; and their roles concerning policy advocacy and formulation.

16 Finally, the intersection of legal empowerment with medical matters – an issue broached by the Maru chapter's discussion of how legal empowerment helped curtail infant mortality in Ugandan communities – is illustrated by David Stephens's and Mia Urbano's chapter on the use of law by and for persons infected with HIV. The authors explore how legal empowerment can advance the rights of persons who have the virus or who are vulnerable to infection. Viewing the situation from a public health perspective, Stephens and Urbano discuss how legal empowerment can be of help concerning prevention, treatment and care.

6. Some common themes

Certain common themes emerge from most or all of the chapters, including:

Beyond the legal sector. As flagged by Sage, Menzies and Woolcock at the outset of the book, and as confirmed by Maru, Stephens, Urbano and others throughout it, legal empowerment should reach beyond what development agencies typically identify as the "legal sector" or even the "justice sector". Its relevance to public health is discussed in the chapters by Maru and by Stephens and Urbano. The point is further reinforced by Maru's discussion of social accountability, as well as the actual work of J4P and other agencies in integrating legal empowerment into other development

fields. The most significant implications and impact of legal empowerment may accordingly lie beyond the justice sector, in the use of law to strengthen the disadvantaged concerning health, education, irrigation, forestry, governance and other services and projects.

Beyond livelihoods. Although CLEP merits praise for putting legal empowerment on the development map, in some respects it contradicted its own broad definition of the concept by narrowly emphasizing the three livelihood-oriented “pillars” of legal empowerment. True to the Commission’s definition as well as many others, the chapters embrace a broad approach, one that benefits public health, social accountability, children, infants lacking identity papers, persons affected by foreign investment in natural resources and a host of other concerns.

Paralegals. A number of chapters refer to the help that paralegals provide. They do not completely obviate the roles of lawyers by any means, but they do provide cost-effective complements or alternatives to attorneys for many tasks.

Civil society. Most chapters also feature the lead or contributory roles of NGOs, grassroots groups or other civil society organizations in legal empowerment initiatives. In fact, Stapleton and Mennen even point out the counterproductive impact of a government taking over or complicating the work of an NGO under many circumstances. The various roles of civil society for legal empowerment—training, organizing, service delivery and advocacy—combine with the limited will or capacities of some governments to weigh in favor of donors funding NGOs and other civil society groups, and not simply as adjuncts to government-centered projects.

A two-way street. In some quarters, legal empowerment is sometimes thought of as being mainly about legal implementation and grassroots activism. In others, it is viewed primarily in terms of legal reform and government action. As Grandjean, Manning, Bordat, Kouzzi and others illuminate to various degrees, legal empowerment operations and impact can cut both ways. True, legal empowerment is more bottom-up than top-down; it often must feature legal implementation, so that good laws do not only exist on paper but are also enforced on the ground. But this does not preclude participation, and even leading roles, by the poor and their allies in legal reform. Furthermore, legal implementation efforts can inform and fuel legal reform, and vice versa.

More country-specific voices. Due to a confluence of factors, this book mainly features chapters by practitioners operating on an international level. Further inquiries into legal empowerment should seek to include more country-specific voices.

Further research. One final insight that most chapters highlight, whether directly or indirectly, regards the need for applied research in demonstrating legal empowerment initiatives’ impact (or, in some instances, lack thereof) and lessons. To varying degrees, the papers in this book attempt to illuminate lessons and impact. But like most law-oriented and social justice initiatives, the field of legal empowerment has a great distance to travel to build up a body of rigorous research that NGOs, governments, development agencies and policy-makers can draw on. This situation may partly be a product of the gap between development practitioners and scholars, with perhaps the former concentrating too much on prescriptions and the latter on descriptions. Regardless, development agencies and other funding sources can help close the knowledge gap through increased support for applied qualitative and quantitative research. This will involve more time and resources than currently go into understanding legal empowerment impact and lessons. For some research efforts it will also involve patience, a quality that ironically (given the long-term nature of the field) is often in short supply in international development. But the potential results—in terms of poverty alleviation, improved governance and increased control by the disadvantaged over their lives—could well justify the investment.

Endnotes

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Taking the rules of the game seriously: mainstreaming justice in development

The World Bank's justice for the poor program

Caroline Sage, Nicholas Menzies and Michael Woolcock*

Executive Summary

This paper explains the ideas and approaches that underpin the World Bank's Justice for the Poor (J4P) Program. J4P is an approach to legal empowerment that focuses on mainstreaming socio-legal concerns into development processes, in sectors ranging from community-driven development and mining technical assistance to labor rights advocacy and classic judicial reform. It has developed out of a perspective that legal and regulatory frameworks and related justice concerns cannot be conceived in terms of a "sector" or a specific set of institutions, but are integral to all development processes. Further, while there is broad agreement that justice reform and building an equitable justice sector is central to good governance and sustainable development, there is limited understanding of how equitable justice systems emerge and how such processes can be facilitated by external actors. J4P addresses these knowledge gaps with intensive research aimed at understanding the ways in which development processes shape and are shaped by local context, and in particular how the poor engage with – and/or are excluded from – the multiple rule systems ("legal pluralism") governing their everyday lives. Through three cases studies of the Program's work, this paper illustrates how understanding the various roles of law in society provides an innovative means of analyzing and responding to particular development problems. The cases also demonstrate the principles that underpin J4P: development is inherently conflict-ridden; institutional reform should be seen as an iterative and thus "interim" process; building local research capacity is critical to establishing an empirically based and context-driven reform process; integrating diverse sources of empirical evidence is needed to deeply engage in local contexts; and rule systems are ubiquitous in all areas of development, not just the "legal sector".

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Introduction

This paper sets out the ideas and approaches that underpin the World Bank's Justice for the Poor program and provides some examples of how a particular approach to legal empowerment is being used to support more equitable and effective reform processes, both within formal justice institutions and across other development sectors. As such, J4P is best understood as an approach to justice and development that focuses on mainstreaming socio-legal concerns into development processes, with an emphasis on understanding and improving the processes by which marginalized and excluded populations seek justice and claim their rights.¹ The program is based on a number of key principles (outlined below) and a particular theory of social change.

J4P has developed out of a perspective that legal and regulatory frameworks are fundamental to all development processes. Development is ultimately about developing and distributing rights, resources and responsibilities; justice systems play a key role in shaping this distribution of power and vice versa. This concern is hardly new. It is now widely accepted that effective and equitable justice systems are central to good governance and sustainable development.² Despite this emerging consensus, however, there is limited understanding of how equitable justice systems materialize, and thus how (and by whom) they can be promoted. A major reason for this limited understanding, we contend, is the fact that, in any given context, state law is but one of a number of rules systems in play, with some of the systems offering diametrically different understandings of problems, solutions and jurisdictions. The presence of more than one legal order in a given context is often called "legal pluralism".³ In many developing countries, non-state legal orders (such as customary law and religious law) have a significant influence on the way in which societies are governed, order is maintained, disputes are resolved and development is experienced. Moreover, all rule systems rest on underlying social norms even as they are embedded within, and serve to mediate, multiple layers and forms of state law (e.g. criminal and commercial law, at the local and the national levels). An underlying premise of the J4P program is that development practice – both classic justice sector work but, more importantly, development programs more generally – could benefit from a deeper analysis and understanding of the role of law in society and the ways in which justice institutions develop.

This paper provides an overview of J4P's central ideas and approach by: (i) looking at the common ways justice is currently conceived in development; (ii) outlining the approach the program has developed in response; (iii) highlighting three cases – from Kenya, Cambodia and Sierra Leone – that exemplify some key characteristics of J4P's work; (iv) offering some concepts to guide the future conduct of justice and legal empowerment work; and (v) concluding with some continuing challenges.

20 1. Justice in development – classic and alternative approaches

The ways in which justice has been both thought about and practiced in development raise a number of questions. These questions can be thought about within two interwoven strands: the way justice is conceived of in classic 'justice sector reform' work; and the frequent failure of other types of development programs to take seriously the multiplicity of rules systems and justice issues.

1.1 Classic justice sector reform work

There has been a growing consensus among development practitioners and scholars about the importance of legal and regulatory systems for development.⁴ These systems are deemed important because they are the basis of property rights, which in turn are vital for encouraging investment and promoting economic growth. They are also central to public administration, which in turn is the basis of public revenue generation and service delivery. Recently, it has been increasingly recognized that judicial systems shape the rules and structures that influence the

opportunities available to different segments of the population. With all this has come an increase in scholarly and programmatic attention to justice issues. However, these initiatives have focused on legal and judicial institutions, invariably state-based and usually at the national level. This approach has numerous shortcomings, with some arguing that “examples of significant, positive and sustained impacts are few”⁵ At the very least it would seem that there is a lack of knowledge⁶ about what is trying to be achieved, what success means, and what does and does not work.

Various explanations have been offered for the inability of classic approaches to declare clear successes more frequently, but for present purposes three can be identified:

1.1.1 Missing theory

Much justice sector work has proceeded without a clear theoretical basis of social and institutional change. While the importance of the rule of law is widely accepted and commonly invoked, there remains little understanding of *how* to build systems that embody its attributes (which include fair laws that are effectively enforced and that bind even the state itself). Legal systems are inherently political, involving legitimate negotiations between different institutions and interests.⁷ Yet development agencies have tended to frame these issues as predominantly technical concerns. Accordingly, the policy response has therefore favored the input of technical solutions – expert missions, sharing of best practices, training programs – but the outcomes regularly fail to meet expectations. Western legal systems are held up as models to aspire to, but little historical interrogation is undertaken of how these systems developed and the underlying bargains they represent.⁸

1.1.2 Missing context

In implicitly or explicitly importing assumptions about alleged best practices from rich country systems, justice-oriented development work often fails to properly understand local contexts. It can be particularly blind to the limits of the state and the continuing strength of non-state governance systems. Development practice in all sectors focuses predominantly on the institutions of the state; justice work is no exception. The systems that are held up as models are invariably those with a well-resourced and functioning state apparatus. However, in many countries where the “rule of law” is said to be most needed, the state is weak, has limited reach and legitimacy, and may be many years from being able to function and provide the services of a modern bureaucratic ideal. Justice reform initiatives have tended to work with justice institutions as if they existed within broad and broadly functioning systems of governance. Even those justice reform efforts that take a sector-wide approach – not focusing on single institutions in isolation, but instead address the array of institutions said to constitute the “justice sector” (judiciaries, ministries of justice, police, prosecutorial services, legal aid, etc.) – can be compromised by weaknesses in the other arms of the state governance apparatus necessary for functioning justice institutions.

Government weakness is often attended (and in some cases reinforced) by the continuing strength and importance of other rule systems in ordering society. In such instances, state law and legal institutions are only one of a number of intersecting rules systems used to govern and resolve disputes. These non-state systems – such as those guided by customary, religious or aid project rules – can reflect very diverse underlying norms and have different sources of legitimacy. State law will have limited power where the institutions of the state have limited reach, and the principles under which such institutions operate have limited meaning and legitimacy for everyday citizens. In these contexts, in short, the “rule of (state) law” is only a small subset of the overall “rules of the game”, and as such, an exclusive concentration on state law by development practitioners is unlikely to yield the results hoped for.

1.1.3 Missing justice

In focusing on the institutions of the state, classic justice sector reform often fails to promote justice for broad cross-sections of society. The content and implementation of prevailing state

systems often reflect the rules and interests of the wealthy, elite, urban and educated, who can capture and/or disproportionately influence state institutions. As such, the processes and principles that underpin state legal institutions are often markedly different from those of the wider population and are therefore not seen as just or legitimate, even in those circumstances where the weak state apparatus manages to serve more than a small minority of the population.

1.2 The missing law in development

Properly functioning legal and judicial institutions are clearly important and the above shortcomings should be explored to see whether justice sector work can be made more effective. In addition, however, concepts of law, regulation, rules systems and justice need to be infused more broadly into development programming. Put more forcefully, “justice” is best understood not as a stand-alone sector in development – at least not in the same way that agriculture, energy and transport are sectors – but rather, as a sector that infuses most aspects of almost every development activity. Every policy in every development sector, for example, is ultimately actionable and enforceable to the extent that it is articulated in and/or supported by law, and all behavior – whether by individuals, groups or organizations – is a function of a complex web of rules systems ranging from social norms to national constitutions.

Beyond just correcting failures in the conception and practice of justice sector reform work, development needs to address the larger issue that most development processes fail to even consider rules systems,⁹ despite the routine invocation of popular expressions endorsing the importance of “understanding the rules of the game”. Rules underpin all aspects of everyday life and are the key to understanding how conflicts form, escalate or get resolved. Yet, development, by design, puts all these rules systems in flux: it reorders society and alters the distribution of rights, responsibilities and resources. Moreover, it alters social relations, especially those pertaining to gender, occupation, and the relative political strength of particular social groups. As such, it is inherently accompanied by conflict. By establishing legitimate spaces and processes for negotiating competing interests, aspirations and interpretations, development actors can potentially become part of the solution to such conflicts.

A detailed consideration of rule systems, in all their various manifestations, is therefore critical to understanding development processes, and the design, implementation and assessment of policies/projects enacted in response to them. A basic starting point should be an understanding that plural legal orders exist in most contexts, and that the nature and extent of this pluralism is often “invisible” to outsiders; that is, it is “illegible”¹⁰ to the dominant modalities of research and operations that characterize most (large) development agencies.

22 Rules systems, even in their most model forms, are always evolving. In fact, arguably the best rule-of-law governments are those in which the rules systems are suitably malleable to channel the constantly competing interests of a dynamic society in a peaceful, equitable and orderly manner.¹¹ As a result, law and justice reform should not be seen as forging some perfect rule or institutional form; rather, it is more accurately conceived of as a process of encouraging more equitable, evolving processes whereby different interests and aspirations can be reconciled. Rule systems in their various forms – sometimes overlapping, sometimes competing, always evolving – have a number of functions in society, and as such can have a role in both undermining and enhancing development processes.

J4P’s response to the shortcomings associated with these two strands of approaches can best be seen by examining a number of cases highlighting work that has been undertaken. From this, J4P suggests a different way of thinking about governance, justice reform and legal empowerment. Justice reform needs to be thought of as one part of the governance and state building agenda, but importantly one that takes seriously the non-state rules of the game. Moreover, as Briggs rightfully stresses, our analysis of rules systems should point beyond the

narrower (if more technical) approaches of game theory – “how the players play particular games” – to “why those games, and not others, arise in the first place, why some players, and not others, get to play, how rules of engagement shift ... and how players acquire the resources – both tangible and intangible – with which to play.”¹² As a result, legal empowerment is best approached not by a singular justice sectoral approach, but by assessing and improving the ways in which justice is experienced through the whole range of development programming.

2. Exploring rules systems: three J4P case studies

When looking at justice reform, either in the classic sense or as part of development interventions, it is critical to analyze the role of law thoroughly, including at multiple levels. Rules systems, of which “the law” (i.e., state law) is but one constituent element, operate as mechanisms to achieve certain ends. The following cases approach development problems by asking what the role of law is and could be in each circumstance. Using law in this way provides an innovative means of analyzing concrete development problems and also suggests new ways of addressing broader development challenges.

2.1 Mechanisms for managing freedom, solidarity and order: peace and development committees in Northern Kenya¹³

2.1.1 Overview

In northern Kenya, peace and development committees (“peace committees”) are an innovative mechanism that have been developed to create spaces for resolving some of the issues arising in a context of legal pluralism. They consciously draw upon the principles and the legitimacy of multiple local rules systems, while also attracting authority from and respecting some tenets of state law. In doing so, the peace committees are attempting to fulfill a classic role of law, namely a mechanism for managing freedom, solidarity and order in society. They represent a legitimate forum in which social compacts can be negotiated and re-negotiated. While not without problems, they are particularly noteworthy because they seek to accommodate the various claims and jurisdictions that inhere in multiple, contesting rules systems.

2.1.2 Context

The arid lands of northern Kenya are inhabited predominantly by pastoralist communities. The region, one of the poorest in Kenya, is characterized by frequent droughts, as well as vast and often inaccessible terrain. Conflicts center largely on access to scarce natural resources, such as grazing land and water supplies, and loss of livestock during droughts that can lead to cattle rustling. A history of conflict and violence has more recently been accelerated by access to firearms, many acquired from adjacent conflict-affected countries. The sources and incidence of conflict are laid out across a number of ethnic groups and their associated socio-cultural systems. These systems vary and come into contact in a number of ways, such as through the movement of populations in search of grazing land as well as from an influx of refugees (e.g. from Somalia).

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The people of these arid lands largely live outside the scope of the services, including justice services, provided by the state. Key state justice institutions, such as the police and the courts, are rarely accessed. Courts are remotely located, and travel is unreliable and costly; even if they can be reached, the time and expense needed to pursue a case makes it prohibitive. Lawyers able to assist parties to navigate the process are rare.¹⁴ Police tend to be located closer to large population centers, but often lack resources to be able to investigate incidents and apprehend suspects.¹⁵

Increasing access to state justice services by, for example, instituting mobile courts, supporting legal aid and addressing fees, will not necessarily ensure just outcomes. As important as logistical constraints, the conceptual gulf between residents and the state legal

regime makes the police and courts unattractive to most communities. Prevailing ideas about what constitutes a wrong and who is responsible for an action, the processes taken to resolve conflict and the determination of appropriate outcomes can all markedly differ between communities and the state. Understandings of seemingly familiar concepts of “individuality” and “group”, for example, vary widely, and there are many ideas of where the balance should lie between freedom and solidarity.

The application of the “rule of law” (as determined by the state), therefore, is not always a benign good, as normative differences in what is considered a fair and appropriate outcome in one community is seen as unjust by others. Even when state institutions are not being consciously captured to further certain interests or repress others, the mere application of state laws leads to injustice. By applying the formal law, state agents run the risk of alienating communities and failing to build a reputation as being “just”. Police enforce sanctions against crimes such as gambling, possession of firearms and the brewing of alcohol, which do not necessarily constitute offences in pastoralist socio-cultural systems. Courts try individual offenders, but in many pastoralist societies the larger kin group may have responsibility. The determination of criminal responsibility in court, therefore, has little impact on solving conflict, which is perceived to be between groups. A kin group may feel entitled to take redress if certain acts are taken against one of their members, but in criminal matters, the state courts focus their orders only on the individual offender. The payment of compensation between groups is a common means of re-establishing peace, reinforcing the social contract both within and between groups. For these reasons, it is not uncommon for kin groups to seek to have matters withdrawn from the court to be dealt with in communities. When such applications are not granted, the parties can effectively frustrate the proceedings by refusing to appear as complainants and witnesses.

Historically, intra-communal conflicts have been managed by community chiefs and elders. Given the gulf with the state in all other matters of everyday life, this remains largely the case today. However, state and non-state spheres are not completely distinct. Tribal chiefs have become employees of the provincial administration and, as such, one of their functions is to maintain law and order. Furthermore, communities do approach the police to try and influence the outcome of disputes undergoing more traditional resolution processes. Individual magistrates also try to take processes outside the court into account but are given little official guidance or professional support. The resolution of matters by chiefs and elders in communities is not without problems. The more powerful members of communities can use the cloak of tradition to solidify their position at the expense of the poorest and most marginalized. Inter-communal disputes have often proved more challenging for chiefs to resolve as they involve more than one set of rule system. Thus, not only are power imbalances and competing interests at play, but competing and sometimes overlapping rule systems

24 further complicate the justice equation.

2.1.3 Legal empowerment initiative – peace committees

Peace committees are an innovative attempt to address both the challenges of conflicts that arise between communities as well as the divide between communities and the state. The committees grew out of efforts in the 1990s to bring an end to particularly entrenched conflicts between specific arid lands communities. Peace committees are formed by communities at the district level, with the support of non-government organizations and donors, and with the participation of local authorities. Given the heterogeneity of most districts, any given committee usually includes more than one ethnic group. Their popularity is evident since they are now found across the region. Each peace committee typically comprises a broad range of members who are locally perceived as relevant for conflict resolution. In some instances, the process of constituting peace and development committees has led to the drafting of detailed declarations, which in turn act as a local system of regulation for the district. Declarations commonly include development objectives, the nature of issues in dispute, ground rules and

procedures to be followed in cases of conflict, and the punishments to be applied. For example, one declaration spells out rules to solve problems associated with cattle rustling, the use of pasture and water, and the trafficking of firearms.

Some declarations refer to the state law and outline matters that should be referred to the police and the courts. The provisions of the declarations are not always wholly consistent with state law or principles of equality. For instance, one declaration originally stated that the death of a man should be compensated by 100 cows or camels, while the death of a woman is valued at only 50 cows or camels.¹⁶ Another provision of a declaration reintroduces a customary system of permission from respective elders and chiefs to enter certain grazing lands that the state regards as common property. In one circumstance, communities moved into a neighboring district to graze their cattle in breach of the provision; the District Commissioner who removed them in accordance with the declaration has been taken to court by the cattle grazers (where the case remains pending).

The popularity and success of the declarations is said to arise from their recognition of local concepts and socio-political structures as well as their ability to define ground rules between different local systems. The success of the peace and development committees, as well as the associated declarations, has led to them being supported by the Office of the President and the subsequent drafting of a national framework. The draft recognizes some weakness in state law and processes, and seeks to promote increased “traditional conflict handling”.

To be sure, peace committees and declarations are not without problems and limitations. The selection of committee members by communities can highlight disagreements about representation and competence. Rifts in communities arise over whether elders, the educated or the democratically elected are the most legitimate and able. Once elected, committee members can act as gatekeepers with access to information and power. Complaints have been made about both inadequate participation of women in the process and unfair treatment that they receive in some of the declarations. Peace committees and declarations do not neatly solve the interaction between state and non-state systems, but at least provide a coherent, legitimate and accessible step towards a system that meets communities’ governance needs.

J4P formed a partnership with an established legal aid and advocacy organization, the Legal Resources Foundation Trust (LRF), to undertake work in Kenya. Building on the program’s ethnographic research experience, J4P was able to support LRF in the development of methods to understand and record local governance and dispute mechanisms. In particular, J4P was able to assist in the capacity to make such research relevant to broader policy reform processes. The outcomes of the work are being used to inform the development of national policies with respect to governance and dispute resolution in local communities; in particular, LRF has provided advice to the Kenya National Commission on Human Rights. J4P also worked closely with the World Bank’s Arid Lands Resource Management Project (ARLMP), one component of which was providing support to the peace committees, and is furthermore informing the design of a more classic justice sector support program.

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2.1.4 Conclusions

When developed over time, forged in legislatures and applied by the courts, state law can act as a powerful expression of a society’s shared values and reflect a social compact between citizens and the state. In many contexts, non-state law plays a similar role at a more local level. This role of law is often challenged in circumstances of legal pluralism, where there may be a range of very different norms regarding the legitimate spaces in which to forge an agreement, and the processes to be followed to reach it. When people from disparate rule systems interact, there is a need to talk across the systems. State law can sometimes play this role. But in circumstances where the state has little legitimacy or reach, its effectiveness is limited, and can in fact increase perceptions of injustice.

Working through peace committees represents one potential entry point in northern Kenya for responding to this challenge, but doing so requires detailed context-specific knowledge of the prevailing ways in which state and non-state justice systems are interacting. J4P has been able to actively contribute to the building of this knowledge base. The peace committees of northern Kenya are a valuable organizational innovation since they aim to reduce conflict by creating a mechanism that incorporates the disparate norms of multiple local rule systems and state systems. They highlight the fact that state and non-state are not separate spheres, but are fluid and dynamic, and continue to influence each other. In this context, the peace committees are one constructive attempt to try to harness the power of all available governance and dispute resolution mechanisms in a joint quest for more equitable processes of dispute resolution.

2.2 Mechanisms for aligning global, national and local: Cambodian Arbitration Council

2.2.1 Overview

In societies with a strong executive, neo-patrimonial power relations and dysfunctional courts, it can be difficult to find equitable spaces for legal empowerment. A consideration of labor relations in Cambodia demonstrates how laws can be used to align global, national and local interests, and be harnessed to allow the poor to claim their rights, even absent hard enforcement mechanisms. The case also illustrates the benefits of creating iterative, interim institutions for legal empowerment in contexts where the prevailing legal and administrative structures are averse to recognizing the rights of the poor. The creation of more equitable spaces for dispute resolution can be of benefit as a pragmatic precursor to ensuring detailed and enforceable rights in law.

2.2.2 Context

In the wake of the 1993 adoption of a liberal democratic constitutional framework and the eventual end of civil conflict, a debate is ongoing regarding the relative merits of Cambodia's progress, with improvements in economic and some social indicators pitted against the continuation of an illiberal governance regime. Strong economic growth in recent years has seen marked increases in the gross domestic product (GDP) per capita, significant reductions in poverty, and improvements in key social indicators, but Cambodia remains one of the poorest countries in Asia and inequality has risen rapidly. Increases in inequity are commonly attributed to elite capture, corruption and entrenched patronage systems. The executive and, more particularly, the ruling political party, maintains a firm grip over the institutions of state – including the judiciary – from national to local levels. The court system remains compromised as a forum in which to resolve disputes and exercise rights: judges are subject to direction from the Executive; many court officers are open to bribery; and inadequate funding and low capacity further hampers effectiveness.

- 26 Cambodia's economic growth has been accompanied by a growing workforce in formal employment, particularly in garment manufacturing and tourism. The country emerged as a garment exporter in the 1990s, and following the end of the civil war, tourism numbers have increased dramatically. Employee growth in both sectors has been marked.¹⁷ Access to major markets for garment manufacturing and the direct experience of foreign clientele in tourism have also drawn international attention, including from international labor rights groups, at a time when local employee growth was bolstering union membership.

Cambodia's formal labor governance framework is relatively comprehensive and progressive in protecting worker rights. The Constitution enshrines the major international human rights instruments and Cambodia is a signatory to the primary International Labour Organization (ILO) conventions. The 1997 Labor Law, drafted with ILO support, incorporates key labor rights such as the right to unionize, bargain collectively and strike. Problems with the regime lie in the gap between the formal law and practice, including the willingness of the state to monitor compliance and the availability of spaces in which parties can seek to enforce their rights.

A 1999 bilateral trade agreement negotiated between the United States and Cambodia had a large impact on the development of labor relations in Cambodia. The agreement established quotas on Cambodian garment exports and critically tied yearly increases to improvements in working conditions. The agreement aligned global, national and local interests by seeking to “improve the working conditions in the textile and apparel sector, including internationally recognized core labor standards, though the application of the Cambodian labor law.”¹⁸ The agreement similarly aligned incentives for employers, unions and the government to improve application of the law. Employers sought compliance as a means of increasing business through higher quotas. The unions’ incentives were better working conditions and more jobs that would arise from higher quotas. The government sought to gain from increased revenue through increased business activity and the allocation of quotas between businesses.

Given administrative and judicial inadequacies, the immediate challenge facing the scheme was the ability to establish legitimate monitoring systems and dispute resolution processes. Attempts to create new independent structures were likely to be blocked or captured. In practice, implementation of the trade agreement rested on two key arms: an enterprise monitoring project and the creation of a labor dispute resolution body. The latter is the focus here.

2.2.3 Legal empowerment initiative – Arbitration Council

The dispute resolution body created is a tripartite Arbitration Council, composed of members nominated by unions, employer organizations and the government.¹⁹ Each case is brought before a Council panel of three. Both employer and worker parties to a dispute choose an arbitrator, while the third arbitrator is selected by the two arbitrators already chosen. The panel has wide powers to grant civil remedies, yet decisions are generally non-binding.²⁰ On the other hand, if either party wants to formally enforce a decision, then a court order must be sought. Given the nature of the court system, this makes the awards practically unenforceable. While the Arbitration Council has its critics, it can also be said to have had enjoyed considerable success, especially given the governance context and the nature of the parties involved. Its caseload has steadily increased and it has managed to find “for the most part, workable resolutions minimally acceptable to all parties.”²¹ A measure of the achievement can be seen by the creation of a viable mechanism “for conducting negotiations between a weak neo-patrimonial state, well-resourced international companies, and fledgling labor unions representing the interests of a membership comprised disproportionately of young women...”²²

Why has the scheme had some positive effect? Undoubtedly, the direct influence of international perceptions and the way in which this has (re)aligned incentives provide an important mechanism facilitating the operation of the Arbitration Council. The selection of Council members, which was heavily influenced by the ILO and the balanced composition of the panels in each case, has contributed to a general perception that the Council is fair. The publication of reasoned decisions for each case adds to transparency and legitimacy. The Council is also carefully positioned so as to be associated with the state and garner authority from it, yet also able to remain sufficiently independent so that it is not captured by the state.

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2.2.4 Conclusions

The World Bank was a lead donor in justice sector reform in Cambodia, but there was limited political will to drive reforms in a difficult context. J4P’s analysis of enterprise monitoring mechanisms and the operation of the Arbitration Council provided opportunities for the World Bank to understand and inform innovative approaches to law enforcement and dispute resolution in a context where classical administrative and judicial responses are (and remain) highly problematic. The classic justice reform response would have been to work with the state institutions, and a classic legal empowerment response would have been to support the most marginalized in their interactions with the state. Given the context, however, both these approaches have serious shortcomings.

The ultimate success of the scheme in transforming labor relations has been said to lie in “embedded social dialogue, the provision of public information and trade preferences rather than more conventional recourse to national or international law.”²³ The creation of a hybrid between a rule of law institution and a forum for social dialogue, building on the specificities of international attention, enabled certain rights to be realized. Law was a significant though not exclusive reference point around which negotiations took place – and has had influence even absent traditional mechanisms for enforcement.

2.3 Mechanisms for defining and enforcing rights: mining in Sierra Leone

2.3.1 Overview

In Sierra Leone, J4P has conducted analyses of mining that bring together international operators, national level agencies and multiple local communities. An array of legislation governing mining development has often failed to ensure peaceful resource extraction and equitable benefit sharing. J4P’s analysis of legal empowerment is grounded in the view that all development processes have the potential to cause disputes as they are invariably about the re-distribution of rights, resources, and responsibilities and the realignment of social relations between different groups. The benefits of development are frequently a source of contention, particularly if they are not equitably negotiated and distributed. An understanding and analysis of the disputes inherent to the very nature of development is too often neglected. The channeling of disputes into fair processes can be a productive means of negotiating interests and aligning them in agreed settlements. If no structure exists to address disputes, then they can flare into more serious, sometimes violent, conflict. In Sierra Leone, the state’s legal framework governing mining development fails to adequately incorporate detailed and appropriate dispute resolution authorities and procedures. J4P’s work was conducted to complement broader government-led reforms of the mining sector and worked with a World Bank technical assistance project to support the improvements in the mining authority at the national level. J4P’s analysis has led to the design of pilot projects to see how increasing access to information can address the justice issues facing communities. J4P teams are also designing aspects of a community-driven development program supported by the World Bank.

2.3.2 Context

There is particular sensitivity surrounding the management of the mineral sector in Sierra Leone. Sierra Leone was subject to civil war from 1991 to 2002. While the reasons for the start of the conflict are debated, the mismanagement of Sierra Leone’s mineral wealth is a well-documented theme in narratives of civil strife. The extraction and sale of diamonds fuelled the continuation of the war. J4P’s work had to be undertaken with care, and highlighted the importance of research and analysis for understanding the potential for mining to trigger or exacerbate conflict. Perhaps as important as conflict over access to the minerals is the inequality that can arise as a result of their exploitation. As Sierra Leone’s Truth and Reconciliation Commission concluded, “while the elite and their business associates in the diamond industry have lived in grandeur, the poor have invariably been left to rue the misappropriation of the collective wealth.”²⁴

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Sierra Leone’s mineral sector is an important driver of the country’s development, second only to agriculture as a source of employment and income.²⁵ Mining occurs on a range of scales and has recently seen the return of several large-scale foreign operators who suspended operations prior to the war. Global mining company investment is sensitive to the risk of local conflict. The International Finance Corporation’s Foreign Investment Advisory Service states that “resistance from local communities was the most common reason for an international mining company to withdraw from an investment.”²⁶ Conflict risk is also assessed on a sub-national scale, affecting the location of mining investments within countries. According to a 2005 study in Sierra Leone, 34 percent of companies surveyed decided against investing in a particular location on account of human rights issues, including potential conflict with local communities, relocation issues, and security concerns.²⁷

The mineral sector in Sierra Leone is governed by numerous national laws and regulations, which have been subject to recent reform. In practice, the mining governance system is characterized by: inconsistencies and ambiguity in the rules; the number of agencies involved, which requires a high level of coordination and capacity across government (which in turn are often overwhelmed and understaffed); and high levels of complexity, which makes it difficult for communities to understand and claim their rights and to hold both mining companies and authorities to account. Monitoring and enforcement of the entire governance scheme remains inconsistent. It frequently relies on pressure from communities and civil society, which are typically inadequately informed and resourced to properly fulfill this role.

The most pressing flaw of the legal framework is the failure to include appropriate dispute resolution processes. The Mining Ministry is the only body legally designated to arbitrate disputes involving mining companies, yet there is no guidance as to the types of disputes the Ministry will handle, nor the principles and procedures for resolution. More accessible avenues for communities to seek redress, such as through a nationwide system of local courts,²⁸ are prohibited from hearing cases involving mining companies. Paramount chiefs, the top authority in each of Sierra Leone's 149 chiefdoms, can hear cases but the process is voluntary and non-binding.

A complex state legal regime intersecting with diverse local rule systems makes it difficult to determine and track benefits. Communities have rights, entitlements and benefits that arise from different sources, which are calculated in various ways, distributed by a range of authorities, and given to different beneficiaries. Under state law, one community may be entitled to surface rents, compensation for disturbance and damage, a percentage of sales from nationally managed development funds, employment and commitments to community development projects.

Though important and justified, a number of additional legal considerations further complicate the picture. National law provides that minerals are owned by the state,²⁹ and that landowners have to grant consent to mineral rights holders prior to any operations taking place on their land. Most land in Sierra Leone is held by communal groups and remains unregistered. The nature of land ownership makes it difficult to determine the appropriate consent giver(s), as well as the processes for offering consent. The government benefits from mining through revenue derived from a number of sources including: annual mining license fees; royalties; export duty on diamonds; import and export fees; corporate tax; council taxes and fees to the National Social Security Insurance Trust.

Thus, even with time and access to information, an understanding of the system is challenging. Information about the law and mining operations is not readily available and is frequently difficult to access even within the state authorities themselves. This lack of transparency fuels accusations about what has been promised and who is receiving what. Community grievances can thus be maintained even when there is little basis in fact. Companies can be following the law but still encounter problems. For communities, it becomes difficult to claim their rights and hold both mining operators and authorities to account.

Local-level disputes are a common cause of conflict. Within communities, some benefit more than others. Those who control interactions with mining companies and the state can entrench their power, particularly through the dispersal of benefits. This can further disadvantage the poorest and most marginalized groups. Mining representatives often feel that they are interacting with communities appropriately by dealing with the leaders, but this opinion is often not shared by the general populace. A common complaint in mining communities in Sierra Leone is that the people do not know the terms of the agreements their leaders have struck with outsiders. Intra and inter-community disputes arise when some obtain employment in the mines and others do not. Local traders may benefit from increased economic activity while

some landowners are forced to resettle. Depending on the local rules systems governing land, some landowners may be willing and able to offer consent while their neighbors may not. These all serve to cause divisions in communities. Traditional mechanisms are not often equipped to deal with such disputes, especially in the face of the rapid social change that industrialization precipitates.

2.3.3 Responding to disputes: the Village Resettlement Committee

Despite a paucity of information, the complexity of the governance regimes and a lack of formal dispute resolution mechanisms, communities have not been without some power in affecting the conduct of mining operations and mineral policy in Sierra Leone. In December 2007, the national government suspended operations at a large-scale diamond mine³⁰ following a series of disputes with local communities. A local pressure group had organized a demonstration at the mine site, using the occasion to present a list of demands on issues including crop compensation, relocation, employment and community development. Demonstrators entered the site and soldiers hired by the mine operator opened fire. Shots were reportedly also fired from within the crowd. In the violence, two protestors died and eight others were injured. This triggered the Sierra Leonean President's intervention and a suspension of mine operations. The President established a commission to investigate the circumstances surrounding the incident. The commission had three months of hearings and released a report and recommendations in March 2008. This led to the drafting of a government white paper based substantially on the recommendations. The white paper suggests fundamental changes to mining policy.

The lifting of the mine suspension shortly after the release of the white paper prompted a flurry of criticism by members of the affected communities, some civil society organizations and certain sections of the media. The government responded to the criticism by inviting the company and the community pressure group to a series of meetings aimed at resolving outstanding matters. Considerable headway was made and the agreements arising from the meetings helped to improve relations, including between communities and their Paramount Chief, who had been siding with the company. The government also established a committee on the reopening of the mine, with representatives from the local pressure group and the company, the Paramount Chief, the local mining warden, the Minister, Permanent Secretary and Director for Mines and the Member of Parliament for the area. Through this process, many of the original community demands were eventually met. One outcome was the creation of the Village Resettlement Committee in conjunction with the local pressure group, the Mineral Authority and the Ministry of Agriculture.

30 Given the lack of any standing judicial or administrative procedures, this dispute resolution process had to be fashioned *ad hoc* in response to the particular event. The dispute resolution process was not in place to prevent the dispute becoming violent. Furthermore, it has not been enshrined to deal with future disputes, either at the same site or elsewhere, raising the chance that disputes could again turn violent without a forum in which to resolve them. Even so, it represents a good faith effort by all parties to identify a constructive and context-specific way forward in an environment otherwise characterized by pervasive institutional fragility.

2.3.4 Conclusions

Interests and disputes concerning mining occur along several axes, and the law is often used as one mechanism to align these interests and establish a process for dispute resolution. Communities often welcome mines as a source of development resources, but disputes regularly arise as promises are not fulfilled or some benefit more than others. National governments gain from the tax and royalty revenues, but have to balance the risk of local conflict with the desire to attract investment. Mining companies seek to maximize profit, but are also aware of the potential of local conflict to disrupt operations and their global corporate responsibility.

The input of intense, large-scale development processes into a context of weak national governance as well as local rules systems not attuned to processes of rapid change is highly likely to cause disputes and/or exacerbate existing ones.³¹ When actors at the local level act collectively, they are often able to assert their interests against national and global actors, and achieve more equitable outcomes. In these contexts, one aim of the law should be to establish “good contests”;³² that is, relatively more equitable negotiation and dispute resolution processes in which the interests of actors can be debated and more closely aligned following principles of fair process. When these processes are established on an ongoing basis, they can help channel disputes in a non-violent manner.

The J4P approach of garnering user perspectives of justice issues around important development processes highlights the pervasive nature of intra-community issues in causing disputes. It also highlights the difficulty that communities face in knowing and claiming their rights when information is scarce and established processes are lacking. Insights into these perspectives can be invaluable in informing national policy-making and reform for more equitable development. This is leading to the design of pilot interventions in the mining areas and to informing the design of a planned mining governance project. The knowledge and experience gained is being used directly by the J4P team beyond mining areas in the design of a community-driven development program.

3. Justice in development – some principles for an alternative approach

What do the above cases tell us about the way we should think about and conduct justice reform, and what role external players can play in the reform process? J4P used research processes and outputs as a fundamental part of the development process. These research projects opened up spaces for dialogue and contestation around reform agendas, brought local perspectives and evidence to the reform debate, and were used to inform the design of more locally embedded, equitable and conflict-sensitive interventions.

These cases, and J4P’s broader experience, have highlighted a number of summary principles which are important in their own right, but together constitute the beginnings of an alternative framework for the theory and practice of legal reform. These principles center on justice and legal empowerment strategies that are developed in conjunction with mainstream development programming, and that emerge through a sustained commitment to undertaking the detailed research necessary to understand local contextual realities.

3.1 Development is conflict

Too often, development practice focuses only on the product – be it a new health facility, road or piece of legislation – and fails to realize that all development activity has the potential for conflict, since the distribution of resources and power will create winners and losers. Even when project managers are sensitive to conflict issues, however, too often effective development programming is seen as a matter of trying to design conflict away; success is seen as perfecting the approach so that disputes do not occur. Notwithstanding that eliminating disputes through design may be overly optimistic, and that conflict can clearly become tragically violent, J4P argues that conflict can also be a good thing, a means by which the participation and voice of diverse interests in the re-ordering of society are harnessed. It is through equitable processes of contestation that new agreements and procedures are formed, and their legitimacy acquired.

In matters pertaining to the enfranchisement of women and minority groups, however, or the inclusion of marginalized communities in everyday economic and social life, the change trajectory is more likely to be a J-curve – things get worse before they (possibly) get better. Moreover, the depth and length of the J curve is often impossible to discern *ex ante* – human rights campaigners often embark on such risky ventures knowing full well the likely costs to themselves, their families

and careers, and that change may not even occur in their lifetime. Played out across countries and regions, especially those that are ethnically diverse, broad processes of democratization and economic development can thus be expected to generate considerable levels of conflict, with a high likelihood of that contention becoming violent. In this sense, Sierra Leone and Cambodia are both countries that have experienced extreme violence as a result of failed and/or misguided attempts at modernization, and where the devastating institutional aftermath has made it only more difficult to bring about and sustain equitable reform.

In less graphic circumstances, development projects of all kinds are inherently part of such processes of social change, but especially those targeted to the poor and to disadvantaged groups (or areas). And precisely because the trajectories of change are likely to be non-linear, even or especially when policies and projects seeking to bring this about are diligently implemented, very different analytical tools are needed to design and assess those policies and projects. It could therefore be the role of those interested in justice and legal empowerment to facilitate the creation and consolidation of spaces for peaceful, more equitable and more inclusive conflict, as part of the process of reform.

3.2 Institutional reform as an 'interim' process

In forging responses in contexts characterized by legal pluralism and weak, corrupt or captured state systems, it can be useful to focus on hybrid and interim approaches to furthering the rights, interests and aspirations of the poor and marginalized. Support for the development of interim institutions in certain contexts, such as the Cambodian Arbitration Council, embodies a historically grounded theory of social change. It recognizes that the modern rules systems and institutions of government, familiar to those in prosperous, rule of law states, emerged as a product of and continue to be forged by political processes³³ Governance and justice institutions are not static and therefore "perfectable" bodies, but rather are continually shaped and re-shaped in response to the demands of society. The very nature of modern systems is that, as society changes, they are able to incorporate and reflect new principles in an orderly and peaceful manner. One of the positive features of most developed country systems is their ability to continually, incrementally and peacefully change – rather than being subject to periods of stasis followed by violent rupture. Legitimate justice institutions are integral to achieving this more positive feature. When it comes to conducting justice work, it can be useful to think about creating institutions that have the ability to change in equitable ways.

32 Justice institutions are also not laid bare on the landscape, but in all contexts there will be systems – often incredibly strong – for ordering society and dispute resolution. Any justice reform initiative, such as the peace committees in northern Kenya, has to take these into account and can benefit from their legitimacy and familiarity. Since legitimate institutions have to develop through a process of equitable political contestation ("good struggles"), their content is largely unknowable in advance. From a policy perspective, it is therefore best to approach the design and reform of institutions with a mindset less concerned with what the end-state institution will "look like" and wary of importing a blueprint of best practices from elsewhere.³⁴ One might even be agnostic with respect to final institutional form, but this does not mean that development practitioners should not care about the outcomes. Rather, a key goal of the outcomes should be the promotion of rule-based, transparent and accountable decision-making, not the replication of a particular institutional form. For development practitioners this leads to the questions: "What spaces exist for the negotiation of development conflicts? How can these be filled with institutions that both respond to the realities of power as it is currently exercised and provide the potential to transform these in the direction of greater equity and participation?"³⁵

3.3 Building local research capacity

Governance and justice reform are qualitatively different to other types of development work, such as building roads and irrigation systems. Since rules systems are a reflection of and

responsive to local norms, their legitimacy rests on being “home-grown”. Therefore, the ways in which development actors support such justice reform are critical to their ability to have a positive influence, and the modalities used for other development programs are not necessarily applicable. Governance and justice work are less amenable than other types of work to the use of “toolkits” and the application of “best practices”. Equitable political contestation and widespread scrutiny is necessary for legitimacy and therefore sustainability of rules.

This does not mean that there is no positive role for outsiders, as the Cambodia case clearly highlighted. Development organizations can also assist in other ways, such as through support for local capacity to conduct the kind of empirical research necessary to understand the user’s perspective and inform policy-makers. J4P’s long-standing partnership with LRF in Kenya illustrated how development practitioners can contribute – in this case, research and policy experience – to increased local capacity, leading to effective national level advocacy. Even if, at a certain level of abstraction, the peace committees share many features with similar organizations elsewhere in the world, the context-specific details matter, just as do the reality that these details, and the legitimacy they confer, are the fruit of local research conducted and communicated by Kenyans themselves.

Development agencies will also continue to support development programming in many sectors, leaving a clear role for justice practitioners to ensure that these programs take an integrated approach to justice and legal empowerment – as shown by J4P’s work with the Arid Lands Resource Management project in Kenya and the design of a community-driven development project in Sierra Leone. In Sierra Leone, J4P’s work was conducted to complement broader government-led reforms of the mining sector and worked with a World Bank technical assistance project to support improvements at the national mining authority.

3.4 Deep engagement with local contexts

J4P understands “law” in a broad sense, incorporating the whole range of rules systems that are relevant for governing communities and resolving disputes. This is informed by theories of legal pluralism. Even a brief consideration of most countries where J4P operates highlights the continuing importance of legal orders outside the state in governing people’s lives and the difficulty that the state has, and will continue to have in many contexts, in providing judicial services to the majority of its population. J4P understands that rules systems are embedded in local norms; such systems cannot be effectively modified without also addressing the attendant changes that must take place in society.

By focusing on the particular context, the program makes sure to start with “what is” rather than the common risk of importing assumptions about what should be, or jumping to an idealized end product. In this sense, it is the underlying function of rules and institutions that is important (i.e. what they “do”), not the form (what they “look like”), which they may take in any one place. An approach that explores the different *roles* of law in society – not just its legislative or institutional manifestation – helps to reveal the importance of context in shaping how rules systems in general and the law in particular are experienced and navigated by marginalized groups. Crucially, given the complexity of the context, the time that reform takes, and the frequent shortage of trained researchers to help policy-makers more adequately understand both context and reform processes, it is especially important to develop a strong commitment to building local capacity to conduct supportive research and associated (long-term) advocacy.

3.5 Integrating diverse sources of empirical evidence

An understanding of context is further served by conducting in-depth research to form an empirical basis for reform. The program recognizes that, in many contexts, development agency decisions about reform – and not just reform concerning justice issues – are made

without sufficient evidence and understanding of the most pressing challenges that people face or sufficient understanding of the available means by which they are addressed (or not). While evidence alone is not sufficient for making good policy, it becomes extremely difficult without it.

It is also critical that the right sort of research is carried out and that appropriate methodological approaches are deployed. Many development fields and organizations, including the World Bank, favor quantitatively gathered data. Such data can, of course, be useful as a starting point in justice and legal empowerment issues, and for discerning wider trends, but complementary qualitative methods are needed to understand: the real meaning of rules systems to those over whom they preside; the trajectory that processes of reform take and the different *aspects* of reform as experienced by those most affected by them; the dynamics that determine whether reform efforts succeed or fail; and the lessons that flow from such dynamics. In formal methodological terms, such issues are often “unobservable” via orthodox household survey techniques, but can be carefully explored and more accurately understood by qualitative methods.

As such, the J4P approach uses mixed methods in an attempt to more closely discern and understand processes of change, but is primarily community-focused, and starts from the perspective of the users of justice systems. By focusing on the most common justice issues, the program recognizes the importance of demand in building sustainable justice reform, linking with the conception of legitimate rules systems as the product of local political processes.³⁶ A user perspective can also be useful in illuminating the most pressing reforms in a legally plural environment. In Sierra Leone, for example, J4P conducted extensive field research with communities in mining-affected areas to identify the impact of development processes and to determine the ability of communities to enforce their rights and claim entitlements. By starting from a user’s perspective, it became clear that access to information about rights, as well a forum in which to assert them, was as important as the content of the rights themselves. Moreover, by ascertaining and disseminating community perspectives on justice, J4P’s approach empowers those voices to inform policy. The program also looks for successes, especially openings where collective action by the poorest and most marginalized has been able to make some headway in terms of overcoming power differentials and achieving more equitable outcomes. An analysis of “success stories”, usually achieved in circumstances otherwise less than conducive to equitable reform can inform and inspire other such efforts elsewhere.

J4P is also concerned with grounding its analysis of the field research data in an explicit theory of social change. In-depth qualitative research, informed by history, the political economy and the socio-cultural context in which reform is being undertaken, are central to this task. As noted above, social change is often non-linear, violating one of the most common assumptions of empirical efforts to assess project efficacy.³⁷ Knowledge of such trajectories is important not only for understanding processes of social change at the local level, but also for discerning the impact of policy/project interventions designed in response to them. In Indonesia, a full arsenal of social science tools, from ethnographic investigation and newspaper analysis to household surveys and case studies have been deployed to better understand and document these processes.³⁸

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3.6 The ubiquity of rule systems in all areas of development

Since all development processes impact on rules systems and have potential to cause conflict, justice issues should be looked at across all aspects of development. Ideally, justice work is best designed and implemented not as stand-alone programs, but together with the whole range of development projects and reform processes. J4P’s work exemplifies this, ranging from mining and community driven development to cash transfers and labor rights. J4P works closely with larger Bank projects which are aligned to a government’s development priorities and reform agenda.

A predominant area of work focuses on land and natural resource management, since this is regularly the most common source of disputes and conflicts in communities with which the program is engaged. Land and natural resources often represent rural communities' most valuable asset and are inextricably linked with group identities, values and ways of making sense of the world; as such, issues of ownership and use raise key rights issues for citizens. In developing countries, land and natural resources, in particular extractive industries, can also be a major source of income for both states and communities. Natural resources are thus an important area of study from both the perspective of individual resource-affected communities and the broader polity.

Conclusions and continuing challenges

The process-driven approach advocated by J4P does not fit easily with the prevailing imperatives of most development institutions, which strongly prefer manageable inputs and knowable, predictable outcomes – or at least outcomes that are stated as such *ex ante* (whether or not they reveal themselves in the fullness of time). The J4P approach, which prioritizes the development of local capacity to establish in-depth evidence as a basis for reform, can be resource-intensive. Furthermore, it involves a necessarily slow process that requires commitment beyond the timeframes typically provided for in development project cycles. It also runs counter to justice reform conceived of as a primarily technical problem, one which simply requires outside “experts” to provide their knowledge of “best practices” via intensive short courses for jurists, senior civil servants and other government officials in capital cities. These may sometimes have their place, but they are unlikely to have much enduring traction and credibility unless they are also grounded in the more labor-intensive and time-consuming work required to understand the nature of the broad array of rules systems shaping the lives of the poor and the dynamics of change (and resistance to it) to which they give rise. These processes are inherently complex, difficult to conceptualize, measure and assess, and it precisely for these reasons that they need a deft articulation of theory and evidence.

J4P is acutely aware that it must not offer itself as a new “silver bullet” solution for legal reform. Indeed, it confronts on a daily basis its inherent limitations and constraints, and the vexing ethical issues emanating from them. The interim institutional approach, for example, may be seen as accepting institutional forms which do not meet the standards of developed countries and/or international norms of best practice. Does this mean accepting “not as bad” justice for poor communities? What does it mean for the goal of advancing supposedly universal and inalienable rights? The danger of adopting incremental and iterative approaches is that the powerful may accede to small initial improvements as a means of relieving (and it is hoped, from their perspective, snuffing out) any further pressure for reform. Establishing and sustaining coalitions for reform is difficult and sometimes even dangerous, while windows of opportunity may be scarce, leading to pressures to maximize any gains made. While such courses of action can be optimal with the benefit of hindsight, the history of successful justice reform suggests that incremental steps are often the most sustained, and are the best places to address the conflicts to which they necessarily give rise.

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Consistent with its own principles, the J4P approach is itself an iterative process, one that seeks and welcomes “good contests” over the most effective and equitable strategies for bringing about more accessible and responsive justice systems for all. In this crucial sense, the program aims to be part of an ongoing and evolving conversation about how best to build accessible, effective and equitable justice systems for and by the poor.

Endnotes

- 1 J4P is led from the Justice Sector Reform Unit of the World Bank's Legal Vice Presidency and brings together a multi-disciplinary team from across the World Bank. J4P has team members based in-country across East Asia and the Pacific, and in Africa. Further details about the program can be found at <www.worldbank.org/justicefortheopoor>.
- 2 See, for example: World Bank, *World Development Report 2006: Equity and Development* (2005).
- 3 The literature, from a diverse range of disciplinary perspectives, is littered with debate about the meaning and definition of the term "legal pluralism". See, for example, J Griffiths, "What is Legal Pluralism?" (1986) 24(1) *Journal of Legal Pluralism and Unofficial Law* 1; S E Merry, "Legal Pluralism" (1988) 22(5) *Law and Society Review* 869; F von Benda-Beckmann, "Who's Afraid of Legal Pluralism?" (2002) 47 *Journal of Legal Pluralism and Unofficial Law* 37.
- 4 See for example, the history outlined in C Sage and M Woolcock, "Breaking Legal Inequality Traps: New Approaches to Building Justice Systems for the Poor in Developing Countries" in A Dani and A de Han (eds) *Inclusive States: Social Policy and Structural Inequalities* (2008) 3. The United Nations' recent *Commission on Legal Empowerment of the Poor* <<http://www.undp.org/legalempowerment/>> is another manifestation of this consensus on the importance of the issue (if not what should be done in response to it).
- 5 C Sage and M Woolcock, "Breaking Legal Inequality Traps: New Approaches to Building Justice Systems for the Poor in Developing Countries" in A Dani and A de Han (eds) *Inclusive States: Social Policy and Structural Inequalities* (2008) 4.
- 6 T Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006) 15.
- 7 For an explication of the roots of both instrumental and non-instrumental views of law, see, among others, B Z Tamanaha, *Law as a Means to an End* (2006).
- 8 In this sense, the legal sector is hardly alone: similar approaches to institutional replication are commonplace in finance, health and education. See J C Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (1998); L Pritchett and M Woolcock, "Solutions when the Solution is the Problem: Arraying the Disarray in Development" (2004) 32 (2) *World Development* 191.
- 9 The term "rules systems" is used here to emphasize that more than just state

laws and regulations (and their associated institutions and processes) are important in governing societies. Social norms and religious precepts, for example, can exert a powerful influence on behavior and what is considered "just".

- 10 J C Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (1998).
- 11 D Adler, C Sage and M Woolcock, *Interim Institutions and the Development Process: Opening Spaces for Reform in Cambodia and Indonesia*, Brooks World Poverty Institute Working Paper No. 86 (2009).
- 12 X de Souza Briggs, *Democracy as Problem Solving: Civic Capacity in Communities Across the Globe* (2008) 22.
- 13 The following case study is built on research laid out in the J4P research reports: T Chopra, *Reconciling Society and the Judiciary in Northern Kenya* (2008a); T Chopra, *Building Informal Justice in Northern Kenya* (2008b); B Ayuko and T Chopra, *The Illusion of Inclusion: Women's Access to Rights in Northern Kenya* (2008). Available at <www.worldbank.org/justicefortheopoor>.
- 14 A system of *Kadhi* courts attempts to address some of the issues of distance and cost. *Kadhis* are often co-located with magistrates in areas with Muslim populations. They are governed by a national statute and have jurisdiction over civil cases, applying *Sharia* law. Some *Kadhi* courts have appointed imams or other scholars in remote areas as a grievance advice and referral mechanism.
- 15 It is reported that only 7 percent of the national population report cases to the police. While no relevant data is available for the arid lands, the proportion is very likely lower. See the *National Integrated Household Baseline Survey Report* (2006) commissioned by the Governance, Justice, Law and Order Sector Reform Program, in T Chopra, *Reconciling Society and the Judiciary in Northern Kenya* (2008a) 5.
- 16 It has since been amended to add that the offender must be handed over to the police.
- 17 Employees in the garment industry increased from 80,000 workers in 1998 to over 320,000 in 2006, and employment in the tourism sector, from 10,000 in 1994 to over 100,000 in 2009, in D Adler and M Woolcock, "Justice without the Rule of Law? The Challenge of Rights-Based Industrial Relations in Contemporary Cambodia", in T Novitz and C Fenwick (eds), *Workers' Rights as Human Rights* (forthcoming) 170.
- 18 *Cambodia Bilateral Textile Agreement 1999*, quoted in Adler and Woolcock, *ibid.*, 178.
- 19 The Arbitration Council was provided for in the Labour Law but had not been created.
- 20 Unless the parties have agreed in writing to be bound by the decision or are bound by a collective agreement incorporating binding arbitration, either party can file an opposition to the decision and it will have no legal effect.
- 21 Adler, Sage and Woolcock, above n 11, 10.
- 22 *ibid.*
- 23 Adler and Woolcock, above n 17, 182.
- 24 Truth and Reconciliation Commission of Sierra Leone, *Witness to Truth*, Vol 3B (2004) ch 1.3.
- 25 World Bank, *Mining Sector Reform: A Strategic Environmental and Social Assessment, Sierra Leone* (2007) 18.
- 26 Foreign Investment Advisory Services, *Competitiveness and Corporate Social Responsibility in Sierra Leone: Industry Solutions for Tourism and Mining* (2006) 4 in K Rogers, *Governing Sierra Leone's Mining Sector: The Mining Sector's Accountability to Host Communities* (Unpublished draft on file with authors) (2009) 13.
- 27 *ibid.*
- 28 Local courts, also known as native administration courts, are the lowest level of the formal justice system, with typically one or two courts per chiefdom. See R Manning, *The Landscape of Local Authority in Sierra Leone: How "Traditional" and "Modern" Justice Systems Interact* (2009) World Bank Justice and Development Working Paper Series, Vol 1 (1).
- 29 The authority to grant access for small-scale and artisanal miners has been delegated to the sub-national (chiefdom) level.
- 30 The Koidu Kimberlite Project operated by Koidu Holdings Limited.
- 31 P Barron, R Diprose and M Woolcock, *Contesting Development: Participatory Projects and Local Conflict Dynamics in Indonesia* (forthcoming).
- 32 Adler, Sage and Woolcock, above n 11.
- 33 See Adler, Sage and Woolcock, above n 12; Robert Bates, *Violence and Prosperity: The Political Economy of Development* (2000); D North, J Wallis and B Weingast, *Violence and Social Orders: A Conceptual Framework for Interpreting Recorded Human History* (2009).
- 34 S Haggard, A MacIntyre and L Tiede, "The Rule of Law and Economic Development" (2008) 11 *Annual Review of Political Science* 205.
- 35 Adler, Sage and Woolcock, above n 11.
- 36 In this sense, research evidence is useful not only for understanding processes of

change, but for monitoring the extent to which any promised policy reforms are actually implemented and to which these reforms are effective. To this end, researchers can be active contributors to the efforts of broader constituencies for change, which can include civil society groups and the media.

- 37 M Woolcock, "Toward a Plurality of Methods in Project Evaluation: A Contextualized Approach to Understanding Impact Trajectories and Efficacy" (2009) 1(1) *Journal of Development Effectiveness* 1.
- 38 The documentation concerning both the methodologies deployed and their

outcomes are available at <<http://www.conflictanddevelopment.org>> and <<http://www.justiceforthe poor.or.id/index.php?lang=en>> at 6 August 2009.



Empowering the poor to access criminal justice: a grass-roots perspective

Adam Stapleton

Executive Summary

This paper describes and documents the origins, evolution, strategy and impact of the Paralegal Advisory Service (PAS) in Malawi, a program that has become an independent NGO – the Paralegal Advisory Service Institute (PASI) – and that is now emulated in several other countries. PAS is significant not simply because its model has been adapted across Africa and more recently in Bangladesh, but because it represents a low-cost method of providing effective legal advice and assistance for ordinary people in conflict with criminal law.

It argues that the current trend in development thinking is progressively cutting off support for such civil society work and legal services for the poor to the detriment of development, human rights and justice, and that the experience of PAS and similar organizations suggests that the international community needs to rethink an approach that is in danger of proving counterproductive. In short, the needs of the poor in the justice sector are being sacrificed on the altar of donor “harmonization”.

It asserts that government cannot “go it alone” in providing legal aid services to its people and that PAS demonstrates the benefits that accrue from a public/private partnership in this field. It concludes with the recommendation that donor agencies should not pursue an uncritical strategy but hold national governments accountable to principles of good governance which include *inter alia* the active promotion of such partnerships.

Introduction

Almost ten years ago, the States Members of the United Nations adopted the Millennium Declaration¹ to end world poverty, in which they noted the importance of good governance in attaining development goals² and the role of civil society.³

In its section on human rights, democracy and good governance, the Millennium Declaration went on to state that States Members “...will spare no effort to promote democracy and strengthen the rule of law...”⁴ and would “...respect fully and uphold the Universal Declaration of Human Rights...strive for the full protection and promotion in all our countries of civil, political, economic, social and cultural rights for all...” and to “...strengthen the capacity of all our countries to implement the principles and practices of democracy and respect for human rights, including minority rights”.⁵

The 2005 Paris Declaration on Aid Effectiveness⁶ admirably sought to harmonize overseas development assistance, align it with government policies and route funding as far as possible through government budgeting processes. It is a practical and sensible attempt to forge international consensus on development assistance.

The eight Millennium Development Goals in the Millennium Declaration are curiously silent on the subject of justice and the rule of law, notwithstanding a clear link between weak/dysfunctional justice systems and societal breakdown.⁷ Whatever the intention, the effect in practice has been to demote the importance of the justice sector and cut it off from mainstream funding. Civil society organizations are advised by donors that unless they can demonstrate a link between poverty alleviation and justice reform they will not be successful in applying for grants.

The effect of the Paris Declaration, as interpreted by program managers based in-country, has often been to disregard the work of civil society actors in providing legal services at the community level – i.e. where the poor usually are to be found – and direct most funding directly to governments, whether or not the government is able or willing to channel the funds necessary to promote access to justice.

The impact of these two instruments, taken together, has been to diminish or sever funding to organizations that have provided access to justice where central governments have proved unwilling or unresponsive or unable – and so thrown the proverbial baby out with the bathwater. This is a tale of one such organizational “baby” called the Paralegal Advisory Service (PAS).

40 1. The Paralegal Advisory Service

PAS started life in four prisons in Malawi in May 2000 as a project of Penal Reform International (PRI) with the modest goals of assisting young persons in conflict with the law and helping to clear the homicide backlog. Few thought that it would last beyond a few months, because any partnership between civil society organizations on the one hand and law enforcement agencies on the other was considered at the time to be an innovation too far.

By 2003, PAS was providing national legal services on the front line of the criminal justice system in police stations, courts and prisons; by 2008, similar organizations based on the PAS model had been launched in West Africa⁸ and East Africa,⁹ and, on a pilot basis, in Bangladesh.¹⁰ Invitations to start a similar scheme have been received from Liberia,¹¹ Zambia,¹² Tanzania¹³ and Lesotho.¹⁴ Visitors come from North American institutions to see what is going on in Malawi and to cooperate with the paralegals,¹⁵ whose work is viewed as good practice: in 2004, it won recognition from the United Nations Centre for Human Settlements (UN

Habitat)¹⁶ and was profiled by the United Nations Children's Fund (UNICEF).¹⁷ The work of PAS has been called "pioneering" by the New York Times¹⁸ and it has been cited in academic and policy publications.¹⁹ Two films have been made about its work.²⁰ In 2007, PAS was constituted as the Paralegal Advisory Service Institute (PASI), a free-standing non-governmental organization (NGO).

The scheme in Malawi has been independently evaluated on three occasions²¹ and variously described as "energizing the criminal justice system";²² "indispensable, bridge building, voices of the voiceless";²³ and most recently "...PAS has taken a leading role in Africa and beyond in demonstrating the value that paralegals can bring to criminal justice systems, even where there is no shortage of lawyers. It has succeeded, with its Malawian justice partners, in visibly changing the legal landscape for both accused persons and prisoners ... PAS has registered itself as an unusually effective project."²⁴

These evaluations were also quantitative. The clinics conducted in prisons between November 2002 and June 2007 empowered approximately 150,000 prisoners to represent themselves in court and access the justice system, for example to make a bail application, enter an informed plea to the charge, conduct their defense, enter a plea in mitigation or draft an appeal to the High Court.²⁵

Impressive as this figure sounds, its impact has been to reduce the overall remand population – those awaiting trial – from 40-45 percent of the overall population to a current figure of 17.3 percent.²⁶

A similar impact has been noted in Kenya and Uganda. In Kenya, an independent evaluation found that the Kenya Prisons Paralegal Project had "...significantly helped decongest the prisons...by speeding up the determination of long-pending cases in courts...helped remove bottlenecks curtailing access to justice for the poor through facilitation of meetings between key criminal justice agencies...improve prison conditions."²⁷

In Uganda, the evaluation team noted: "Although the team did not carry out a thoroughgoing validation test,²⁸ the evidence we summoned strongly suggests attribution to PAS. For instance, the Commissioner of Prisons told us that inmate population had fallen from 63 percent to 58 percent in five months. In the absence of any other intervention apart from PAS, he could only attribute this fall to its activities.²⁹ A similar observation was made by the Officer in Charge of the Gulu Regional Prison³⁰ where PAS is present. He showed us prisons population statistics before and after PAS. The evidence clearly revealed a significant reduction. In his informed estimation, this was because of the work of PAS. As a way of further verifying these assumptions, the team took the PAS figures and compared them with those of the prisons and police. The correlation was compelling."³¹

Two supplementary informal case studies illustrate the impact of a team of two paralegals in Kenya and Malawi. In Langata women's prison in Kenya, in a six week period, the paralegals reduced the remand population from 80 percent of the total to 20 percent.³² These were either women who had overstayed awaiting a trial and whose sentence on a finding of guilt would anyway not have exceeded the time they had served in prison, or women charged with bailable offences or otherwise held unlawfully. Many of these women were also mothers and/or single parent householders; all were poor and unable to afford the services of one of the 4,000 lawyers in practice in the country.

In Zomba prison in October 2003 a team of two paralegals conducted a paralegal clinic on murder/manslaughter. Following the clinic, 33 accused approached the team and indicated that they were willing to enter a plea to manslaughter.³³ The cases were duly referred to (i) the legal aid department so that a lawyer could interview the group and advise them on the

consequences of entering a plea, (ii) the Director of Public Prosecutions to determine whether a plea to the lesser charge was acceptable and (iii) the criminal registry for the cases to be listed. Subsequently 29 people entered pleas, were convicted of manslaughter and sentenced.³⁴ This resulted in savings to the judiciary of some £18,000 on the basis of the average cost of convening a court to try the matter (2004 figures). The Chief Justice sent a letter of thanks to the PAS national coordinator.³⁵

This is the hook that catches the interest of prison administrations across Africa and in Bangladesh, where high remand populations are placing considerable pressure on available space inside prison and on their management capacities. The intervention of PAS helps to push cases through the system, so that those who are stuck “in the system” are moved on and those held unnecessarily are moved out.

So how did it all start?

In 1996 an extraordinary meeting took place in Kampala, Uganda, at which 133 delegates from 47 countries, including 40 African countries, gathered to discuss the state of prisons in the continent. They included the President of the African Commission on Human and Peoples’ Rights (ACHPR), Ministers of State, prison commissioners, judges and international, regional and national NGOs.

There was no finger wagging: State and non-state actors, who were at loggerheads in their own countries, had grasped the enormity of the problems facing the prison administrations across the continent. There was almost instant recognition that no one could “go it alone” and that all needed to work together to find common solutions to the problems facing African prisons.

The meeting produced the *Kampala Declaration on Prison Conditions in Africa* which opened with the uncompromising words “Considering that in many countries in Africa the level of overcrowding in prisons is inhuman...” and went on to lay out an agenda for prison and penal reform on the continent in line with international standards, and specifically addressed the plight of remand prisoners, the use of “accredited paralegals”, the needs of prison staff, and alternatives to prison. The importance of the Kampala Declaration was immediately recognized by ACHPR, which adopted the Declaration at its next Ordinary Session³⁶ and appointed a Special Rapporteur on Prisons and Conditions of Detention in Africa in answer to one of the specific recommendations of the conference.³⁷ A year later, the Economic and Social Council of the United Nations (ECOSOC) adopted the Kampala Declaration and its Plan of Action as a United Nations standard.³⁸

42 PRI’s work in Africa took as its point of departure the agenda set in Kampala in 1996 and sketched out in the Plan of Action. It sourced funding for the work of the African Commission’s Special Rapporteur on Prisons and Conditions of Detention, and in the following year organized a regional conference on alternatives to prison in Zimbabwe in order to expose other countries on the continent to the groundbreaking community-service scheme that the Zimbabwe judiciary with NGO partners had been developing. A national committee was formed at the conference and a workplan was agreed for the coming months. PRI agreed to raise funds in support.

This became the model for the way PRI operated. Drawing on the Kampala Declaration, PRI (i) identified what had worked in Africa or elsewhere to address the prevailing priority, (ii) convened a meeting of major actors to review the situation in their countries and compare it with the situation elsewhere, (iii) agreed a provisional plan of action and (iv) proceeded to source the funds to implement the plan.

In this way PRI helped the Zimbabwean National Committee on Community Service to “package” their scheme. Brochures were produced explaining how it worked; forms, court

documents and guidance notes were collated and reproduced in a single manual to show how the scheme operated in practice and so enable new countries to pilot a scheme immediately by adapting what had been tried, tested and adjusted in Zimbabwe. A roster of experts and resource persons from the region was compiled. Within a few years the scheme was being discussed, introduced, piloted and operated in a number of countries in sub-Saharan Africa.³⁹

In juvenile justice, PRI helped the Government of Malawi in a similar way to develop a comprehensive program of reform. PRI invited the Ministry of Justice and Constitutional Affairs to co-host a regional conference that brought together a number of practitioners to discuss some useful approaches and strategies used in the region and elsewhere. Listening to the experiences of others, major actors in Malawi were emboldened to consider new and often innovative measures.⁴⁰

One of the outcomes of the juvenile justice conference in Malawi was a realization that unless young persons in conflict with the law were afforded some kind of legal advice and assistance and were monitored, they would remain highly vulnerable. It was recognized that lawyers could not fill such a role: there were not enough of them, they would prove too costly and their expertise was not required. It was recognized that trained non-lawyers, also known as “paralegals”, could provide the necessary services at an affordable rate.

So PAS was conceived.

It started without fuss. It was predicated on the openness of the prison service to allow eight “NGO people”⁴¹ inside the four main regional prisons for a period of 12 months; they were regulated by a clear and firmly worded code of conduct signed by each paralegal that placed them under the authority of the most junior prison officer. The code of conduct contains nine short paragraphs that include express proscription of any whistle-blowing to the media and confidential meetings with prisoners – every act carried out by the paralegal was to be within the sight and hearing of a prison officer – while recognizing the independence of the paralegal as a human rights monitor. The United Kingdom Department for International Development (DFID) agreed to fund the pilot scheme.

2. Forming phase: 2000-2001

Initially the aims were to assist young persons in conflict with the law and identify the homicide backlog, which the lawyers and courts could start to process. Maintenance of a daily presence and talks with prisoners and prison officers, however, revealed a range of other needs.

The most obvious was that many prisoners had no idea what they were doing in prison or how long they would be detained there. Virtually none had access to a lawyer.⁴² Some prisoners awaiting trial did not know what they were charged with; others did not know the date of their next court appearance, or what would happen when they were next produced in court.

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Some of the sentenced prisoners were unsure whether the time they had spent on remand had been taken into account when sentence was pronounced; few had any notion of lodging an appeal, and even less of how to access the appeal process. The overwhelming majority had had no legal representation at trial.⁴³

It was also obvious that many were held unlawfully or unnecessarily. Some had overstayed – that is, they had been detained for excessive periods – while others were admitted to bail but could not afford the terms set by the court.⁴⁴ In addition, the paralegals found a substantial number of prisoners who had been “dumped” in prison by police using a device called a “temporary remand warrant” to bypass the courts and hold someone in prison for 24 hours

pending enquiries. Once the 24 hours had elapsed, police renewed the period *en bloc* and, in this way, a person could languish for weeks and even months without being produced before a court, to the chagrin of the prison officers who felt powerless to do anything to arrest the process. The police could do this because they acted in a vacuum. As a matter of fact, the paralegals found that each criminal justice agency acted in a vacuum, or silo: the police investigated the case, the courts heard it and the prisons held the accused. There was no link between the various justice agencies.⁴⁵

The third obvious need was for something for prisoners to do: they just sat around all day.

With only two paralegals for each of the four prisons, which varied in size from 1,800 persons to 500 and contained over 60 percent of the total prison population, emphasis was placed at the outset on maximizing outreach to as many people in need as possible in the time available. Not only were one-to-one meetings between paralegal and prisoner proscribed under the paralegals' Code of Conduct: it was realized that they were inefficient. Paralegals had to think less like lawyers providing case-specific advice and act more as "filters": they had to think less of what they could do themselves and more about what they could outsource or facilitate, of how they could link up with others and of what dormant processes they could catalyze or re-start.

At the end of the first six months, the paralegals had gained qualified acceptance from the prison administration. The project recruited a third paralegal for each team. DFID extended funding. By January 2002, in quantitative terms, paralegals had facilitated the release of 369 prisoners, conducted 292 clinics in prison reaching 1,650 prisoners charged with homicide, observed the trials in 90 capital cases and issued their report. They had also started up micro-projects such as soap-making and sandal-making in the prisons they worked in.

More impressive was the way in which the paralegals managed in each location to link the various criminal justice agencies and facilitate communication among them. They revived the Court Users Committee, familiar to all practitioners as a forum for meeting each month under the chairmanship of the Chief Magistrate, which had fallen into disuse; and, at the cost of a few soft drinks and local transport,⁴⁶ police, courts, prisons and social welfare and traditional authorities came together each month to discuss the justice situation in the district while the paralegals took notes, drafted minutes and circulated them in the locality. Within weeks, the committees had all but abolished the practice of "temporary remand warrants" issued by police, and the numbers of prisoners committed to prison by this procedure was reduced to tens from the hundreds at the outset.⁴⁷ The Malawi Prison Service invited PAS to extend its services to new prisons.

44 Reviewing the first two years of PAS, an evaluator found that it had "energized the criminal justice system in Malawi" and that by clearly focusing work plans and linking where they could, the paralegals had effected extraordinary change.⁴⁸ As one senior prosecutor remarked: "Without them, the whole process would go back to sleep."⁴⁹

3. Storming phase: 2002

However not all was rosy. The micro-projects were a source of tension with prison officers and prisoners. Products were sold off or went missing. The paralegals realized that they could not sustain the relationship with prison officers, advise and assist prisoners and maintain small businesses at the same time. The first evaluation report picked this up and recommended discontinuing these activities under PAS.

Other developments proved hit-and-miss: the clinics were dull; the lecture format did not work under a hot sun with difficult concepts and hungry prisoners. A manual was produced that

assisted the paralegals but did not really “communicate” the law and procedure to the prisoners. And the referral of cases to community service workers was not working very well.⁵⁰

The paralegals met in a retreat to review the findings and recommendations of the report and decided to drop the micro-projects and invite others to run them instead. They agreed to invite theatre practitioners to help them to improve the clinics in prison. They agreed to expand their activities to new prisons.

This required the recruitment of 18 new paralegals and the need to standardize the training course.

4. Norming phase: 2002-2003

The costs of training are high: bringing people to a central venue and housing and feeding them over a period of weeks places enormous strains on cash-based and operational budgets.⁵¹

Cost is a reason why legal aid services provided by central governments around the world are unable to meet the needs of ordinary citizens. PAS recognized from the outset that to succeed they had to prove that they were cost-effective. The approach they took to training was that it should be (i) practice-oriented, (ii) layered over time and (iii) affordable.

4.1 Practice oriented

Paralegals need to know how the law works in practice. The theory may be taught, but the practice has to be experienced. PAS approached the law enforcement officers and courts in each of the towns where the paralegal teams were located and invited their participation in the introductory training module. The introductory course involved several days with each justice agency and walking through, as it were, the justice process from arrest to court appearance and admission to prison. The paralegals had to observe a number of stages in the process and complete several assignments.⁵²

In this way, over a month the paralegals learnt the practice from the practitioners, for good or ill, and the conditions in which the various agencies worked; they placed themselves in a student-to-teacher relationship with the agencies with whom they would be working in the future. This approach proved highly effective: it cost nothing more than a party at the end to thank the police and prison officers as well as court officials who had assisted, and it engendered the goodwill of their erstwhile teachers.

A number of modules were then developed that sought to balance classroom work – i.e. the theory – with the field work – i.e. the practice. The paralegal aid clinics (PLCs) form the core work of the paralegals in prisons. The original manual⁵³ was rewritten with an experienced practitioner in forum theatre,⁵⁴ and the second edition was published in 2007. It runs to 19 clinics from arrest and detention to appeal. It doubles as a manual for conducting clinics in prison, a course book on the law and procedure and as a manual of generic application to other common-law countries.⁵⁵

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In the morning, the paralegals learnt the law and procedure and relevant constitutional provisions; in the afternoon they prepared the clinic that would be given to prisoners in the prison the next morning. The group observed the clinic, which was given by between two and four new paralegals, and would critique it on their return to the classroom and clarify areas of confusion or doubt. This lasted up to six weeks, during which a presence in the prison was constantly maintained.

The other skills the paralegals needed to acquire concerned information management. Each day, the teams entered a prison and were inundated by a wave of data – new arrivals, sick people, urgent

actions: look at this, what about that, here's this story, here's another, and so on. They required the organizational skills to make sense of the data and translate it into information for those who could act on it. They also required filing systems that would enable them to track the caseload and follow up as appropriate.⁵⁶ They were taken away for two weeks to work in the classroom and their offices for this, and for a week for basic computer training.

This completed the initial training, which closed with a formal invigilated examination of three hours certified by PRI. The newly recruited paralegals were now able to work independently inside prisons.

4.2 Layered over time

Considerable attention was given to the development of the paralegals and their training needs, first because the criterion for selection as a paralegal expressly excluded university graduates – the aim was to provide opportunities for those with a secondary school leaver's certificate and people who had worked in community projects before and were unable to access tertiary education through lack of funds or contacts or grades,⁵⁷ and second because the notion of a non-lawyer or paralegal working in the criminal justice sector was entirely new in Africa. PRI sought to develop a professional cadre of such people, akin to the paramedics working in the health sector, and so they had to set high standards and demonstrate manifest competence in everything they did.

Initially, the thought was to adopt a hierarchical approach to training with certification at basic, intermediate and advanced levels. This was soon recognized as impractical. Paralegals needed a range of skills that were not necessarily "advanced" at all: they needed "building up". So emphasis was placed on getting the paralegals to practice what they had learned and then come back for more training in forum theatre and information management – and adding new trainings as they became relevant, from human rights law to leadership and team-building skills.

As the paralegal numbers increased and the scope of work expanded to courts and police, so new modules were added: for instance, how to conduct a trial observation, and, crucially, how to attend at police interviews.⁵⁸

4.3 Affordable

Where local expertise was available it was used; and where it could be used free – i.e. police trainers – it was. Where local expertise was not available locally, distance learning was employed, i.e. with an eight-week practical course on human rights law, covering fact finding and report writing.

46 In 2007, the University of KwaZulu Natal (UKZN) and the faculty there who had spearheaded the street law program in South Africa in the 1980s agreed to assist PAS in developing a two-year diploma course in paralegal studies, accredited and accepted by UKZN and the South Africa Qualifications Authority. The aim was to provide a standard across the region for paralegals working in the criminal justice system and to provide paralegals with a career path so that some could proceed with the diploma to the LLB and so become lawyers, while others could equip themselves with a qualification that was recognized internationally.

5. Performing phase: 2003-2006⁵⁹

By the end of 2002, the PAS "baby" had established itself as viable.⁶⁰ It had also developed a program structured on four pillars: (i) providing legal education, (ii) providing advice and assistance, (iii) establishing linkages and (iv) informing policy and decision makers. It had a total of 26 paralegals, and the scheme had received a boost from its replication in Benin, supported by PRI.

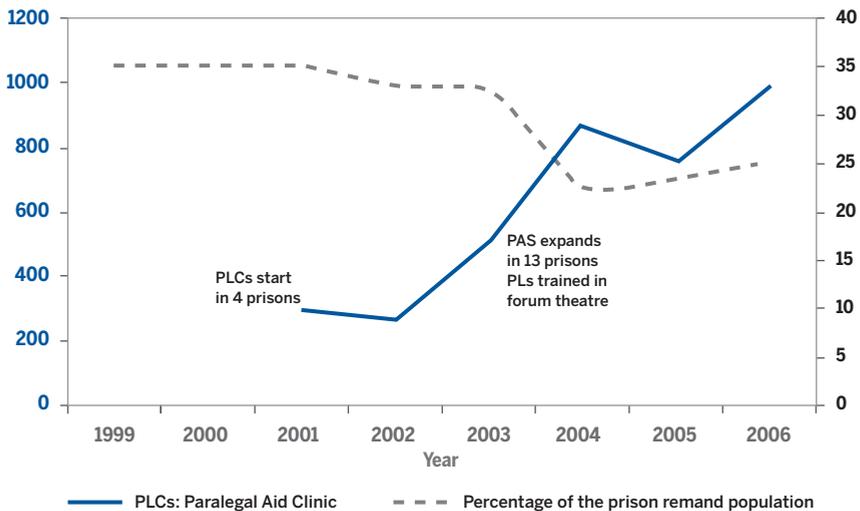
In line with the invitation from the Malawi Prison Service, PAS proceeded to expand services to 13 more prisons catering for 84 percent of the total prison population, and recruited a further

12 paralegals, bringing the total to 38 – 15 of whom women where it stands today. The training in forum theatre techniques had an immediate and lasting impact on the conduct of the paralegal aid clinics in prison.

Between November 2002 and October 2003, PAS conducted just over 500 clinics attracting more than 16,500 prisoners compared with just under 300 clinics and 1,650 prisoners reached by January 2002 as noted above. The introduction of participatory learning techniques and forum theatre empowered prisoners to argue for bail, enter a plea in mitigation, conduct their own defense and cross-examine witnesses. Attendance levels at the clinics rose dramatically, not so much because they were thought to be entertaining as because prisoners noticed that their friends were not coming back from court. They were being sent home, whether on bail or having already served their sentence on remand.

The impact on the overall remand population was striking (see graph below). From about 40 percent before PAS started, the paralegals had directly contributed to the reduction of the remand population to under 25 percent by 2004, where it has remained.⁶¹ As mentioned above, the introduction of the scheme in Kenya in 2004 and Uganda in 2005 demonstrated a similar pattern. In all these countries, criminal justice actors attributed the drop in the remand population to the intervention by paralegals and their ability to engage the participation of the criminal justice agencies in processing these cases.

Remand Population & Legal Empowerment of Prisoners



The justice system is under-resourced in many countries. The courts are overloaded; prisons are unable to produce a person in court because they lack the transport and the prosecution misplace files, or a police officer is transferred to another district. These problems are common across many parts of the world. PAS continued to evolve and, with the assistance of PRI, explore ways of addressing the problems they encountered by drawing on successful efforts elsewhere. PRI drew attention to the “camp courts” developed in Bihar State in India, whereby the courts come to the prisons to screen the caseload and release those held unlawfully or unnecessarily.

The paralegals introduced this approach in the four main prisons. Since a court can be constituted virtually anywhere, there was no objection in law. The objections came from

magistrates and the High Court: one judge of the High Court opposed it on principle, observing that it undermined the majesty of a court by setting one up in prison. Magistrates were concerned less with principles than personal scruples: prisons are dirty places, the prisoners would hiss and boo at them and they would be embarrassed by the decisions of other magistrates.

It took a woman who was also a magistrate to break the mould and set up the first camp court in Malawi. She did so in the juvenile section of Zomba prison in plain view of all the young prisoners, on a wooden bench, in the full glare of the sun, accompanied by a paralegal, court clerk and police prosecutor, and with curious prison officers in attendance. She went through the list prepared by the paralegal in consultation with the prosecution and released a number of young persons.⁶²

Often the numbers released were not particularly high – i.e. 20-30. The impact and utility of this mechanism lay elsewhere: prisoners saw the law in action and realized they were not forgotten. As a result, tensions were reduced and the magistrates themselves were encouraged. They were fêted on arriving inside the prison rather than booed. Their visits enabled them to see conditions of overcrowding and inform their sentencing practice. The mechanism was particularly effective in addressing urgent situations⁶³ or when it was picked up at a Court User Committee meeting and a joint decision was taken to hold a camp court to address a problem.

In August 2003, following extensive negotiations, PAS gained access to five main police stations to assist young offenders in conflict with the law. It also started work in the four regional court centers, offering assistance and guidance to members of the public, witnesses and accused alike.

Gaining access to the police stations was never going to be easy. The entry point for the paralegals was their offer to trace the parents of suspected young offenders. This was welcome assistance to the police, who were themselves under-resourced and under-manned. Paralegals drafted another Code of Conduct with police officers to regulate their conduct at the police station. They started by making short daily visits to the police station to develop an acquaintance. In a short time, the police in the four pilot sites agreed a screening form drawn up by the PAS with social services and police officers. They allowed paralegals to interview the juveniles in the presence of a parent or guardian when possible and recommend a simple diversion option.⁶⁴

After 12 months, the pilot scheme was evaluated by a joint team comprising members of the PAS and police in each of the four regions. Their findings are set out in the table below:

Item	Number	Comment
Juveniles screened by PAS	80	Pilot scheme working well in Lilongwe and Blantyre. An evaluation of the scheme to take place in June.
No. Bailed	33	
No. diverted	18	Diversions by police on the recommendation of PAS after consideration of the forms.
No. sent to approved school	8	
No. remanded	14	Juveniles with serious offences and sometimes jointly charged with adults.
Police interviews attended	23	
Parent/guardian traced	25	Parents who did not know of their children's arrests were traced for bail and/or releases.
Juveniles referred to social service	6	Screened juveniles referred to social services for a social report with little outcome as the department is under-resourced.
Other	19	Illegal immigrants. Cases referred to immigration officials and deportations effected.

The police and paralegal evaluation team jointly concluded as follows:

“The joint evaluation meetings that took place in the four police regions have confirmed that this partnership between the PAS and Malawi Police Service – if correctly utilized – can benefit accused persons during pre-trial stages, immediately on arrest and detention.

Lack of human and material resources can at times negatively affect the efficiency of criminal justice agencies like the police and social welfare department in juvenile cases (e.g. in tracing parents/guardians, finding sureties, preparing and submitting social reports to the courts).

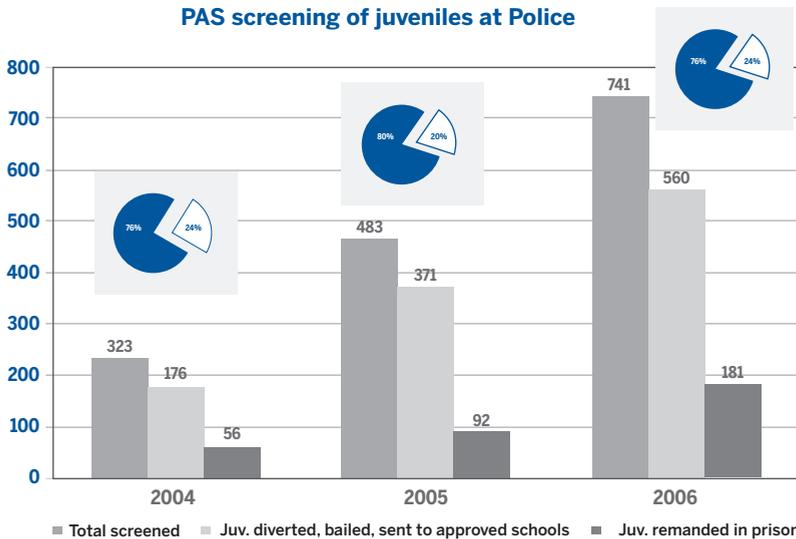
Currently, most people (including the young) cannot access protective measures nor the most basic safeguards when they are arrested because there are no legal assistance programs operating in police stations (as for instance in Angola, where the Law Society has set up a roster system in the capital Luanda where student lawyers and young lawyers out of university attend the police interview in the police station).

In juvenile matters, both social welfare officers and parents/guardians are rarely available to assist the police in the administration of juvenile justice. As a result, juvenile cases can take overlong before they are concluded.

Most children who are in conflict with the law run the risk of being treated as an adult while in the hands of police because it is very difficult to determine their age in the absence of a birth certificate. If age is not correctly assessed, young offenders often end up in prison as convicted adults (contrary to the Children and Young Persons' Act currently in force).⁶⁵

A meeting with senior police officers to review the report then agreed that PAS should be extended to adult offenders in police custody to improve access to justice.⁶⁶

Since 2004, the paralegals have diverted an average of 77 percent of young persons in conflict with the law,⁶⁷ as indicated by the graph below.



In the courts, the paralegals started to provide basic assistance for those attending, i.e. members of the general public, accused on bail and in custody, and witnesses. They showed them the layout of the court, explained what was going to happen at the court appearance and, with the permission of the prison staff, linked the accused in custody to their family members outside. By the end of 2006, they were functioning in 11 court centers; and in the period between November 2003 and October 2006 they had assisted 10,827 accused and 2,198 witnesses.

In addition, they worked with police, prison and judicial officers to produce two visual aids. The first, about bail,⁶⁸ explained how bail worked; it was widely distributed in police stations, police posts, courts, prisons and village *bomas* (enclosures for district or government offices). The second, which describes the criminal justice process in ten steps,⁶⁹ was also developed in collaboration with police, prisons and the judiciary and widely distributed.

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6. Adjourning and transforming phase

PRI was formulating an exit strategy from the earliest days. One of the tasks of the evaluator in 2004 was to recommend how PAS was to proceed as an independent, free-standing legal entity. Over the intervening period, considerable thought and discussion went into this until in 2007 PAS constituted itself as the Paralegal Advisory Service Institute with a Board made up of senior justice actors.

A concern in Africa and elsewhere is that organizations are led by charismatic or highly energetic individuals but lack organizational “depth”. This is not the case with PAS however:

"Feedback and observation both emphasized the high degree of competence and motivation of the individual paralegals...The flat management style adopted by PAS appears to have contributed a great deal to the impressive levels of responsibility, drive and collaboration that was demonstrated on the visits to the four offices..."⁷⁰

In order to guard against "capture" by senior management, the constitution of PASI vested powers in the paralegals through the organ of the General Assembly to elect and dismiss directors and board members, and so keep ownership of PAS with the paralegals themselves.

Ensuring continued funding of the PAS and diversifying its funding base was a *sine qua non* for the newly established institute. DFID pledged to extend PAS for a further 18 months and so free time to develop itself as an organization, but new partners in the donor community had to be sourced.

A strength of the PAS is its developmental approach: in the words of Muhammed Yunus⁷¹ it takes "bite-sized" chunks of a problem and proceeds to address them. The extension of work into the community had proved problematic in the past. While seeking to avoid over-extending itself and "invading" the province of other paralegals and community workers operating in the villages, it nevertheless realized that some mechanism for referring cases back to villages was essential. PAS had established a communication chain linking the community to the police (tracing parents), prisons (tracing sureties) and courts (notifying witnesses and relations of court dates), and had trained 240 community based "animators", with UNICEF funding.

However, some mechanism was required to reduce the numbers of people entering into the formal justice system and overloading it. PRI had long been impressed by the work of the Madaripur Legal Aid Association in Bangladesh and the mediation model it had developed over 30 years.

UNICEF agreed to support a visit by the Madaripur Legal Aid Association to Malawi in 2007 to explore the viability of replicating their mediation model to sub-Saharan Africa. The overwhelmingly positive findings of the report and clear application to Malawi of lessons learned in Bangladesh led to a pilot scheme starting in 2008 with funding from Irish Aid.

It is too early to comment on the results of this pilot scheme, but the approach fits well with the overall strategy of PAS to provide an effective service for ordinary people to access their justice system(s) and of PRI to reduce the flow of persons into the criminal justice system.⁷²

Part of the overall strategy of PAS was to develop a viable, cost-effective partnership between a private service provider and government. PRI put considerable effort into developing consensus among all practitioners for a national legal aid scheme that the development partners could initially support, through a basket fund, and that government could work towards.

In some respects the timing was propitious: Malawi's Law Commission had already reviewed the Legal Aid Act and made some far-reaching recommendations, which were accepted by the Ministry of Justice.⁷³

PRI negotiated a basket fund with donor agencies present in Malawi to take the place of a legal aid fund, pending the passage of legislation enabling such a fund. Memoranda of Understanding were drafted and entered into. Technically, PRI had completed the project cycle from design and implementation through to a successful exit strategy.

If only life were that simple.⁷⁴

7. Sustainability

What, then, is the cost of all this? According to the last independent evaluation: "Calculations made during the evaluation arrive at a figure of approximately £480 per month to keep a paralegal in the field. This calculation was based on 2006 expenditure."⁷⁵

The three evaluations are all positive in their analysis of cost versus benefit. The first evaluation report recorded that "...the PAS project runs economically, without extravagance or waste."⁷⁶ The second noted that "...a small number of paralegals from the Paralegal Advisory Service is capable of delivering certain services that are relatively inexpensive, focused and targeting a great number of prisoners or other detainees."⁷⁷ The third evaluation noted that "...offices do not reflect any significant extravagance in the availability and use of resources. Indeed, the condition of some of the offices leaves a lot to be desired, with cramped and unappealing workrooms."⁷⁸

Pierce examined this issue further, comparing the PAS paralegals with their counterparts in the Ministry of Justice. He found that while the former received more in terms of monthly take-home pay "...the differentials shrink significantly when the full package accorded to government employees are taken into account, particularly those at a senior level – with housing and other allowances, pensions, training opportunities at Diploma level, etc."⁷⁹ He also examined staff turnover as a contributor to an assessment of cost-effectiveness. He compared a "very high turn-over of staff amongst paralegals in the DPP and LAD offices" with an "impressively low" turnover among PAS paralegals.⁸⁰ He further noted that "Paralegals have a well structured day that mostly sees them engaged directly in activities in the courts, police stations and prisons in the mornings, with follow-up work mostly done in the afternoons. There is a daily de-briefing meeting at the end of the day. The impression left behind is one of unusually productive and task-oriented teams who are well supported by planning and organizational structures that help the efficient allocation of human resources."⁸¹

The issue of providing a sustainable legal aid service is one that requires closer consideration. Justice systems and NGOs are not income-generating entities. They do not produce wealth. Someone has to pay, and that someone is government. The provision of justice services is, like health and education, essentially a matter for government. While it appears to be recognized that government alone cannot meet all the "unmet needs" of ordinary people in wealthy countries,⁸² the current maxim among donors, and encouraged by the "Paris principles", is that a project is only sustainable if it is taken over by government. Put another way, NGOs and other civil society groups do not merit ongoing development support because they are inherently unsustainable organizations, or because they must generate funding themselves after a few years of donor financing.⁸³

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This in spite of the growing body of evidence that a litany of good practices developed by civil society have foundered once subsumed in the maw of government, as indicated in the experience of community service discussed in Footnote 51.

Golub posits three "sustainability myths";⁸⁴ The first is that "...support for state legal institutions will yield self-sustaining reforms and enduring improvements in services". He cites an interview he conducted with former United States Agency for International Development (USAID) official John Blackton working in Egypt, who asks:

"Will that hold up when we leave? Will our changes move from our court clusters to the nation as a whole? Have we brought about a genuine change in judicial culture – one in which reducing case delay is valued? I fear that the answer will, three years after we are gone, be "no" to most if not all of my questions. The expat and Egyptian professionals organized within the construct of "the project" are the ersatz

substitute for political will and a new judicial culture. We [the project team] are in fact, variables in the experiment. Our presence strongly impacts the results. Donors don't like to admit how much this is true, but in justice projects in settings like Egypt, I believe it is significantly so."⁸⁵

Where there is intellectual ownership among recipients, there is no need for any "ersatz substitute". PAS was entirely home-grown, with PRI offering a supporting role. Its success is largely due to a collaborative effort involving the participation of many stakeholders, linked together by the paralegals. A former Minister for Justice catches something of the pride that PAS has generated among justice actors: "What excites me more about what is happening in the Malawi justice sector is that we are trying to find our own solutions to our problems and at a cost we can sustain in the long term."⁸⁶

Golub's second sustainability myth concerns the notion that "government initiatives should always be seen as potentially sustainable and that civil society efforts should not."⁸⁷ He asks: "If state institutions merit such ongoing support, especially with highly uncertain outcomes, then why exclude civil society from the long-term mix? In reality, legal services NGOs and other civil society groups can outlast the appointments of the personnel heading and staffing many government agencies and acquire a greater knowledge of their fields."⁸⁸

Community legal services, or legal services organizations as they are sometimes called, have long been established in the communities they serve: "They help people gain access to the benefits and protections of the legal system, both inside and outside the court system...They help change the rules...They change the way the rules are applied by judges, bureaucrats and the police. More abstractly, they enable people to think differently about themselves ... and the government agencies that have power over their lives. They work with and for their clients. They collaborate with other organizations to meet their clients' basic needs. In the long run, bringing about change is the essence of the work they do – at the very least change for a particular individual on an immediate problem, and whenever possible lasting change that empowers people to control their own lives."⁸⁹

A recent review of community legal services in Bangladesh undertaken for DFID⁹⁰ found that these services are available in an estimated 35-40 percent of the country, with family-related disputes being the most common. It found, strikingly, that 96 percent of beneficiaries believed that community legal services help people to become less poor, and that 88 percent of opinion leaders believed that community legal services helped government to become more responsive to the needs of the poor.

It has been observed in practice how "...[r]eform initiatives are invariably driven by a combination of internal and external forces and incentives of various kinds..." and that "...[w]hile commitment on the part of responsible public officials from the outset inspires confidence, reforms may ultimately be secured through bottom-up pressure applied by civil society, the private sector or a combination of stakeholders".⁹¹

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PAS has brought about change in Malawi through a collective endeavor to provide legal empowerment at the grassroots level, as well as mechanisms for people to access justice. Since its inception, the paralegals corps has remained virtually unchanged, while in the same period the prison service has had three different heads, the judiciary has had two Chief Justices and a high turnover of magistrates, the police, the ministries of Justice and Home Affairs have seen their chiefs come and go with such frequency that an accurate count is not kept.

The third sustainability myth is that "...legal services and related NGOs in many developing nations must have the potential to become wholly self-supporting if medium-term outside support is to be justified."

Golub argues that donors and other development agencies should move beyond repeatedly uttering the “NGOs must make themselves sustainable” mantra and take more responsibility for assisting worthwhile partner organizations in moving toward sustainability, *inter alia* through “self-sustaining endowments” and citing the Ford Foundation, USAID and most recently the Asia Development Bank, which have established such mechanisms for “selected high-impact organizations and important fields in certain countries”.

Finally, Golub differentiates organizational sustainability, which biases funding toward often ineffective state institutions, and sustainability of impact. He argues: “If a given legal services NGO serves enough people, or builds enough capacities for the poor to effectively assert their own rights, or affects enough laws – such impact is sufficient to justify past and future donor investment. It would be unfortunate for such an organization to cease operating down the line, but its existence would still be validated by the poverty it has helped alleviate and the justice it has helped secure.”⁹²

In the short time PAS has been in existence, the 38 paralegals have not only assisted tens of thousands of persons in conflict with the law, they have catalyzed change both in attitude and process. They have enhanced communication, cooperation and coordination among justice actors so that any change becomes “systematized” and hence sustained.

As non-lawyers, they have been open to learning lessons from other sectors such as health. Just as paramedics and nurses offer low-cost services to provide effective primary preventive services, dealing with minor ailments and incidents providing basic and appropriate first aid, the paralegals in PAS offer similar services in police stations, courts and prisons. Furthermore, just as paramedics and nurses refer serious and complex cases to doctors, surgeons or specialists, so the paralegals refer serious and complex cases to the lawyers.

The over-emphasis on establishing high-cost legal services through formal adjudication in the courts relying exclusively on highly trained – and hence costly – lawyers has been commented on elsewhere.⁹³ This approach, exclusively top-down and supply-led with scant regard for the services ordinary people may need, has not yielded the results hoped for.⁹⁴ As a result, the person who comes into conflict with the law has no access to first legal aid. His/her situation then starts rapidly to deteriorate as a confession is coerced, s/he is sent to prison and waits years for his/her trial on a charge s/he does not understand.

PAS has demonstrated in Malawi and in countries in East and West Africa that, like paramedics, paralegals can provide a critical role, particularly in the early stages of the criminal justice process. They can screen cases in prisons, police and courts and filter the caseload. They may (i) advise and assist those in conflict with the law at police stations, at court at first instance and in the prisons, (ii) educate the public and accused on the law and procedure so that people understand the status of the case and more importantly (iii) how to apply to the justice process in their own case. They can inform policy makers on the obstacles to the law. They link all the actors and facilitate communication and coordination and refer serious and complex cases to legal experts.

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In this way, paralegals can and do provide primary legal aid services that no one else is providing, which in turn results in:

- the elimination of unnecessary detention;
- speedy processing of cases;
- diversion of young offenders;
- reduction of case backlogs;
- improvement of the *equality of arms* in court; and
- reduction of the remand population.

The chief intervention therefore lies in developing a professional cadre of paralegals who work with – and to – the formal justice agencies and facilitate the justice process through the provision of appropriate legal aid services that will reduce the flow of cases into a process that currently ends in a period of incarceration.

Unfortunately, many donor agencies charged with implementing projects on the ground are not listening. The current trends favor direct budget support to governments, to the exclusion of civil society, and the avoidance of “parallel implementation structures”.⁹⁵ To put it crudely: “government good, civil society unsustainable”.

While governments develop their strategies linked to a medium-term expenditure framework in the name of “ownership”, often crafted by foreign consultants, donors align their aid flows with the priorities identified by government, often with the assistance of donors, and donors then “harmonize” their use of common arrangements and procedures – the voices of the poor grow increasingly faint.⁹⁶

Civil society organizations with a consistent track record of service delivery see their sources of funding dry up as donors construe the “Paris principles” to mean that they must work through, and provide funding support to, the very government machinery that has signally failed to bring about accessible justice to the citizens of a country, and to provide funding only to those civil society organizations that can demonstrate a direct link between their work and poverty reduction in line with the Millennium Development Goals (MDGs).

This narrow approach cuts across the spirit of the Paris Declaration, which aims to make aid more effective and in so doing actively encourages “...the participation of civil society and the private sector...”⁹⁷ rather than their marginalization.

The keyword here is “partnership”, because it is through partnerships that the donor agencies, reform-minded governments and the private sector can best accommodate the harmonization of external funding and ensure that the funding available benefits the poor. The opportunities provided by public-private partnerships in the justice sector such as PAS should be welcomed because they provide donors with a “pragmatic alternative that lies between project support, with funding outside of government, and sector budget support, with funding directly to government”.⁹⁸

For instance, by establishing and contributing to a basket legal aid fund, as is the case in Uganda and Malawi, and supporting the idea of “cooperation agreements” or contracts between the fund and private service providers “...donors will have the opportunity to move towards a staged approach to budget support. This staged approach should involve less risk, by supporting a partnership between government, which may have little experience in delivering the services, and a [civil society] organization ... which has proven experience of delivery cost-effective services efficiently.”⁹⁹ Such arrangements introduce a sharper, clearer and more accountable culture in conducting business.

8. Meeting the challenges ahead

Paralegals under PAS constitute the “front-line” of a national legal aid service. If they are to provide a primary justice service – as paramedics provide primary health services – then they will require recognition by government and the legal establishment.

In 2004, PRI organized a pan-African conference on legal aid in Lilongwe.¹⁰⁰ The conference produced the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa and Plan of Action. Among other things, the Lilongwe Declaration recommended

broadening the definition of legal aid – moving from representation by lawyers in a court to including advice, assistance, education and access to alternative dispute resolution – and including service providers such as paralegals outside the formal legal establishment. It traced a line of authority for these developments from several ACHPR resolutions.¹⁰¹ Both the Lilongwe Declaration and Plan of Action were subsequently adopted by ACHPR¹⁰² and the United Nations Commission on Crime Prevention and Criminal Justice.¹⁰³

The ECOSOC resolution on “International Cooperation for the Improvement of Access to Legal Aid in Criminal Justice Systems, Particularly in Africa”¹⁰⁴ went beyond expressing concern that the prolonged incarceration of suspects and pre-trial detainees violated their fundamental human rights and recognized that “...providing legal aid to suspects and prisoners may reduce the length of time suspects are held at police stations and detention centers, in addition to reducing the prison population, prison overcrowding and congestion in the courts”.¹⁰⁵

It goes on to note that many States Members “...lack the necessary resources and capacity to provide legal assistance ...in criminal cases...”¹⁰⁶ and to recognize the “...impact of action by civil society organizations in improving access to legal aid in criminal justice...”¹⁰⁷ The body of the resolution goes on, in the polite style of United Nations resolutions, to encourage States Members implementing criminal justice reform “...to promote the participation of civil society organizations in that endeavor *and to co-operate with them*”¹⁰⁸ (author’s italics).

For those working in the field, away from the capitals, the cooperation of justice agencies has not proved to be an obstacle. Over-stretched and under-resourced police and prison officers have repeatedly demonstrated their willingness to enter into partnership with responsible civil society organizations. The legal establishment too has shown that where the demarcation between paralegal and lawyer is clearly stated, the role of the paralegal has been a welcome development.

8.1 Standardization and regulation

In gaining recognition, the paralegal movement – if it can be so termed – needs to keep the legal establishment on its side and nurture the relationship. Requests in Malawi from the poor as well as the judiciary for paralegals to provide a representational role in a lower court appear to some to stray over the line into the domain of the lawyer. To date this development is still under discussion and has received qualified approval from the Malawi Law Society.

Many paralegals wish, eventually, to become lawyers. As mentioned above, UKZN has developed an accredited two-year diploma course for paralegals working under PAS that (i) sets a standard for the region and (ii) provides a career structure for those who wish to remain as accredited paralegals or proceed to further legal studies.

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If donor agencies chorus “unsustainable” whenever they see an NGO, the reaction of the legal establishment on hearing the word “paralegal” is to raise a number of obstacles in the name of “regulation”. Naturally, many will prefer to maintain the status quo. However, if the aim is to provide the poor with access to justice, the objections simply cannot be sustained. The codes of conduct signed by each paralegal in Malawi, Kenya, Uganda and now in Bangladesh have proved to be a highly effective self-regulating mechanism.¹⁰⁹ The training the paralegals receive stands comparison with any criminal lawyer; and their services are free. Yet the legal establishment in some countries persists in raising objections to any innovation while providing no solution to the needs of the thousands of indigent accused persons who pass unnoticed through their police stations and languish for years in their prisons.

8.2 Managing expectations

“Perhaps the biggest key to the remarkable success of PAS has been the mutual trust and respect that has been engendered with partners. This was apparent not only from the warmth

of feedback, but also from observing the interactions between paralegals and prisoners, and paralegals and their justice sector colleagues.”¹¹⁰

PAS has succeeded in lubricating the wheels of a justice system that has grown rusty and creaky: it diverts cases at police stations, pushes cases out of the prisons and empowers ordinary people to apply the law in their own case. However paralegals cannot substitute for lawyers, nor can PAS – innovative as it is – substitute for more systemic reform. The remand population may be reduced, but the prisons will remain overcrowded unless other reform measures and strategies are brought to bear. The flow of people into a criminal justice system that ends in prison needs to be reduced and prison needs to be reconsidered as an option of last, rather than first or only, resort.

8.3 Regional cooperation and development

The role of paralegals in post-conflict states should be self-evident. It is here that it has run into most resistance, however. The new governments with the support of their “development partners” appear entirely focused on the reconstruction of the police stations, prisons and court houses damaged by war and on the need to train the panoply of judicial and law enforcement officers and lawyers. The assumption is that a justice system will emerge phoenix-like from the ashes of the old, even when the most cursory examination of the old will often show it to have been deeply flawed.

The calls for lessons to be learned and good practices to be shared begin to produce a dull echo as the “listening” to which many practitioners are “talking” remains tuned into the supply-side.

From Afghanistan to Liberia, courthouses, prisons and police stations are reconstructed at considerable cost and the “capacity” is then developed to service them – a process of several years. The Liberian proverb “Dried dog meat is good to eat, but while it dries what do you eat?” acts as a useful corrective: for while the lawyers and judges are trained, prisoners grow restive at their prolonged incarceration pending trial and eventually riot, inflicting costly damage to the prisons newly built to house them. Often the same old corrupt faces reappear in judicial robes or police uniform, to the dismay of local populations. The tried and tested failures of the past are repeated in the formal justice arena while 80 percent of the population continue to resort to their own traditional justice remedies within their own communities.

Legal services NGOs can prove instructive. The focused work of Timap for Justice paralegals in Sierra Leone addressing the justice needs of villagers in their communities, the Madaripur Legal Aid Association’s mediation workers operating through community-based organizations in rural Bangladesh, the work of the *Bureau internationale catholique de l’enfance* (BICE) with juveniles in the Democratic Republic of the Congo, and lawyers from the People’s Legal Aid Centre (PLACE) providing free services for the internally displaced persons in their camps outside Khartoum (the list goes on), all attest to the “rich experience” of good practices¹¹¹ that have been developed to address the “unmet needs” of ordinary and/or highly vulnerable people, especially in post-conflict situations where the need for a ready and prompt primary legal service is required.

Conclusion

The most recent evaluation of PASI observes that "...PAS has taken a leading role, in Africa and beyond, in demonstrating the value that paralegals can bring to criminal justice systems, even where there is no shortage of lawyers. It has succeeded, with its Malawian justice partners, in visibly changing the legal landscape for both accused persons and prisoners."¹¹²

It is submitted that the application of the PAS paralegals extends beyond the criminal justice system. Paralegals could operate effectively and more cheaply as human rights officers in United Nations peacekeeping operations. They could act as fact finders and evidence gatherers in investigations of the International Criminal Court. There is an anomaly in bringing into rural settings, often in Africa, highly trained, highly expensive experts from foreign countries, who attract high attention and need to be protected, rather than employing trained paralegals from the region, who can easily and swiftly adapt to the local situation.

The criteria for what may constitute "good practice" has been summarized along the following lines:

- the practice is generally low-cost;
- has a high impact;
- requires the participation of a number of different actors;
- often involves partnerships with civil society;
- catalyses reform processes and assists in changing institutional attitudes;
- conforms to national constitutional guarantees and international human rights standards;
- pursues an approach that benefits the vulnerable and poor; and
- is transferable from one country to another.¹¹³

PAS meets these criteria squarely and provides a creative approach to the provision of competent legal aid services in line with the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa (2004).¹¹⁴

Donors should support those civil society initiatives that are proved to be effective in increasing access to justice for poor people, especially where they lead towards partnerships with the state. However, where governments do not adhere to principles of good governance and such partnerships are therefore closed to civil society organizations, the Paris Principles cannot be invoked to defend such governments because the losers will be the poor.

Endnotes

- 1 United Nations Millennium Declaration 2000, UN A/RES/55/2 (2000).
- 2 Any success in meeting development goals 'depends, inter alia, on good governance within each country.' UN Millennium Declaration 2000, at paragraph 13.
- 3 It resolved to "...develop strong partnerships with the private sector and with civil society organizations in pursuit of development and poverty eradication". Ibid paragraph 20, bullet point 4.s
- 4 Ibid section V paragraph 24.
- 5 Ibid section V paragraph 25, bullet points 1-3.
- 6 Organisation for Economic Co-operation and Development (OECD), High Level Forum. The Paris Declaration has been agreed by 22 donors and 57 partner governments. The Paris Declaration "...marks a significant set of donor commitments to improve the effectiveness of aid for the stated purposes of accelerating the achievement of the 2015 Millennium Development Goals and reducing poverty and inequality". Cited in: J Perlin and M Baird, *Towards a New Consensus on Justice Reform: Mapping the Criminal Justice Sector*, Open Society Justice Initiative (2008) 25.
- 7 The preamble to the Universal Declaration of Human Rights 1948 states: "...it is essential if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law." Contributing factors to civil wars in many parts of the world have been attributed to the inability of the justice system to resolve disputes impartially or at all.
- 8 Benin, under the *Projet d'assistance judiciaire aux détenus* (PAJUDE), in 2002; and Niger, under the *Association nigérienne pour la défense des droits de l'homme* (ANDDH), in 2006.
- 9 Kenya, under the Kenya Prisons Paralegal Project (KPPP), in 2004; and Uganda as the PAS (Uganda) in 2005.
- 10 PAS (Bangladesh), with funding from the German Development Agency (GTZ), as a joint project with the Ministry of Home Affairs and the Bangladesh Prison Service.
- 11 In 2006 the Ministry of Justice in Liberia formally invited PAS to start a pilot. This invitation was repeated after the Chief Justice of Liberia and a senior delegation visited Malawi in 2008 to observe PAS in action.
- 12 Following a visit by the Chief Commissioner of the Zambia Prison Service, Jethro Mumbwa in 2004.
- 13 The Commissioner for the Tanzania Prison Service, Nicas Banzi, chaired a two day seminar in Dar-es-Salaam in 2004 to discuss PAS and requested that a pilot start in three prisons around Dar-es-Salaam.
- 14 The Deputy Minister of Justice formally requested PAS to start in Lesotho following a presentation in Nairobi in November 2006.
- 15 Northwestern University's Center for International Human Rights has been working with the Ministry of Justice, the Legal Aid Department and the Office of the Director of Public Prosecutions and with PAS to screen the homicide caseload and so assist in the reduction of the case backlog. A team from the International Human Rights Clinic at Fordham University visited in November 2008 to work on public interest litigation with one of the PAS teams, focusing on the constitutional right to trial within a reasonable time.
- 16 PAS was granted a Best Practice Award by UN Habitat in 2004.
- 17 Interagency Co-ordination Panel on Juvenile Justice, *Protecting the Rights of Children in Conflict with the Law*. (2005), 38.
- 18 Michael Wines, 'The Forgotten of Africa. Wasting away in Jails without Trial' *The New York Times*, 6 November 2005
- 19 Vivek Maru, 'Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide' (2006) 31 *Yale Journal of International Law*, 427; UK Government *Eliminating World Poverty: Making Governance Work for the Poor*, White Paper on International Development, (2006) 48.
- 20 Pierre Kogan, *Path to Justice*, 2004; and Pierre Kogan, *Freedom Inside the Walls*, 2005.
- 21 Thomas Hansen (2004) *Evaluation of Activities 2002-2004*; Fergus Kerrigan (2002) *Energising the Legal Justice System in Malawi*; Martin Pierce (2007) *Changing the Landscape*. The reports were prepared for DFID.
- 22 Kerrigan, (2002).
- 23 Hansen, (2004).
- 24 Pierce, (2007).
- 25 PASI. 'Where there is no lawyer', *Bringing Justice to the Poorest of the Poor*, brochure, (2007) 8.
- 26 International Centre for Prison Studies, *World Prison Remand List 2008*. Since 2004 the mean average remand population has been under 25 percent.
- 27 KPPP. First evaluation, Msiska / Nyongesa, (2005). Author's files.
- 28 "What we did was to compare the paralegal 'release' statistics with those of the prisons. Similarly, we asked the [officers in charge] (OCs) to estimate the number of discharges attributable to PAS. The numbers agreed for the most part, with the exception of the Mbale Pilot, whose paralegal figures were, in our view, inflated." Author's files.
- 29 Interview with Uganda Prison Service Commissioner Dr Johnson, 5 October 2006.
- 30 Interview with the Officer in Charge of Gulu Prison, 12 October 2006.
- 31 PAS (Uganda), first independent evaluation, Ngunyi/Namakula, 2006, vii. Author's files.
- 32 Minutes of the first regional coordinators' meeting, Nairobi, 30 April – 2 May 2006.
- 33 Police routinely charge murder where the facts may disclose manslaughter. However, neither state prosecutors nor legal aid lawyers review the files until they are listed for trial. Properly advised, many accused will enter a plea of guilty to the appropriate offence. By helping prisoners to understand the law, paralegals enable them to enter an informed plea to any charge.
- 34 PAS Newsletter, No. 4, February 2004. Author's files.
- 35 8 October 2003. Following further research conducted by paralegals, PRI issued a discussion note explaining how the backlog of homicide cases could be further broken down into distinct categories and disposed of by way of a plea to manslaughter or dismissal on grounds that the defense was irretrievably prejudiced by the delays in bringing the case to trial. PRI calculated that the lowest figure would amount to 48 percent of the caseload and produce savings to the judiciary of £200,000. PRI, *Tackling the Homicide Backlog in Malawi*, a discussion paper, 2005. Author's files.
- 36 October 1997.
- 37 The Ghanaian academic and Commissioner Professor E Dankwa was appointed as the first Special Rapporteur on Prisons and Conditions of Detention in Africa.
- 38 UN Commission on Crime Prevention and Criminal Justice (1997) E/CN.15/1997/21.
- 39 With EU funding, the scheme was introduced in Malawi, Kenya, Uganda and Zambia and thereafter in Mozambique, the Central African Republic, Burkina Faso, Congo Brazzaville, Mali, Benin and Niger.
- 40 The Juvenile Justice regional conference held in Lilongwe in November 1999 in partnership with the Malawi Ministry of Justice and Constitutional Affairs approved the Namibian 'Juvenile Justice Forum' that was originally designed by the South

African National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and implemented by the Legal Assistance Centre, Windhoek.

- 41 The original NGOs involved were Malawi CARER, Youth Watch Society, Centre for Human Rights and Rehabilitation (CHRR) and Eye of the Child (EYC). Later the paralegal team from EYC set up their own NGO as the Centre for Human Rights Education, Advice and Assistance (CHREAA) and CHRR withdrew from the scheme to be replaced by the Centre for Legal Assistance (CELA).
- 42 In line with many countries in sub-Saharan Africa, Malawi lacks lawyers, with 300 registered and only 120 in private practice. They are based in the two major cities and few outside the Legal Aid Department provide criminal representation.
- 43 Representation is only guaranteed in capital cases in Malawi and the legal aid lawyers are often freshly graduated from law school with only a few weeks of experience. Source: PAS (2001) *Report of Trial Observations in Capital Cases 2000-2001*. Thus, even in serious cases before the First Grade magistrate (with powers to sentence up to 14 years), it is rare that an indigent accused will be represented by a lawyer.
- 44 Again, this situation is not peculiar to Malawi: "In Accra, Ghana, prison authorities estimated that the courts had granted bail to between 65-75 percent of the 650 prisoners in St James Fort Prison, itself an old slaving station; these prisoners remained locked up because they could not raise the money to pay a surety to the court for their future attendance. An inquiry revealed that only seven out of the 650 remand prisoners had legal representation."
"A case review of three selected Kenyan prisons by the Kenya Prisons Service revealed that, of the total number of prisoners who had committed bailable offenses, 86 percent were granted bail but could not afford the financial terms set by the court, and only 6 percent had the means to hire lawyers." Adam Stapleton 'Introduction and overview of legal aid in Africa' in PRI and The Bluhm Legal Clinic, Northwestern University, *Access to Justice in Africa and Beyond: Making the Rule of Law a Reality* (2007), 9.
- 45 The lack of communication is not restricted to developing countries. In a lecture given in 2002, the then Chief Justice of England and Wales, LJ Woolf, observed: "The reasons for adjournment are numerous. Frequently, they are brought about by a breakdown

in communication between the Crown Prosecution Service and the police. Where witnesses fail to attend, this can be the result of a failure to take sufficient steps to secure their attendance. A similar problem arises in relation to late changes of plea. It should not be beyond our capacity to put in place suitable systems that would avoid the communication breakdowns that give rise to so many adjournments. 2002 Rose Lecture "Achieving Criminal Justice", Manchester Town Hall, 29 October 2002.

- 46 US\$20 is budgeted for each meeting.
- 47 The northern, southern and central police regions complied promptly; the eastern region held out for some time. There is always a redoubt.
- 48 Kerrigan, above n 22.
- 49 Mr Kamwembe, now Justice Kamwembe, formerly Chief State Advocate, interviewed in 2002. Kerrigan, above n 22.
- 50 PRI facilitated the introduction of community service orders (CSOs) in Malawi under the European Commission's replication program. The law was amended to require that the court consider a CSO in any case attracting a term of imprisonment of less than 12 months. In 2000, the Government of Malawi took over the management of the scheme. By 2002, community service workers were growing despondent because they were increasingly neglected as an agency within a larger department. Motorcycles were not being repaired (no budget) and salaries were being paid in arrears (cash budget). Thus, when paralegals referred a case where the law had not been applied and would be appropriate for such an order, the community service workers would often fail to visit the prison and make the referral.
- 51 Development budgets are virtually non-existent in many countries, and the funds available may be diverted to upgrading housing and foreign trips rather than training staff, which is one reason why so many law-enforcement agencies around the world are under-trained.
- 52 At police stations trainees observed arrest, interview and bail procedures and visited police cells. At court, they observed the procedures covering first appearance at court, adjournment, bail, taking of pleas, sentencing and summary trial. In prisons they observed the admission process, allocation of cells, disciplinary proceedings, production at court and release process, and they reviewed the files and filing process in the prison registry.

53 Published by PRI in 2002.

54 Forum theatre grew out of the work of the Brazilian dramatist Augusto Boal. The techniques were adapted for use in prison to help prisoners understand their situation in relation to the law and how to access the law in order to extricate themselves. The manual was co-written with Nanzikambe, a theatre for development acting troupe based in Malawi.

55 The PAS shares its materials as a matter of principle. The *PLC Manual* was developed for Malawi and for other countries applying English common law so that it can be easily adapted for use in these countries and so avoid – as with community service orders – spending time drafting new manuals, forms and guidance notes. It is available from PASI in hard copy and on the PRI website at: www.penalreform.org

56 The "provision of prompt and accurate information" was highlighted by Pierce (above n 24, 14) as one area where stakeholders had suggested the paralegals were *particularly* effective.

57 "This emphasis on training and career development is seen as a valuable lesson in how to retain staff, minimizing the risk of more academically qualified employees seeing the job merely as a stepping stone to other opportunities." Pierce, above n 24, paragraph 3.3.7, 17.

58 Piggybacking on to the DFID police reform program, PRI invited Malawi police trainers to train the paralegals in *investigative interviewing skills* so that they received the same training as investigating police officers.

59 In September 2003, DFID awarded a three-year grant to scale up its services to all prisons, the courts and police stations and offer national legal-aid service linking where appropriate to the Legal Aid Department.

60 Applying criteria developed by the Development Assistance Committee (DAC) of OECD (1991): relevance, effectiveness, efficiency, impact, sustainability.

61 Currently, the remand population, stands at 17.3 percent according to the World Prison Remand List produced by the International Centre for Prison Studies in London: www.prisonstudies.org. By 2006, PAS was operating in 21 out of 26 prisons.

62 PAS facilitated 19 camp courts in 2003, 12 in 2004, 8 in 2005, 26 in 2006, 36 in 2007 and 35 in 2008.

63 For instance, when individual prisons became chronically congested, the paralegal would inform the Chief Magistrate of the area who would then mobilize a team of magistrates to visit

- the facility and order the release of a number of prisoners.
- 64 Formal caution and release into the custody of the parents/guardians; release to the parents with or without bail; apology to the victim.
- 65 PAS. *A Consolidated Report on the Screening of Juveniles in Blantyre, Lilongwe, Mzuzu and Zomba Police Stations. Period 2003-2004*, (2004). Author's files.
- 66 By 2006, PAS was operating in 18 police stations.
- 67 "Diversion in this instance includes, cautions (approximately 19 percent), bail (approximately 48 percent) and admission in the approved school (approximately 10 percent)." Pierce above n 24, paragraph 3.5.1, 21.
- 68 *What is Bail?* (2004) produced by PRI and PAS in Chichewa with English translations and by KPPP and PAS (Uganda) in KiSwahili.
- 69 *10 Steps from Your Arrest to Your Appeal* (2004) produced by PRI and PAS in Chichewa with English translations and reproduced as *9 Steps from Your Arrest to Your Appeal* by KPPP.
- 70 Pierce, above n 24, paragraph 3.3.7, 17.
- 71 Founder of the Grameen Bank micro-credit scheme *banker to the poor* in Bangladesh, and Nobel Peace Prize laureate.
- 72 At the time of writing, 450 village mediators have been selected for the pilot sites and attended a four-phase training course in mediation, the establishment of monitoring structures and linkages and referral mechanisms to the formal justice system.
- 73 In general terms, the Law Commission recommended that the Legal Aid Department should be reconstituted as an independent Legal Aid Bureau, with funding from parliament, and that "co-operation agreements" (known elsewhere as service contracts) should be entered into with private service providers such as PAS.
- 74 The basket fund is yet to be established. The political tensions and trade-offs in Malawi since the last elections in 2004 have frozen legislative output. Among other things, new international staff with different personalities and fresh policies have arrived to manage old programs.
- 75 This amount includes salaries of the paralegals and two coordinators, training events and meetings, central and regional office running expenses, overheads paid to the NGOs managing the regional offices and a proportion of PRI's management costs that can be attributed to PAS. The figure does not include one-off costs such as those attributable to the implementation of an exit strategy, the development of PAS training materials and capital expenditure. Pierce, above n 24, 18.
- 76 Kerrigan, above n 22.
- 77 Hansen, above n 23, 6.
- 78 Pierce above n 24.
- 79 Ibid.
- 80 Ibid at 20 "...with only four paralegals having left PAS voluntarily since it started in 2000."
- 81 Ibid.
- 82 The UK government maintains service contracts with private legal aid providers, for instance.
- 83 Stephen Golub, *Beyond Rule of Law Orthodoxy. The Legal Empowerment Alternative*. Rule of Law Series, Carnegie Endowment for International Peace, Working Paper, (2003) 41, 19.
- 84 Ibid at 19-21.
- 85 Ibid at 20.
- 86 Bazuka Mhango, MP, Minister of Justice, Malawi, opening the national meeting to start a national legal aid scheme in Malawi, February 2007.
- 87 Golub, above n 83, 20.
- 88 Ibid at 21.
- 89 World Bank, *Legal Services for the Poor Best Practices Handbook*, World Bank Legal Vice Presidency (2003) 4.
- 90 The Asia Foundation, *Promoting Improved Access to Justice: Community Legal Service Delivery in Bangladesh*, (2007) 6. Author's files.
- 91 Asia Development Bank, *Draft Country Governance Assessment Bangladesh* (2004) at paragraph 882. Author's files.
- 92 Ibid.
- 93 Thomas Carothers (ed.) *Promoting the Rule of Law Abroad In Search of Knowledge*, Carnegie Endowment for International Peace (2006).
- 94 Kirsti Samuels, *Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt*, World Bank Social Development Papers, (2006) Paper No 37; Christopher Stone et al, *Supporting Security, Justice and Development: Lessons for a New Era*, Vera Institute paper, (2005) see www.vera.org/publications.
- 95 *Paris Declaration on Aid Effectiveness* 2005, Section III: Indicators of Progress, point 6.
- 96 There is a hint that the policy makers in their capitals are beginning to alter this thinking. Some donors realize that what national governments want from their justice systems is not the same thing as what their citizens expect. It is reported that some donors "...seem to be shifting towards a 'demand driven' approach to criminal justice reform" and that justice reform driven by state institutions with the NGOs playing a marginal role "is not sufficient". J Perlin and M Baird, *Towards a New Consensus on Justice Reform: Mapping the Criminal Justice Sector*, Open Society Justice Initiative (2008) 26.
- 97 *Paris Declaration* 2005, paragraph 14, bullet point 3.
- 98 Pierce, above n 24, 35.
- 99 Ibid.
- 100 'Legal Aid in Criminal Justice: the Role of Lawyers, Non-Lawyers and other Service Providers', 22-24 November 2004. Senior representatives from prisons, the judiciary, the Bar and civil society attended from Benin, Botswana, Burkina Faso, the Democratic Republic of the Congo, Ghana, Kenya, Liberia, Mali, Namibia, Niger, Nigeria, Senegal, Sierra Leone, South Africa, Sudan, Tanzania, Uganda, Zambia and Zimbabwe. See: *Access to Justice in Africa and Beyond: Making the Rule of Law a Reality* (footnote 45).
- 101 ACHPR Resolution on the Right of Recourse and Fair Trial 1992; Kampala Declaration on Prison Conditions in Africa 1996; ACHPR Resolution on the Right to a Fair Trial and Legal Assistance in Africa 1999 (the Dakar Declaration); and ACHPR Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa 2001.
- 102 The Lilongwe Declaration was adopted by the African Commission at its 40th Ordinary Session, November 15-29, 2006. Ref. ACHPR/Res.100 (XXXX) 06.
- 103 Report on the Sixteenth Session (28th April 2006 and 23-27 April 2007 and 29-30 November 2007) Economic and Social Council, Official Records, (2007) supplement No.10.
E/CN.15/2007/17/Rev.1.
- 104 ECOSOC Resolution 2007/24.
- 105 Ibid at paragraph 18.
- 106 Ibid at paragraph 19.
- 107 Ibid at paragraph 20.
- 108 Ibid at point 2.
- 109 "The Codes of Conduct were singled out, by paralegals and partners alike, as a major contributor to the quality of relationships developed. By leaving the institutions clearly in control of when and where and whether PAS activities are carried out and by making it explicit that paralegals are present in the institutions by invitation only, the Codes of Conduct successfully disarmed any resistance and suspicion that might have been expected." Pierce, above n 24, paragraph 3.3.3, 15.
- 110 Ibid.
- 111 "The rich experience available across the continent can best be utilized if proven and effective programmes are progressively implemented in more countries." *Ouagadougou Declaration on Accelerating Prison and Penal*

Reform (2002), Recommendation 5, Encouraging Best Practice.

112 Pierce, above n 24, 1.

113 PRI, *Index of Good Practices in Reducing Pre-Trial Detention*, (2005) Version 7, 4.

114 Recommendation 7: Diversifying legal aid service providers. It has been observed that there are not enough lawyers in African countries to provide the legal aid services required by the

hundreds of thousands of persons who are affected by criminal justice systems. It is widely recognized that the only feasible way of delivering effective legal aid to the maximum number of persons is to rely on non-lawyers, including law students, paralegals, and legal assistants. These paralegals and legal assistants can provide access to the justice system for

persons subjected to it. They can assist criminal defendants, and provide knowledge and training to those affected by the system that will enable rights to be effectively asserted. An effective legal aid system should employ complementary legal and law-related services by paralegals and legal assistants.

The mystery of legal empowerment: livelihoods and community justice in Bolivia

Tiernan Mennen*

Executive Summary

The linkages between good governance, rule of law and economic growth, once more fully understood, have the potential to unshackle economies and decrease poverty throughout the developing world. Currently, however, most initiatives are heavy in rhetoric and light on directly addressing the legal structures and policies that affect the poor. Until developing countries can enable their vast populations of poor citizens to actively participate in their economies, their growth and the creation of egalitarian societies will be severely hampered. Analyzing and building on the final report of the Commission on Legal Empowerment of the Poor and other previous work, this article outlines a functional approach to addressing the most critical needs of the poor, including but not limited to issues that directly affect livelihoods and economic opportunity. It accordingly aims to help the poor gain a foothold in effecting their own development and making legal empowerment a reality. By introducing important lessons in community-based justice from an access to justice program in Bolivia, the article provides tangible examples that might help shape legal empowerment initiatives to best address the needs of the poor.

The article particularly suggests six programmatic aspects that can enhance legal empowerment work. The first aspect is the need to adapt to the varying and complex legal environments that affect poverty in different countries, including reaching beyond the Commission's useful but narrow perspective. The second is a greater focus by legal empowerment programs on proactive, livelihood-oriented work. The third is the need to integrate the provision of legal services and other activities with existing community-based and informal justice systems. The fourth aspect, based on the successful use of community volunteers in Bolivia, is the expansion and systemization of programs that link law student interns and post-graduate public service to the provision of legal services in communities. The fifth aspect is the widespread training and deployment of community-based paralegal networks as an extension of justice centers and lawyers located in cities. Finally, based on the Bolivia experience, the article recommends implementation of legal empowerment programs by independent civil society groups and urges caution in allowing government ministries to take over programs created and executed by development agencies.

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* The author would like to thank program beneficiaries in Bolivia and other countries for their support and willingness over the past years to open their doors and share their personal stories.

Introduction

Co-chaired by international development authority Hernando de Soto and former U.S. Secretary of State Madeline Albright, the Commission on Legal Empowerment of the Poor aimed “to make legal protection and economic opportunity not the privilege of the few, but the right of all”.¹ The Commission’s final 2008 report, *Making the Law Work for Everyone*, accelerated recent years’ critical reconsideration among some law and development practitioners and scholars of how and why most law-oriented development aid has focused on judiciaries and other formal legal institutions that, inter alia: are often not the informal or governmental forums where the poor seek justice; are typically inaccessible to the poor due to overly complicated legal codes, geographic isolation and the expense of legal assistance/representation; and are permeated by corruption, favoritism and other undue influences.² The Commission’s report has been influential in suggesting that such development efforts should focus more heavily on issues that directly address the informal economic sector in which the billions of poor worldwide scratch out a living.

The substantive approach adopted by the Commission focuses on livelihood-oriented issues involving income and assets. The rights accordingly articulated by the Commission, termed livelihood-oriented legal empowerment for the purposes of this article, pertain to small and micro businesses, labor and property (mainly land), but bypass much of the wider spectrum of legal issues affecting the poor. The Commission’s focus thus contrasts with a broader approach to legal empowerment favored by many development scholars and practitioners that allows the contextual needs of the poor to define subject matter emphasis. It includes many crucial issues and rights that are not directly livelihood-oriented such as those pertaining to gender, children, natural resources, input into governance and monitoring of government services, criminal defense, and racial, ethnic, religious and caste discrimination.

This article recognizes the importance of both the livelihood-oriented focus and the broader approach to subject matter emphasis without advocating one over the other. It furthers this debate by analyzing the impact of both approaches with data from five years of access to justice programming in Bolivia, while addressing the implementation challenges faced by each.

Although the Commission’s report has advanced theoretical concepts of legal empowerment, there is much analysis needed to turn theory into reality. This article draws a distinction between the Commission’s endorsement in principle of legal empowerment’s bottom-up nature (through which legal empowerment substantially overlaps with community-driven development) and the Commission’s programmatic emphasis on top-down initiatives driven by enlightened politicians, national-level policies and legal technicians. This distinction reflects the opinion in some circles that the Commission’s approach strays from the bottom-up principles of legal empowerment and does not adequately grapple with the challenges of obtaining effective top-down support for reform.³

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Instead, this article advocates an approach based on a combination of legal service provision and empowering community-level actors to advocate for change, using examples and data from the access to justice program in Bolivia. Data from the operations of this network of 11 justice centers provides a unique insight into the legal reality and challenges faced by the poor. Lessons learned from the centers form the basis for the article’s proposal to enhance legal empowerment through six programmatic aspects that increase the potential for effective advocacy and emphasize proactive interventions on livelihood issues of the poor. For as de Soto himself states in his book *The Mystery of Capital*, policies need to be informed by grassroots realities – or as he puts it, where “the dogs stop barking.”⁴

1. The legal empowerment approach

Legal empowerment is a term commonly used to differentiate from classic rule of law development approaches that focus aid on state institutions and the officials that oversee and operate them. Legal empowerment, however, recognizes that access to these institutions is limited for most vulnerable populations, especially in developing countries. Much rule of law attention by international development agencies and national governments has focused on increasing the technical proficiency of state institutions to ensure a legal environment more conducive to foreign direct investment and to improving the efficiency of the criminal justice system.

In contrast, the concept of legal empowerment, as articulated by the Commission and scholars such as Stephen Golub and Frank Upham, is based on substantial evidence that most poor and vulnerable populations are found outside the normative and organic framework of these institutions.⁵ These populations are legally marginalized due to inequitable power dynamics, inordinately complex and corrupt formal legal systems, and a host of other factors. As a result, they often employ informal systems and customary practices to protect and, where possible, enhance their incomes and assets.

In order to reach these populations and address their legal needs, law-oriented development has to be turned on its head. It should focus less on national-level institutions that institute top-down reforms and more on building solutions from the bottom up, based on the legal realities faced by the targeted beneficiaries. Legal empowerment can potentially cross-sect a large body of law that includes human rights, family law, property, and land law and contract enforcement/interpretation, but is best defined by its more grassroots approach that includes a wide range of community-based legal services, from mediation/alternative dispute resolution to legal orientation to formal legal representation.

Compared to more traditional areas of rule of law reforms – e.g. support for judicial and other training institutes, courthouse construction and repair, the establishment of management and administration systems of judiciaries, technological upgrades, the strengthening of bar associations and the development of international exchanges for judges and court administrators – legal empowerment approaches attract significantly less funding from development agencies. The World Bank, for example, has implemented a number of programs to provide legal services for women, but funding pales in comparison to judicial reform efforts. In Ecuador, the World Bank's Judicial Reform Program devoted less than US\$400,000 of its US\$10.6 million budget in 2002 to projects providing legal services to the poor.⁶

While the efficiency of the formal legal system is important, legal empowerment emphasizes alternative approaches to legal system reform that are broader in focus and incorporate both formal and informal aspects. Legal empowerment works with local and community sources of the rule of law and builds advocacy for programs and policies using customary and local practices as a complementary mechanism to improving efficiency.⁷

Advocates of the legal empowerment approach tend to focus on rights and political disenfranchisement; however, the theory also has important implications for economic development and access to economic justice. The Commission's report and economic rule of law theories by de Soto, Posner and Reed,⁸ presented in greater detail in Section III, present important legal reforms needed to increase economic opportunities for the poor and increase economic growth as a whole. However, much of these proposed reforms will continue to exist as "paper tigers" if their implementation ignores the informal legal system and the empowerment of local actors. Legal empowerment is an intriguing but underappreciated part of the solution to these complicated reforms and the apparent paradoxes they present.

Rule of law “orthodoxy” has long been an aspiration of international institutions focused on increasing the stability of formal legal adjudication and predictable dispute resolution.⁹ Golub states that “as most prominently practiced by multilateral development banks, this top-down, state-centered approach concentrates on law reform and government institutions, particularly judiciaries, to build business-friendly legal systems that presumably spur poverty alleviation.”¹⁰ The problem lies in the means to this end, as institutions rely on questionable assumptions, unproven impact and insufficient attention to the legal needs of the disadvantaged.¹¹

The legal empowerment approach instead focuses on the use of legal services, advocacy, and related development activities to foster “critical consciousness”¹² and increase disadvantaged populations’ control over their lives¹³ - focusing directly on the poor rather than state institutions. In its most advanced form, it imparts “critical consciousness” – the ability of women, the poor and other marginalized groups to understand and think critically about the inequitable power relationships that affect their lives and to take action to challenge and transform those relationships.¹⁴ The approach also incorporates community-driven and rights-based development, and offers concrete mechanisms, including legal services that alleviate poverty, advance the rights of the disadvantaged, and make the rule of law more of a reality.¹⁵ Emphasis is placed on strengthening the roles, capacities and power of the disadvantaged and civil society; addressing issues and strategies that flow from the evolving needs and preferences of the poor. Activities can include community organizing, group formation, political mobilization, micro-credit provision, natural resource management and use of media, with integration of all a key element.

The legal empowerment paradigm is not intended to replace all orthodoxy programs with legal empowerment programs, but rather to shift focus and pursue legal empowerment strategies as a complement. Grounded in grassroots activities, legal empowerment can also translate community-level needs into reforms of national laws and institutions.¹⁶ Golub analogizes the current rule of law reform paradigm to a public health campaign that only concentrates “on urban hospitals and the doctors staffing them, while largely ignoring nurses, other health workers, maternal and public education, other preventative approaches, rural and community health issues, building community capacities, and non-medical strategies.”¹⁷ Rule of law, like health, cannot be addressed merely by central institutions, but must involve a wide spectrum of societal actors, especially the informal institutions of the poor, indigenous and disenfranchised.

66 Legal empowerment approaches go hand in hand with rights-based approaches to development and programs to enhance civil society. Legal empowerment uses legal services through civil society groups to help the poor learn, act on and enforce their rights in pursuit of development and the goal of poverty alleviation. Legal empowerment, however, goes much further than rights-based approaches by focusing on the connections between development, freedom and power. Building on Amartya Sen’s conclusions on development being a measure of freedom, legal empowerment is an avenue by which the poor can increase freedom in the areas that most affect their capacity to progress.¹⁸

2. Commission on Legal empowerment of the poor: livelihood-based legal empowerment

Over the past two decades, the widespread transformation to democracy and market-based economies around the world has largely assumed the existence of the requisite rights and market characteristics on which these systems are based; establishing a well-functioning market economy without them has proven to be extremely difficult. Despite radical changes to the economies of many countries, millions remain mired in poverty. The diagnoses and remedies provided by the West and its institutions, such as the International Monetary Fund

and the World Bank, have not brought the predicted changes and have often exacerbated the efforts of countries to lift the majority of their citizens out of poverty. The “lost decade”¹⁹ of the 1980s in Latin America was a particularly egregious result of how market policies such as the now largely defunct Washington Consensus²⁰ can go awry. As dire as the market-based approach has become, it has not failed completely, and still represents the best opportunity for lifting millions of citizens out of the poverty trap in which they find themselves. To do this, however, the focus of economic development must be radically altered from macroeconomic policies to address the underlying foundation of market economies – the rule of law.²¹

As many famous theorists and academics have argued, from economists such as Hernando de Soto to jurists such as Richard Posner, the success of market economies in countries such as the United States and Japan is due to the fundamental, but often overlooked, characteristics of secure, delineated property rights and contract enforcement.²² Market approaches have largely ignored or found it too difficult to address this foundation and have focused instead on macroeconomic policies and central government operations in areas such as natural resources extraction and infrastructure development. The powerful potential of capitalism and market economies meanwhile remains largely untapped. Entrepreneurs cannot access the capital trapped in land without title; investors are unwilling to lend without contract enforcement; and small businesses face large, prohibitive costs for making their enterprises legal.

The deep-rooted economic problems of fledgling markets, however, extend beyond contract enforcement and property title to basic foundations of a market economy that allow entrepreneurs of all classes to strive for economic efficiency and to pursue innovative market approaches beyond their families and close associates. Furthermore, the economic opportunities that do exist, including access to collateral and contract enforcement, are accessible only to the wealthy. This disparity between poor and rich in access to the benefits of market economies furthers the socio-economic divide that has become the defining characteristic of many young democratic societies and market economies.

The importance of property – the legal expression of ownership of assets – in a market-based economy cannot be understated. Numerous rule-of-law theorists have identified property rights as the primary cause of market access failures for the poor in the developing world.²³ They have identified three important and overlapping ways that property rights premise the marketplace.²⁴ First, property rights identify and protect the set of tangible and intangible resources that can be transferred in the marketplace. Second, property rights secure benefits of and provide incentives for owners to seek improvement of their resources. Third, property rights create security for capital borrowing and investment, turning fixed resources like land into mutable and liquid form.²⁵

As Tom Bethall states in his highly regarded book, *The Noblest Triumph*, “all areas of law radiate from the broad concepts of the property system, including the narrow modern body of ‘property law.’”²⁶ But as fundamental as property is to law and the functioning of a marketplace, the organic growth of property systems that occurred in industrialized nations has not happened on a society-wide scale in the developing world; instead, indigenous, customary and informal property systems exist simultaneously and often in conflict with foreign, superimposed property laws – vestiges of colonial efforts to solidify elite access. Many scholars, including de Soto, see this as a failure of the rule of law and call for inclusion of the poor into the “formal” property system used by the elites.²⁷

Hernando de Soto’s signature work, *The Mystery of Capital*, is an innovative account of how capitalism has failed throughout the developing world and is the theoretical foundation for much of the Commission’s work.²⁸ In this book, de Soto details how lack of access to capital, extensive government restrictions and lack of contract enforcement combine to undermine the capitalist economies that developing countries have been striving to create for the past

half-century.²⁹ Using his native Peru as a measuring stick, de Soto shows, through investigation and reproduction of small business scenarios, the barriers that prevent illegal or poor entrepreneurs from entering the legal sector of the market economy. He states that the problem is not that developing countries do not have formal property systems, but that most citizens cannot gain access to it.³⁰ Developing countries have been trying to open up their property systems to the poor for the past 180 years, but have largely failed to realize that property is not a primary quality of assets, but the legal expression of an economically meaningful consensus about assets.³¹ Western nations built formal property systems by discovering the “people’s law” through the formation of social contracts based on the practices and norms of the extralegal sector.³² Developing countries, in contrast (de Soto uses Peru as an example), have not geared their formal property systems to process extralegal proofs of ownership, which is the only kind of proof the poor have.³³ The poor and indigenous have never been given the legal mechanisms that would allow them to fix their economic rights over their assets, despite apparent legal rights.

It is not entirely surprising then that the Commission’s report focuses almost entirely on de Soto’s area of expertise – reform of the informal economy – to brand its own version of legal empowerment based on “the livelihoods of the poor: property rights, labour rights, and business rights”,³⁴ referred to in this article as livelihood-based legal empowerment. The report calls for reform along “four pillars of legal empowerment” directly linked to the informal status of the poor: access to justice and rule of law, property rights, labor rights and business rights.³⁵ Access to justice reform as defined by the report is more of an approach similar to institutional reform and seemingly embraces the classic form of rule of law orthodoxy. The “pillar” calls for increased functional reach of legal protection to the poor by improving state institutions and addressing issues of elite capture. Access to justice turns paper rights into functional rights, including addressing basic legal vacuums such as lack of legal identity – a precursor for access to government services and legal education efforts.³⁶ The pillar, however, is amorphous in focus and an artificial mix of structural interventions and thematic issues. More specifically, the pillar mentions all of the following as access to justice: classic justice sector institutional reform, provision of legal services to the poor through community-based organizations, and establishing clear legal identity through some combination of the above.

The remaining three pillars are more firmly based in important thematic topics: property, labor and business regulations. The property rights pillar emphasizes the legal security as well as psychological ramifications of not having recognized title to both physical and liquid assets. For example, as many as 90 percent of laborers in some South Asian and African countries are informally employed.³⁷ The labor rights pillar calls for reform and greater enforcement of the legal protection for laborers provided by laws and international declarations.³⁸ The business rights pillar is based on the findings of the Commission that there are substantial barriers to business registration and entry into the formal economy, and that there is an impediment to the ability to contract, access financial services and other governing precursors for a robust economy.³⁹

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To a good extent, the Commission’s report sidesteps the crucially important issue of how to make the substantive rights that it describes a reality for the poor. It largely falls back on the good faith and intentions of governments that it acknowledges may be permeated or even controlled by corrupt or otherwise anti-reform interests. Similarly, it argues that such governments can be persuaded in their own self-interest to promote legal empowerment. But it conflates the self-interest of governments with that of the individuals who may constitute or control them, and whose power or profits may hinge on preserving the status quo.

Emphasis needs to be placed instead on the process by which legal empowerment is implemented in relation to the subject matter focus of the Commission’s report. As detailed earlier, a defining aspect of the legal empowerment approach is working through local, non-

lawyer actors. An overemphasis on having governments launch reforms without grassroots input and on legal technicians providing services such as formal judicial representation decreases the powerful dynamic of community empowerment.

The Commission's report presents many of the same shortcomings of the rule of law orthodoxy and the same criticisms that de Soto's past work has elicited.⁴⁰ While many top-down economic law reforms are necessary and have resulted in more efficient laws, they do not address the entire range of issues faced by the poor; instead, they rely on the effects of reforms trickling down to the poor, a dubious assumption in many contexts. Top-down approaches such as these fail to link formal law with the informal economic activities of the poor. Beneficiaries are mostly limited to established, wealthy economic actors who have the capacity or political capital to access the credit and contract enforcement systems, while the economically and politically disenfranchised are unaffected and only left further behind economically. This article recognizes the important contributions of these reform efforts, but calls for a paradigmatic shift in the approach to rule of law reform that places less emphasis on rewriting laws and increasing the efficiency of formal government institutions, and more emphasis on structural access issues and informal legal mechanisms.

The economic access issues identified by the Commission and in de Soto's *The Mystery of Capital* have inherent empowerment implications for the poor. The lack of access to capital and the insecurity of property rights are problems with grassroots ramifications that require community-based initiatives on a society-wide scale to address. Despite this reasoning, there is a genuine disconnect between economic reform and legal empowerment approaches. Legal empowerment programs tend to concentrate on human rights and social causes involving, for example, the protection of workers and the environment. Economic reform, meanwhile, is left to microfinance and macro-level efforts. These economic initiatives rarely employ local input, organization or empowerment.

A legal empowerment approach to economic access issues is particularly effective in combating entrenched interests to economic reform, because it embraces the extra-legal approaches that make the informal sector vibrant, attempting to scale these approaches up to the point of legal recognition. This contrasts with the Commission and de Soto's more top-down approach that places reform in the hands of enlightened political leaders, instead of selecting issues and strategies that flow from the evolving economic needs and preferences of the poor. The nexus of legal empowerment and poverty alleviation in the approach advanced by this article, however, is directly associated with economic activities of the poor. Rather than focusing only on Western social ideals and social definitions of poverty, legal empowerment harnesses the changes identified by small entrepreneurs and farmers to improve their access to economic advancement and improved business climate. Lessons learned from legal empowerment activities in Bolivia support this approach yet also illustrate a more complex environment for reform.

3. Bolivia National Access to Justice Program

The Bolivia National Access to Justice Program (BNAJP) was initiated in 2004 as a collaboration between the Ministry of Justice and the U.S. Agency for International Development (USAID). The core element of the Program is the creation of 11 justice centers located in poor rural and urban communities throughout the country, each operated by individual center coordinators and supported by USAID project staff and Ministry of Justice BNAJP officials.⁴¹ BNAJP provides a useful case study for analyzing the effectiveness of legal empowerment in relation to both livelihood-based and broader legal empowerment approaches. The centers are the base of operations for provision of legal services and community legal education efforts performed by center staff and volunteers. Currently, each

center is staffed by a coordinator, a lawyer, two mediators, and in six of the centers, a judge. The centers also support over 120 community volunteers and law student interns.

Since 2004, the centers have provided dispute resolution and legal counseling in over 150,000 cases.⁴² The centers have also conducted a variety of legal education campaigns that have directly trained over 48,000 people and reached countless more through the distribution of legal information pamphlets and posters, and radio and television programs.⁴³ The number of cases brought to the centers has steadily increased each year, indicating an increasing consciousness of community members on where and how to address their legal issues. Community surveys also indicate a greater general awareness in targeted communities of their rights and the legal structures that allow for their protection.

The centers have developed a number of programs and campaigns in their communities to increase access to justice on a variety of issues ranging from intra-family violence to registration of land titles to property inheritance. The programs employ a combination of community leaders, volunteers and legal professionals to educate and suggest proactive solutions for citizens to resolve their own legal issues, including which local/national government offices can address specific problems. The programs also inform communities of the services offered by the centers for issues and disputes they are not able to resolve themselves.

Rural centers tend to conduct a greater degree of outreach through mobile clinics of mediators, volunteer counselors and lawyers visiting remote communities. As indicated by Figure 1, a high percentage of center clients tend to come from indigenous and marginalized populations.

Figure 1. Cross-section of Justice Center Users⁴⁴

Ethnicity	%
Aymara	58
Quechua	10
Other Ethnic Groups	5
No Specified Ethnicity	27

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Gender	%
Female	71
Male	29

Highest Level of Education	%
No Education	10
Primary Education	56
High School Level	28
University or Higher	6

Five years of BNAJP data suggest that the issues that constitute the subject matter emphasis of livelihood-oriented legal empowerment highlighted by the Commission (business, labor and property rights) are prevalent throughout Bolivia, but arguably to a lesser degree than other issues such as criminal and domestic disputes. This suggests the importance of the livelihood subset of issues, but also indicates the greater priority placed by the poor on other issues outside the Commission’s foci that directly and indirectly effect general livelihood needs.

As shown in Figure 2, the percentage of cases across all justice centers is highly skewed toward family disputes, including divorces, child support and domestic violence. The vast majority of family cases end up in mediation, sometimes referred by the center lawyer, but most often requested directly by the parties. Formal legal representation of aggrieved parties in family disputes is less common. Civil cases have the second highest frequency, at 24 percent. Civil disputes cover a wide range of subject matters, including contract disputes, property and inheritance, and legal identity issues. A further breakdown of civil cases is detailed below. Criminal cases represent 12 percent of the cases received by the centers and are most commonly brought by plaintiffs declaring a grievance for assault or theft. Most criminal cases are relatively minor and are handled within the center through the center lawyer and/or judge. More severe cases are referred to the state prosecutor’s office. As indicated in Figure 2, subject matter areas related to livelihoods, such as labor disputes and land titling/disputes only represent a small portion, 2 and 3 percent respectively, of the cases brought to the Centers.

Figure 2. Percentage of Cases by Subject Matter across all Justice Centers (2007)⁴⁵

Subject Matter Area	% of Cases
Family	54
Civil	24
Criminal	12
Land	3
Administrative Law	3
Labor	2
Other	2

A further analysis of cases indicates the importance of certain livelihood issues for the poor and disfranchised in Bolivia. Case logs and individual case details were analyzed for two centers from January to March 2009 – one urban, El Alto District 6, La Paz, and one rural, Yapacani in the rural Chapare region of the Department of Santa Cruz. In total, 2,119 cases were reviewed from this three-month period (see results in Figure 3). The analysis revealed a number of disputes within the Civil and Administrative law categories that pertain to the livelihoods subset, including 106 cases of contract enforcement in urban El Alto and 31 in Yapacani. Requests to modify erroneous identification documents such as birth certificates and ID cards were a major category of cases in both locations, which is directly related to the legal identity focus in the Commission’s report. In Yapacani, the Center conducted an extensive campaign to ensure that all citizens had identification documents. As a result, over 31 percent (248) of requests for cases handled over the course of the three months involved such identity issues. The figure for the El Alto Center was 17 percent. The prevalence of these cases in Yapacani and, to a lesser extent, in El Alto is evidence of the importance of legal identity for both urban and rural citizens, but also an indication of the effect that directed campaigns have in reaching a larger number of people.

**Figure 3. Cases by Subject Matter, Individual Justice Centers
(January 2009 – March 2009)⁴⁶**

Subject Matter Area	No. of Cases	% of Cases
El Alto District 6 (urban)		
Contract enforcement	106	8
Property-inheritance	54	4
Land/titling	58	4
Legal identity	225	17
Labor	12	1
Family	632	48
Other (criminal, administrative law, other civil, etc.)	243	18
TOTAL	1,330	
Yapacani (rural)		
Contract enforcement	31	4
Property-inheritance	3	<1
Land/titling	9	1
Legal identity	248	31
Labor	10	1
Family	217	28
Other (criminal, administrative law, other civil, etc.)	271	34
TOTAL	789	

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Other results from the two centers covering the Commission's foci include: Property/Land Rights – 57 cases of property-inheritance and 67 cases of land/titling; Business Rights – 137 cases of contract enforcement; and Labor Rights – 22 cases of labor disputes. Over the three-month period in these two centers, there were no issues presented on business registration or government interference with business rights or expropriation of property. The greater amount of property and business rights cases in a major urban location such as El Alto is not entirely surprising considering that the economy is more robust. The low incidence of land disputes or titling-related requests in rural Yapacani, however, is surprising given the importance of land and agriculture to rural subsistence.

In general, the numbers of livelihood-based cases are minor in comparison to other issues such as family and criminal disputes. Nonetheless, addressing livelihood represents a potentially significant step toward advancing legal and economic security for affected populations. Of particular note is the success the centers had when conducting a targeted campaign on one of the issues – legal identity. The ability to harness the community mobilization power of a network of volunteers and interns to address a specific issue, such as was done in Yapacani, is particularly important for future targeting of specific livelihood-based legal empowerment issues.

The analysis of the cases handled by these two centers indicates that the issues addressed by a legal empowerment approach are much broader than those proposed by the four pillars of the Commission. At the same time, it does not diminish the importance of targeted efforts on

livelihood-based issues. As shown by the legal identity campaign in Yapacani, there are potentially a large number of unidentified livelihood issues, of which the poor may be unaware of in daily life, but that have severe ramifications for future economic activity. The challenge for legal empowerment approaches, as embodied by the centers in Bolivia, is to balance the immediate legal needs of the poor with proactive campaigns that address additional underlying issues affecting economic opportunity.

4. Suggestions for fortifying legal empowerment of the poor programming

4.1 Flexibility to adapt to complex legal environments

The success of the project in Bolivia in addressing the legal needs of marginalized populations, tempered by a less than robust salience of livelihood-oriented work, provides important lessons on the need for flexible programming in legal empowerment work. There are a number of legal issues with immediate impact for the poor, such as criminal claims and family disputes, but the barrier to addressing subject matter areas related to the informal economy are greater than merely providing access to legal services. Targeted interventions, such as campaigns on specific issues, are required to improve community knowledge of formal vs. informal economy issues and the available legal options to empower individuals to effect change in their socio-economic status.

The BNAJP data indicate a more complex environment for legal empowerment initiatives than the Commission presented. In fact, there are a variety of other legal issues that confront and constrain poor Bolivians and other impoverished populations. In this context, the Commission's central concern of livelihood-oriented legal empowerment issues seems far too narrowly defined. A broader definition of poverty and development, such as that held by the United Nations Development Programme (UNDP) and many other international organizations, emphasizes the importance of human development and the many other ways in which disadvantaged populations achieve or lack control over their own lives, while also including the income and assets focus of the Commission. This definition of poverty is supported by the BNAJP data on issues that affect the poor on a daily basis. For example, women victimized by domestic violence or discrimination, a substantial source of cases in the centers, are likely to suffer income and assets deprivation.

A broad definition of poverty is necessary for a comprehensive approach to legal empowerment programs. Nevertheless, livelihood-oriented issues, including the thematic focus of the Commission, are an essential aspect of any programmatic definition of poverty. Legal empowerment program designs need to incorporate these issues with consideration of their often unseen, but fundamental effect on economic security. This article suggests that legal empowerment programs need to balance the immediate needs of the poor with more long-term, fundamental economic issues and to build in flexibility into programming that would allow for adaptation to the continually evolving issues and needs of the poor.

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4.2 Increased focus on livelihood-based issues

Justice centers are community-level institutions that increase access to justice for poor rural and urban communities. They are ideally run by local civil society organizations insulated from political interference while providing links to the formal justice sector. Their unique approach of bringing together civil society, the local justice sector and community stakeholders to reach consensus on local problems is a powerful tool that can be harnessed to affect change on a range of economic issues. However, as already emphasized, there is a need to increase the attention paid by the centers to economic issues that extend beyond the most common community-level disputes. The provision of basic legal services is an important aspect for garnering greater community-level support and increasing the profile of the centers in the community, but the temptation to stop at that level must be resisted in the interest of addressing other fundamental issues related to the plight of the poor.

More specifically, centers need to play a highly proactive role in their communities to identify issues related to livelihood themes, conduct educational and legal service campaigns, and support advocacy around these themes, including aggressive outreach to more remote populations that might otherwise be unaware of their livelihood-oriented rights. Examples of such initiatives include land titling campaigns for rural, farming communities and legal education outreach on how to establish a business, while helping to identify, analyze and promote changes to policies that create obstacles for the poor. The centers can build sustainable solutions to problems encountered by the poor by not only assisting with immediate needs, but also fomenting critical consciousness of the root cause of these problems and the necessary advocacy efforts to combat them.

Livelihoods-oriented work should also be linked to rural/agricultural banks, microfinance projects and other institutions that provide credit or that affect the ability to turn assets into collateral.

4.3 Integration of community and informal justice systems

Justice centers and other community-based legal initiatives often operate in isolated, controlled programmatic environments that provide limited linkages to the formal system. Unfortunately, local and customary forms of justice and dispute resolution are often ignored or subsumed within the centers instead of complementing and increasing their standing as important mechanisms for access to justice vis-à-vis the formal system, despite wide community support for such local mechanisms. The author's own work in southern Sudan on customary law showed that both men and women prefer local tribal chiefs as the first arbiters of disputes by nearly ten to one over the formal judiciary.⁴⁷ Countries such as South Africa have been largely successful in incorporating customary and tribal justice institutions into the larger justice sector, providing an avenue for the poor to address legal issues and disputes while providing formal recognition. In customary and tribal societies such as Sudan, South Africa and Bolivia, it is essential that national legal frameworks are pluralistic and flexible enough to incorporate customary legal traditions. Understanding local customs and giving local people the ability to articulate their rights and ensure recognition will create economic conditions and informal legal systems akin to the "people's law" and social contracts formed by Western nations in their infancy.⁴⁸

Another example of community-level justice systems that exist in developed and developing countries alike are Justices of the Peace (JPs) – a system of small-town legal laypersons that originated in England in the 1700s. A number of countries including the United States of America, France and Peru have a tradition of appointing local residents as JPs. In the 19th century, Peru instituted a system of uncompensated JPs that has enjoyed public popularity due to their ability to understand the litigants' cultural values as well as their social problems.⁴⁹

74 Seventy percent of the JPs are laymen, the rest attorneys. According to the Executive Council of the Judicial Branch, almost every population center in Peru has at least one JP.⁵⁰ In contrast to the professional judiciary, JPs are praised as being honest and just. A majority of Peruvians (51 percent) trust JPs more than other forums for resolving disputes, despite their lack of formal legal training.⁵¹

Community-level justice systems do not employ legal empowerment techniques per se, but represent an important source of conflict resolution that reflects the local legal environment, including the use of customary or indigenous law. The operators of these systems generally do not receive the amount of training or responsibility that could expand their adjudicating capacities to include more economic law issues such as contract enforcement, property disputes and collateral foreclosures. But their mere existence and success throughout many societies is worth studying further for their potential role in expanding legal empowerment initiatives. As with any institution, scaling up a volunteer or part-time institution such as the JPs jeopardizes its success and ability to provide continued, unbiased dispute resolution. A

comprehensive and independent training and monitoring program linked to civil society groups, bar associations and formal judicial ethics bodies could potentially mitigate corrupting influences.

4.4 Law student interns and postgraduate legal service

The use of community volunteers and law student interns in the Bolivia justice centers has proven to be one of the most efficient and cost-effective initiatives developed over the course of the program. Interns have proven particularly adept at learning and implementing the skills necessary to extend community outreach and provision of basic legal counseling services to greater sectors of the local community. The Bolivia method, however, is largely ad hoc, with individual interns choosing to dedicate a semester to providing legal services in communities as part of their educational requirements. Chile's system of Corporaciones for Judicial Assistance (Corporaciones de Asistencia Jurídica), established in 1981, is a model for creating an obligatory post-graduate requirement for law students to serve the country by providing legal aid services to poor communities.⁵² In the Corporaciones, recent law school graduates are required to perform six months of unpaid legal services before receiving their licenses as attorneys.⁵³ The Corporaciones are a unique institution in Latin America. In all, 13 Corporaciones, composed of recent law graduates and two or three staffed attorneys and social workers, work in conjunction with municipal and regional governments to provide legal services.⁵⁴ A typical student postulant can handle up to 110 cases over a six-month period.⁵⁵

Post-graduate and law student intern programs do not necessarily include livelihoods-based themes, but their contact with local communities represents an important resource for potential expansion into these issues, including community education and advocacy on land reform and other national issues that effect economic well-being. The Corporaciones illustrate a successful and sustainable model of collaboration between public service attorneys and law students, supported by government funding, which can expand the reach of legal services for the poor.

4.5 Paralegal networks

Networks of community paralegals⁵⁶ have proven to be a successful approach for advancing legal empowerment. Paralegals are most often laypersons drawn from local communities that are trained to provide legal education, advice and assistance to the poor and disadvantaged. Paralegal activities can range from providing basic information to representation in administrative processes and assisting litigation. Paralegal networks seek to improve access to justice by creating local bases of knowledge that facilitate community involvement in the legal/administrative processes that can resolve their problems. One of the most important aspects of the paralegal approach is the flexibility of paralegal groups to use informal, community-based legal systems to articulate rights that translate to the formal system. The empowerment aspect of paralegal work encourages advocacy and lobbying in areas outside the formal law and creates mechanisms for addressing problems throughout different sectors.

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The community volunteers in the Bolivia Justice Centers work largely like groups of paralegals. Their insight into community issues combined with legal training at the centers allows them to be an effective force for disseminating legal information and extending the provision of legal services. However, they do not fully embody the concept of a paralegal network since they are largely restricted to working in the centers, rather than a more dynamic community presence stationed in isolated communities that promote advocacy efforts through regional interconnection. Specifically, the physical location of the Bolivian volunteers limits their ability to serve as extensions of the city/town-based lawyers and centers. The expansion of center-based legal empowerment programs to a more dispersed but better connected paralegal network has the potential to transform legal service provision into a truly community-driven empowerment process that enhances the ability of remote communities to advocate for necessary change.

A number of legal advocacy NGOs have been very successful in using paralegals to affect a wide range of issues. NGO-sponsored or supported paralegals have proven effective at promoting judicial access, and have helped to demystify the law and create self-reliant legal capabilities for the communities they serve.⁵⁷ Paralegal networks strengthen implementation of laws by applying informed pressure on government bodies and private offenders and heighten participatory development by bringing previously powerless voices into the decision-making process.⁵⁸

Paralegal networks in countries such as China, Ecuador, the Philippines, South Africa, Sierra Leone and Namibia are examples of projects that have used innovative approaches to increase “legal literacy” and affect change in a variety of environments and on topics directly and indirectly related to livelihood-based legal empowerment. Namibia’s Legal Assistance Centre is a professional paralegal network that worked on apartheid issues upon its inception, but now primarily helps victims of domestic violence to secure restraint orders, workers to regain jobs from which they have been unfairly dismissed, and the disadvantaged to secure government benefits. Paralegal programs in Sierra Leone have provided a compelling example of building the rule of law in post-conflict environments amidst conflicting or dualist legal structures.⁵⁹ The SUBIR Project in Ecuador developed a paralegal network in indigenous, Afro-Ecuadorian and peasant communities to promote legal rights among their communities, including securing land tenure to community land that had been classified as state land.⁶⁰ Empowerment of the communities to claim legal title to the land corresponded with greater commitment and responsibility in conserving the protected areas than when administered by State Forestry agencies. Through SUBIR, the paralegal networks have also helped local producers of handcrafts access external markets and acquire environmentally friendly certifications for their products.

Paralegal networks are an important element to expanding current legal services programming to a more legal empowerment approach. A well-developed network has vast potential to provide a powerful combination of community-based legal literacy, training and advocacy, including on livelihood-based issues. Paralegal networks can also play an active role in increasing access to the legal services essential for building the confidence of poor entrepreneurs to expand and enter into contracts outside of informal networks. Paralegal networks can help provide security to these entrepreneurs through a gamut of legal services, beginning with advice on creating a contract up to legal action and dispute resolution using the legal resources of supporting NGOs. They can also provide legal advice for individual or groups of farmers to gain access to credit for purchasing seeds or construction irrigation, including perfecting security interests in future harvests, equipment or other movable property.

- 76** Paralegals do not just provide legal services, but also work with communities to organize and create collective solutions to common problems. This aspect of the work of paralegals is particularly salient for livelihood issues. Paralegals have the potential to collaborate with a wide range of economic actors in the communities they serve to demand rights and services, and to take advantage of legal opportunities. Business associations such as farmer cooperatives, women’s groups, trade unions and microfinance projects abound in many poor communities. The potential of these groups to further organize and empower themselves to effect change in economic regulations and legal reforms is limitless with the help of community paralegals. Paralegals have the capacity to work with both individuals and groups in the communities in which they live to help delineate and translate informal property systems into legally protected rights.

Paralegals are important agents, if trained and organized properly, for determining “where the dogs stop barking” and to consolidate informal systems into local, organic systems that form a bridge between the formal and informal.

4.6 Prioritizing independent, non-governmental efforts

The legal empowerment approach proposed by this article emphasizes grassroots work carried out by independent entities rather than governmental agencies. Although the Commission does acknowledge a bottom-up facet of legal empowerment, it basically calls for an agenda of change and programmatic interventions from the policy level down, promoted and implemented by enlightened politicians. In contrast, this article advocates that interventions must be driven by the needs of the poor and developed both through stakeholder-led advocacy and careful analysis of local problems (including interventions regarding livelihood-based issues). Excessive reliance on the good will and effectiveness of governments' top-down initiatives or government-implemented programs can prove counterproductive.

The BNAJP experience illustrates this point. Throughout their five years of existence, the Bolivia justice centers have largely been operated directly by the USAID project contractor, with collaboration from the Bolivia Ministry of Justice more in name than in substance. In May 2009, however, the Ministry of Justice enacted a decree to take over the supervision of center staff and payment of their salaries. Within days of the Ministry's assumption of control, all center staff (lawyers, coordinators, mediators) were replaced by less experienced, and in some cases, completely unqualified professionals. Early analysis indicates a strong political allegiance by the new center staff to the controlling political party of Bolivia and political favoritism in the appointment process – a fact underscored by increased politicization throughout Bolivia since national elections will be held at the end of the year. This development is a stark example of the potential pitfall of having centers run by the government and subject to politics. Not only does political interference potentially affect the professionalism and efficiency of the centers, but it also virtually eliminates the ability of the centers to serve as a source for advocacy against ineffective government policies. On the contrary, the jobs offered by the centers serve as a tool for awarding political supporters, with little emphasis placed on performance or providing effective services to the poor.

The argument for such government take-over is that it promotes program sustainability by virtue of the state assuming costs. But sustainability is in doubt when a program becomes tainted by political control and ineffective service delivery. Such centers and other legal empowerment programs should largely operate outside the purview of the government. This and other lessons learned from the Bolivia program help support a basic framework for legal empowerment interventions. Programs should:

- emphasize civil society and community-based groups as opposed to government-run interventions;
- contain a mix of elements that prioritize the needs and concerns of the disadvantaged;
- work with local justice institutions, informal or customary, that the poor can best access;
- encourage a supportive rather than lead role for lawyers;
- cooperate with government wherever possible, but apply pressure to it where necessary;
- use community organizing and advocacy;
- integrate with mainstream socio-economic development work; and
- build on community-level operations to enable the poor to inform or influence systemic change in laws, policies and state institutions.⁶¹

Where adopted, this framework and the five previous suggestions offered in this section will enable access to justice programs to harness a more robust legal empowerment approach and stimulate a greater focus on livelihood issues.

Conclusion

Legal empowerment is a multi-faceted approach that benefits from the collaboration of a variety of actors in the legal, economic and political arenas, but its primary focus is on empowering the poor and disenfranchised. It is by nature an integrated, multi-disciplinary approach that tackles legal issues from various angles, but that is decidedly community-based. The current rule of law reform paradigm, focused primarily on formal institutions and operating in a top-down manner, has dominated funding and theoretical approaches for the past three decades. However, its failure to address issues facing the poor is increasingly evident. The legal empowerment approach is a promising alternative paradigm that focuses exclusively on giving the poor and legally marginalized the tools and knowledge to affect change as they see fit.

This article illustrates the benefits of the legal empowerment approach, in particular how it can be used by the poor to address prevalent economic problems that impede not only their socio-economic advancement, but also the economic growth of countries as a whole. By embracing and adapting leading economic law theories of de Soto, Posner and others, and taking cues from the thematic foci of the Commission on Legal Empowerment of the Poor, legal empowerment approaches can effectuate grassroots-driven change in complex areas of community economic development through both micro and macro-level initiatives.

The suggestions of the article have important elements that should be incorporated into any comprehensive approach to legal empowerment. These suggestions expand collaboration with informal or quasi-formal institutions such as customary courts and Justices of the Peace while developing community-run legal service and advocacy networks composed of community paralegals and post-graduate law students, all working in conjunction with justice center-based lawyers, mediators and social workers. Justice centers and paralegals networks administered and supervised by a consortium of legal service NGOs represent the most effective way to realize livelihood-based legal empowerment on a broader scale.

As illustrated by the Bolivia case study, a more flexible and expansive approach to legal empowerment is needed than that articulated by the Commission. At the same time, justice centers can better serve the poor if they develop programming on the livelihood-based themes that comprise the thematic focus of the Commission. Legal empowerment programs must be proactive in developing education campaigns and legal service outreach around economic issues, including collaboration with microfinance groups, business associations, cooperatives and trade unions. Building bridges between informal economic legal systems and the formal state-sanctioned system through community-centered programs is also an important element for ensuring sustainability of reforms. Linking formal and informal systems is fundamental to creating an organic “people’s law” that incorporates all sectors of society and creates the preconditions for universal access to the economic tools of a thriving market.

Endnotes

- 1 See The Commission on Legal Empowerment of the Poor website: <<http://www.undp.org/legalempowerment>> at 22 July 2009. The Commission also comprised such influential figures as former President of Brazil, Fernando Cardoso; former Prime Minister of New Zealand, Mike Moore; former President of Ireland and the United Nations High Commissioner for Human Rights, Mary Robinson; and former U.S. Secretary of the Treasury, Lawrence Summers.
- 2 See T Carothers, "Promoting the Rule of Law Abroad: The Problem of Knowledge", *Rule of Law Series, Democracy and Rule of Law Project*, Carnegie Paper No. 34 (2003); S Golub, "Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative", *Rule of Law Series, Democracy and Rule of Law Project*, Carnegie Paper No. 41 (2003); V Maru, "Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide" (2006) 31 *Yale Journal of International Law* 427.
- 3 See generally, M Stephens, "The Commission on Legal Empowerment of the Poor: An Opportunity Missed" (2009) 1 *Hague Journal on the Rule of Law* 132; S Golub, "The Commission on Legal Empowerment of the Poor: One Big Step Forward and a Few Steps Back for Development Policy and Practice" (2009) 1 *Hague Journal on the Rule of Law* 101.
- 4 The analogy refers to how property lines are often defined in untitled areas outside government influence – where a landowner's property ends is often best defined by where his/her dogs stop barking. See de Soto, below n 28, 179, 187.
- 5 S Golub, "Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative", *Rule of Law Series, Democracy and Rule of Law Project*, Carnegie Paper No. 41 (2003); F Upham, "Mythmaking in the Rule of Law Orthodoxy", *Rule of Law Series, Democracy and Rule of Law Project*, Carnegie Paper No. 30 (2002).
- 6 World Bank, *Impact of Legal Aid: Ecuador* (2003) 2.
- 7 See generally, M Stephens, "The Commission on Legal Empowerment of the Poor: An Opportunity Missed" (2009) 1 *Hague Journal on the Rule of Law* 132; S Golub, "The Commission on Legal Empowerment of the Poor: One Big Step Forward and a Few Steps Back for Development Policy and Practice" (2009) 1 *Hague Journal on the Rule of Law* 101.
- 8 See generally, O L Reed, "Law, The Rule of Law and Property: a foundation for the private market and business study" (2001) 38(3) *American Business Law Journal* 441; R Posner, "Creating a Legal Framework for Economic Development" (1998) 13(1) *The World Bank Observer* 1; H de Soto, *The Mystery of Capital: why capitalism triumphs in the West and fails everywhere else* (2003).
- 9 F Upham, "Mythmaking in the Rule of Law Orthodoxy", *Rule of Law Series, Democracy and Rule of Law Project*, Carnegie Paper No. 30 (2002) 8.
- 10 S Golub, "Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative", *Rule of Law Series, Democracy and Rule of Law Project*, Carnegie Paper No. 41 (2003) 3.
- 11 *Ibid.*
- 12 The "critical consciousness" concept was developed by Paulo Freire. See P Freire, *Pedagogy of the Oppressed* (1970); P Freire, *Education for Critical Consciousness* (1973).
- 13 Golub, above n 10.
- 14 Asian Development Bank, *Law and Policy Reform at the Asian Development Bank 2001, Legal Empowerment: Advancing Good Governance and Poverty Reduction* (2000) <http://www.adb.org/Documents/Others/Law_ADB/lpr_2001.asp?p=lawdev> at 22 July 2009.
- 15 Golub, above n 10.
- 16 *Ibid.*, 5.
- 17 Golub, above n 10, 6.
- 18 A Sen, *Development as Freedom* (2000).
- 19 The "lost decade" refers to the stagnation of Latin American economies in the 1980s after steady and promising economic growth during the previous two decades. For more discussion on the "lost decade" see, M Daly Hayes, "The U.S. and Latin America: A Lost Decade?" (1988/89) 68(1) *Foreign Affairs*.
- 20 The Washington Consensus is an original package of ten neo-liberal economic policy reforms that encourage market liberalization and privatization of state industries. The term was first coined and presented by J Williamson in *Latin American Adjustment: How Much Has Happened* (1990).
- 21 A number of important initiatives in reforming economic legal frameworks have been attempted in the past, but their efforts largely exist as paper tigers or have never been implemented due to entrenched influences. For more information on the work of groups such as the Center for Economic Analysis of Law, see, among others: H Fleisig, "The Right to Borrow", *Public Policy for the Private Sector*, World Bank Private Sector Development Department, Note No. 44 (1993); H Fleisig, J C Aguilar and N de la Peña, "Legal Restrictions on Security Interests Limit Access to Credit in Bolivia" (1997) 31(1) *The International Lawyer* 65; K Pistor, M Raiser and S Gelfer, "Law and Finance in Transition Economies", *Centre for International Development*, Working Paper No. 49; H W. Fleisig and N de la Peña, "Peru: How Problems in the Framework for Secured Transactions Limit Access to Credit" (1997) 33 *NAFTA Law and Business Review of the Americas*.
- 22 R Posner, "Creating a Legal Framework for Economic Development" (1998) 13(1) *The World Bank Observer* 1.
- 23 See generally, T Bethall, *The Noblest Triumph: Property and Prosperity through the Ages* (1998); H de Soto, *The Mystery of Capital: why capitalism triumphs in the West and fails everywhere else* (2003); O L Reed, "Law, The Rule of Law and Property: a foundation for the private market and business study" (2001) 38(3) *American Business Law Journal* 441; B Atuahene, "Legal Title to Land as an Intervention Against Urban Poverty in Developing Nations" (2004) 36 *George Washington International Law Review* 1109.
- 24 O L Reed, "Law, The Rule of Law and Property: a foundation for the private market and business study" (2001) 38(3) *American Business Law Journal* 441, 451.
- 25 *Ibid.*
- 26 T Bethall, *The Noblest Triumph: Property and Prosperity Through the Ages* (1998) 3.
- 27 H de Soto, *The Mystery of Capital: why capitalism triumphs in the West and fails everywhere else* (2003).
- 28 *Ibid.*
- 29 *Ibid.*
- 30 *Ibid.*
- 31 *Ibid.*, 157.
- 32 *Ibid.*, 160.
- 33 *Ibid.*, 167.
- 34 See, Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone*, Final Report (2008) 31, available at <<http://www.undp.org/legalempowerment/reports/concept2action.html>> at 22 July 2009.
- 35 *Ibid.*, 5.
- 36 *Ibid.*
- 37 *Ibid.*, 6.
- 38 *Ibid.*, 7.
- 39 *Ibid.*, 8.
- 40 Golub, above n 10.
- 41 The BNAJP is implemented through a USAID contract with Checchi and Company Consulting.

- 42 Data from 2008-2009 project records combined with project publication, *Centros Integrados de Justicia reporte de Resultados 2005-2007*, Proyecto de Apoyo a la Administracion de Justicia en Bolivia (PAAJB), USAID/Bolivia (2008). Report on file with author.
- 43 Ibid.
- 44 Data from *Centros Integrados de Justicia reporte de Resultados 2005-2007*, Proyecto de Apoyo a la Administracion de Justicia en Bolivia (PAAJB), USAID/Bolivia, 2008.
- 45 Ibid.
- 46 Data from Individual Justice Centres Case Information Database, Support Project for the Administration of Justice in Bolivia, USAID/Bolivia. On file with author.
- 47 See United Nations Population Fund (UNFPA), "Adapting Restorative Justice Principles to Reform Customary Courts Dealing with Gender-Based Violence in Southern Sudan" (May 2008). Report on file with author.
- 48 S Golub, "Nonlawyers as Legal Resources for Their Communities", in M McClymont and S Golub (eds.) *Many Roads to Justice: The Law Related Work of Ford Foundation Grantees Around the World* (2000) 297.
- 49 T L Anenson, "For Whom the Bell Tolls: Judicial Selection by Election in Latin America" (1997) 4 *Southwestern Journal of Law and Trade in the Americas* 261, 277.
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- 51 Ibid, 95.
- 52 M Samway, "Access to Justice: A Study of Legal Assistance Programs for the Poor in Santiago, Chile" (1996) 6 *Duke Journal of Comparative and International Law* 347.
- 53 Ibid, 350.
- 54 Ibid.
- 55 Ibid, 358.
- 56 The term "paralegal" is rejected by some due to the existence of professional paralegal associations that differ widely from the definition used in this context of layperson community actors.
- 57 D Manning, "The Role of Legal Services Organization in Attacking Poverty" (paper presented at the World Bank Conference: *Empowerment, Security and Opportunity through Law and Justice* 8-12 July 2001, 21).
- 58 Golub, above n 48.
- 59 V Maru, "Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide" (2006) 31 *Yale Journal of International Law* 427.
- 60 See S Baranyi, C D Deere and M Morales (eds.) "Perspectives from Research" in Land and Development in Latin America: Issues and Openings for Policy Research (2004) available at <http://www.idrc.ca/fr/ev-67380-201-1-DO_TOPIC.html> at 22 July 2009. For more information on SUBIR, see the CARE website: <<http://www.careusa.org/vft/ecuador/day1.asp>> at 22 July 2009.
- 61 Adopted from a legal empowerment approach presented by Golub, above n 10, 37.

Allies unknown: social accountability and legal empowerment

Vivek Maru*

Executive Summary

This essay suggests that two strands of social action, which have hitherto developed separately – legal empowerment and social accountability – ought to learn from one another. Legal empowerment grows out of the tradition of legal aid to the poor. Drawing from the experience of Timap for Justice in Sierra Leone and kindred efforts in many parts of the world, the essay argues for five defining principles of the legal empowerment approach: a focus on concrete solutions to instances of injustice; a combination of litigation with more flexible, grassroots tools like education, organizing, advocacy, and mediation; a pragmatic, synthetic orientation towards plural legal systems; a commitment to empowerment; and a balance between rights and responsibilities.

Social accountability interventions employ information and participation to demand fairer, more effective public services. Social audits, for example, allow community members to compare their experience of local government outputs against recorded expenditures. Another intervention, the community scorecard, involves aggregating data on the performance of service facilities like schools and health clinics. The scorecards provide a basis for dialogue between community members and facility staff; the dialogue in turn leads to action plans for closing the gap between policy and practice. Both social audits and community scorecards have achieved substantial, life-saving improvements in service delivery at the local level.

A strategic blend of legal empowerment and social accountability methods would increase the effectiveness and reach of grassroots efforts to advance social justice.

The two approaches share a focus on the interface between communities and local institutions. The legal empowerment approach includes, in addition, the pursuit of redress from the wider network of state authority. Successful legal empowerment programs find traction in that pursuit even when state structures are largely dysfunctional. The essay therefore suggests that social accountability interventions couple local community pressure with legal empowerment strategies for seeking remedies from the broader institutional landscape. Legal empowerment programs, for their part, often under-emphasize injustices related to essential public services such as health and education, perhaps in part because they tend to wait for communities and individuals to raise problems. Instead, they should learn from social accountability practitioners' use of aggregate data as a catalyst for community action. Legal empowerment organizations would also benefit from adopting the attention to empirical impact evaluation that has characterized experimentation in social accountability.

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Introduction

This essay argues that two strands of social action which have hitherto developed separately – legal empowerment and social accountability¹ – ought to learn from one another.

“Legal empowerment” grows out of the tradition of legal aid for the poor and seeks, as legal aid has sought for centuries, to help people protect their rights. For much of the world’s population, legal aid in its classic form is either impractical or inadequate: lawyers are costly and scarce; lawyers are ill equipped to deal with the plural legal systems prevalent in most countries; and many people do not prefer the solutions afforded by litigation and formal legal process. Legal empowerment efforts aim to provide legal aid in a way that is practical, flexible, and responsive to socio-legal context. Legal empowerment programs often combine a small corps of lawyers with a larger frontline of community paralegals who, like primary health workers, are closer to the communities in which they work and employ a wider set of tools.

Drawing from the experience of Timap for Justice in Sierra Leone and kindred programs in many parts of the world, I argue here for five defining principles of the legal empowerment approach: a focus on concrete solutions to instances of injustice; a combination of litigation with more flexible, grassroots tools like education, organizing, advocacy, and mediation; a pragmatic, synthetic orientation towards plural legal systems; a commitment to empowerment; and a balance between rights and responsibilities.

“Social accountability” refers to strategies developed in the last two decades that employ information and participation to demand fairer, more effective public services. Social audits, for example, allow community members to compare their experience of local government outputs against recorded expenditures. Another intervention, the community scorecard, involves aggregating data on the performance of service facilities like schools and health clinics. The scorecards provide a basis for dialogue between community members and facility staff; the dialogue in turn leads to action plans for closing the gap between policy and practice. Both social audits and community scorecards have achieved substantial, life-saving improvements in service delivery at the local level.

The missions and methods of these two communities of practice overlap significantly. And yet thus far they have ignored one another. Law is strikingly absent in the social accountability literature,² and the legal empowerment literature in turn makes no mention of the recent experimentation in social accountability. I argue that a strategic blend of the two approaches would increase the effectiveness and reach of grassroots efforts to advance social justice.

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The two approaches share a focus on the interface between communities and local institutions. The legal empowerment approach includes, in addition, the pursuit of redress from the wider network of state authority. Successful legal empowerment programs find traction in that pursuit even when state structures are largely dysfunctional. I therefore suggest that social accountability interventions couple local community pressure with legal empowerment strategies for seeking remedies from the broader institutional landscape. Legal empowerment programs, for their part, often under-emphasize injustices related to essential public services such as health and education, perhaps in part because they tend to wait for communities and individuals to raise problems. Instead, they should learn from social accountability practitioners’ use of aggregate data as a catalyst for community action. Legal empowerment organizations would also benefit from adopting the attention to empirical impact evaluation that has characterized experimentation in social accountability.

1. Legal Aid 1.0 and 2.0

Legal aid is nearly as old as law itself.³ Legal systems are plagued by a founding contradiction: the law is meant to dispense fair judgments in disputes between parties who are, in many

respects, unequal. And yet inequality – in money, power, status – has a way of seeping into the space from which it is barred. All people may be promised their day in court, but a party of wealth or strength will likely find a way to improve its chances. Legal aid is one classic corrective to this fundamental tension: a way of bolstering the weak party's hand.

But in its classic form legal aid has serious limitations. In many places lawyers are costly and scarce, and providing enough formal legal assistance to meet demand would be implausible. Conventional legal aid is also ill equipped to deal with the plural legal systems prevalent in most countries. Perhaps most significantly, the solutions afforded by litigation and formal legal process are not always the kinds of solutions desired by the people involved, and they do not always contribute meaningfully to the agency of the people they serve.

There is a second generation of efforts to assist people who face injustice, one that is marked by greater flexibility and creativity, that is responsive to socio-legal context, and that is concerned not just with service delivery but with building power. Because of this last concern, these efforts are sometimes termed "legal empowerment."⁴ (In this essay I also use the term "justice services," which similarly has a broader connotation than "legal services").

I co-founded and for four years co-directed a program in Sierra Leone, Timap for Justice, that aspires to deliver justice services in this newer, broader vein. Learning from the experience of Timap for Justice and kindred work around the world,⁵ I would argue that at their best, legal empowerment efforts are defined by the following principles:

- 1. Concrete solutions to instances of injustice:** Legal empowerment efforts seek to demonstrate, case by case, that even in environments accustomed to arbitrariness and unfairness, justice is possible. Injustice is interpreted to include intra-community disputes as well as problems and abuses that arise between citizens and traditional authorities, between citizens and state institutions, and between citizens and private firms. Legal empowerment organizations by no means win every battle they take on, and the remedies they do reach are incremental improvements on the status quo rather than pure moral victories. But more than any other thing, an organization's judgment of its own performance, and the trust it receives from communities, rests on its capacity to achieve concrete solutions to instances of injustice. Open-ended awareness raising, or advocacy for large-scale political change, say, are both important tools but not in themselves sufficient. It is the solving of people's daily problems that defines the grassroots practice of legal empowerment: a mother receives support for her children from their hitherto derelict father; a community association succeeds in advocating with local government for repair of a dangerous broken bridge; a school is required to stop using its students for forced farm labor; a wrongfully detained juvenile is released; a group of farmers receives compensation from the mining company that damaged the farmers' land.
- 2. A combination of litigation and high-level advocacy with more flexible, grassroots tools, including community education, organizing, local advocacy, mediation:** A wide set of tools allows for constructive and cost-effective solutions, while the sparing, strategic use of litigation and high-level advocacy backs frontline efforts with greater power of enforcement. The credible threat of litigation, in turn, lends weight to the advocacy of frontline workers. This is the case even in a state like Sierra Leone, where the courts are significantly dysfunctional.
- 3. A pragmatic, synthetic approach to plural legal systems:** A legal missionary outlook toward traditional institutions is not uncommon among human rights advocates: the aspiration to banish traditional darkness with modern legal light. This contempt of traditional institutions and norms makes as little sense as sanguine romanticization.

In most cases I would argue for engaging and respecting both traditional and modern legal regimes, for building bridges between them, and for advocating for the positive evolution of each.

4. Empowerment: A conventional legal aid approach tends to treat people merely as clients – or perhaps victims – requiring a technical service. Wherever possible, legal empowerment efforts should seek to cultivate the agency and power of the people with whom they work. Not “I will solve this problem for you” but “I will work with you to solve this problem, and give you tools with which to better face such problems in the future.”⁶

5. A balance between rights and responsibilities: The rights discourse poses an existential danger: an emphasis on demands can undercut the ethic of self sufficiency. Legal empowerment efforts can strike a balance between right and responsibility by supporting community and self-help organizations and by advocating as often and as strenuously for fulfillment of citizen obligation as for insistence on citizen rights.

2. Social Accountability

If legal aid is an old idea, social accountability is older. The very existence of a government poses the question of its relationship to the governed. John Stuart Mill emphasized this point in 1861: “[P]olitical machinery does not act of itself. As it is first made, so it has to be worked, by men, and even by ordinary men. It needs, not their simple acquiescence, but their active participation.”⁷

In democracies one fundamental mechanism for participation and accountability is the election. But elections have limits. They reduce a complex set of factors – policy proposals, past performance, sometimes region and ethnicity – into a single, periodic vote. Also, elected officials constitute only a small layer of the state apparatus, and the signals transmitted from voters to the non-elected bureaucrats who conduct the majority of the state’s work are indirect and easily muddled.⁸

In recent years civil society organizations and development agencies have experimented with interventions to ensure direct state accountability at a local level. Bjorkman and Svensson define social accountability this way:

“[So]cial accountability is an approach towards building accountability that relies on civic engagement where citizens and civil society organizations directly or indirectly participate in extracting accountability (Malena et al., 2004) ... most interventions have in common that they inform citizens about their rights and status of service delivery and encourage participation.”⁹

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The recent experimentation has come in a number of forms; I discuss two of these below.¹⁰

2.1 Social audits and participatory expenditure tracking

Participatory measures for tracking actual public expenditures against budgets have been undertaken with varying degrees of success in India, Uganda, Indonesia, and many other places.

These interventions depend on the public availability of budgetary and expenditure information. With public records in hand, civil society actors can engage in participatory comparisons against actual spending. Mazdoor Kishan Shakti Sangathan (Association for the Empowerment of Workers and Farmers) pioneered social audits in Rajasthan, India in the early 1990s. Sangathan workers read out government accounts and expenditure records at

community meetings, and then invite villagers to testify to any discrepancies between official records and the villagers' personal experience. These meetings expose corruption and sometimes lead to the return of stolen funds.¹¹

Mazdoor Kishan Shakti Sangathan joined with other organizations to form a broader movement for the right to information, leading to the passage of right to information legislation in Rajasthan in 2000 and a national law in 2005.¹² India's National Rural Employment Guarantee Act, also passed in 2005, requires local governments (gram panchayats) to hold public meetings (gram sabhas) in which communities review past spending under the act and plan future spending. The state of Andhra Pradesh has deployed civil society resource persons to facilitate social audits during these public meetings.¹³

2.2 Community scorecards and community-based monitoring of frontline service provision

These efforts focus on the nature and quality of service by frontline providers. Care International organized community scorecards for health services in Malawi in the early 2000s. They are a cousin to individual "citizen report cards," which were pioneered in Bangalore, India in the 1990s. Community scorecards are generated for service delivery facilities like health clinics or schools. Civil society organizations gather objective data on facility performance and subjective data on the experience of facility users and facility staff. The scorecards aggregate these data and present them in a simplified form. Organizations then hold an interface meeting, in which both community and staff are present, to discuss the contents of the scorecard and the discrepancies between actual facility performance and performance as envisioned under policy. The aim of the interface meeting is to agree on an action plan, under which facility staff will improve performance going forward. The community then monitors the facility for compliance with the action plan. After a designated period – perhaps six months or a year – the civil society organization conducts a subsequent scorecard exercise to track progress.¹⁴

A recent evaluation of a community scorecard intervention in Uganda demonstrated striking quantifiable results within one year. The intervention and evaluation were designed by staff from Stockholm University and the World Bank and implemented in cooperation with 18 Ugandan community-based organizations (CBOs) in 50 health dispensaries across nine districts. Of the 50 facilities, 25 were randomly selected for "treatment" (i.e. the intervention would take place in those communities) and 25 designated as control for the purpose of impact measurement. The CBOs collected data in two ways: a service delivery survey based on facility records and a household survey of randomly chosen households within the facilities' catchment areas. The household survey measured health outcomes like child mortality and infant weights as well as each household's experience with the facility, including parameters such as usage (e.g. when and how often household members sought care from the facility), access (e.g. actual prices paid for drugs), quality (e.g. wait times for receiving care), and satisfaction (e.g. household members' rating of facility performance).

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For the treatment communities, this data was aggregated into a simple scorecard. (A sample scorecard is provided in the Annex.) In addition to data on the facility under review, the scorecards provide district and national averages for comparison. The community-based organizations presented the scorecards, along with information on the health ministry's policies governing how dispensaries are supposed to function, in a series of three participatory meetings: one with community members, another with service providers, and a third with the community and the service providers together.

In the final, interface meeting, the community and the dispensary staff jointly developed and agreed upon a community action plan to improve facility performance. Typical items in the action plans include: the clinical officer in charge will post a schedule of services provided by

the facility; clinic staff will report to work regularly; the clinic will stop charging user fees, as mandated by law; the clinic will reduce wait times to one hour maximum; the health unit management committee will begin to meet regularly; and the community will increase its use of the facility.¹⁵ Community members were asked to continuously monitor compliance with the action plan. The CBOs held public follow-up meetings quarterly to discuss progress and problems.

The evaluation found remarkable results after one year of this relatively simple intervention: when compared with facilities in the control group, the treatment facilities experienced 19 percent less nurse absenteeism, 7-10 percent higher immunization rates, a 16 percent higher rate of facility utilization, and a stunning 33 percent drop in child mortality.¹⁶

3. Why these approaches would enrich one another

The missions and methods of these two communities of practice – legal empowerment and social accountability – overlap significantly. But the two communities have largely ignored one another. My claim is that they ought not do so.

In the literature on social accountability, the law is strikingly absent. Reading Bjorkman and Svensson's study on Uganda health monitoring, for example, a lawyer wonders: what would happen if the nurses do not respond to persuasion? Where is the legal remedy? None is mentioned: that intervention, and most interventions of its kind, focus only on the direct interaction between community and service provider or between community and local government.¹⁷

Indeed, when social accountability interventions have failed to produce positive impact, researchers have identified the lack of a remedy as a key obstacle. Researchers in Rajasthan, India paid a community member to regularly monitor nurse attendance at a local clinic; the experiment yielded no reduction in nurse absenteeism. In Indonesia, an experiment invited community members to meetings in which public officials were to account for public expenditures in village roads projects; the increased participation did not result in a statistically significant decline in corruption. The purveyors of both experiments concluded that, among other flaws, the interventions faltered because communities lacked a way of seeking redress for either the absenteeism in Rajasthan or the corruption in Indonesia.¹⁸ Similarly, K.S. Gopal, reviewing the social audits conducted in Andhra Pradesh, India under the National Employment Guarantee scheme, reports large gaps between the amounts of fraud exposed and the amounts recovered. Gopal worries that the audits risk futility in the absence of an effective remedy against corrupt officials.¹⁹

86 Justice services, meanwhile, are in the business of pursuing remedies. While traditional legal aid – Legal Aid 1.0 – focuses on the judiciary as a source for remedies to breaches of rights, the legal empowerment generation engages a broader set of methods and institutions. This broader set includes the tools used in social accountability interventions: monitoring and advocacy with local authorities or service providers. In addition to those two, in the case of a breach of health policy as in the Uganda intervention, frontline workers in legal empowerment programs (in some places called community paralegals) would also draw on their knowledge of the administrative law that governs line ministries, the laws that bar and punish corruption, and the chains of accountability and responsibility across levels of government. If the efforts of frontline staff to make use of these various channels fail, the staff may call on the lawyers with whom they are connected, who in turn can engage in litigation or higher-level advocacy.

In Lombok, Indonesia, at a meeting of youths convened by a village paralegal, I heard the paralegal's supervising lawyer explain the power of the legal empowerment approach this way: "The difference this paralegal post makes is that it connects you to a wider network. If you have

a case in the villages” – they had been discussing two cases involving unlawful seizure of agricultural land by corporate developers – “it doesn’t have to stop there: together we can engage the land administrator, the sub-district police station, the district government, and if need be we can go to court.”²⁰

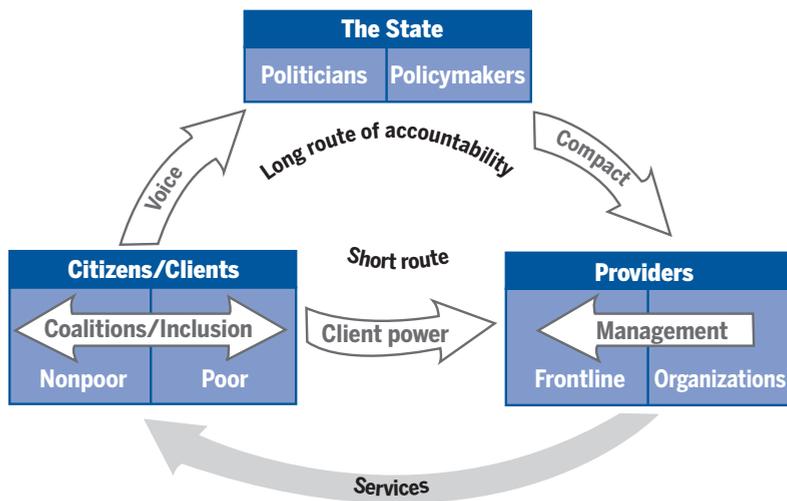
Social accountability practitioners may tend to ignore this broader legal framework because of the perception – often valid – that the law and larger state structures are largely unresponsive and dysfunctional. But legal empowerment practitioners *specialize* in squeezing justice out of dysfunctional systems. As I mentioned above, they by no means win every battle. But their combination of advocacy, mediation, education, organizing, and litigation seeks expressly to make even broken systems move.²¹

Another possible objection to the relevance of the legal empowerment approach in the arena of social services in particular is the old doubt about the enforceability of social and economic rights. Some law scholars and human rights organizations have held that spheres like health and education are matters of political process, not rights.²² But whether or not a polity grants abstract fundamental rights to social and economic goods, any health or education or housing policy inevitably creates specific entitlements, and in turn a chain of responsibility to ensure that those entitlements are fulfilled. Legal empowerment programs strive to understand that chain, no matter how faulty, and to get it to work for people. Indeed contrary to conventional wisdom the judiciary itself is often involved. The empirical work of Gauri et al. on courts in South Africa, Nigeria, Brazil, Indonesia, and India found substantial litigation on health and education rights in each of those countries, from a few dozen cases in Nigeria to several hundred in India to thousands in Brazil.²³

The 2004 World Development Report on making services work for poor people offers a triangular schematic, with communities and service providers at either corner of the base and the state at the apex.²⁴

Figure 1. Key Relationships of Power

Source: World Bank, 2004 World Development Report: Making Services Work for the Poor (2004).



Social accountability interventions often pursue what the World Development Report authors call the “short route” to accountability – direct interaction between citizens and service providers, as with community scorecards. Other social accountability interventions engage a limited, shortest-possible version of the “long route,” influencing service delivery via local governments, as with social audits at the panchayat level in India.

What the perspective of legal empowerment offers is a disaggregation of the “state” corner of the triangle. The state is not a unitary entity but rather a wide, layered network governed by rules and institutions. Even when those rules are honored vastly in the breach, they are worth knowing and invoking.

Legal empowerment practitioners, on the other hand, have much to gain from the experience of the recent social accountability efforts. In particular, legal empowerment programs should learn from the social accountability community’s use of data and from their adoption of a proactive, community-wide perspective in relation to public goods and services.

Traditional legal aid providers tend to structure their efforts according to the problems that “clients” bring forward. Many among the newer legal empowerment generation also abide by this model. Responding to clients, it is thought, means allowing the community to set priorities. But the key to the Uganda health intervention was that no single family appreciated how poorly the facilities were functioning until the community was presented with data on facility performance. Any particular household interacts with the facility only occasionally and so may not be able to generalize from the irregularities it encounters. Only with aggregate data on performance could the community see that the facility was systematically in breach of policy.

I have found that the dockets of generalist justice service providers often include disproportionate numbers of intra-community conflicts – child support claims, land disputes – with fewer cases involving failures of state institutions and public services.²⁵ My hunch is that these proportions do not reflect relatively well-functioning public institutions, but rather are a sign that communities have not conceived of state failures as injustices capable of remedy, and that legal empowerment organizations have not demonstrated well enough their effectiveness in addressing state failure.

The social accountability experience suggests that justice service providers should take a more proactive approach to discerning and addressing community needs. Instead of waiting for citizens and communities to present complaints, legal empowerment organizations should seek out possible problems with state institutions and services. Where there are potential failures, legal empowerment organizations should gather data as in the various social accountability interventions: budgetary data with which to monitor public expenditures, and facility data with which to measure the quality of service delivery. Legal empowerment workers can then employ that data, both for local-level mobilization and advocacy, as in the social accountability interventions, *and* in the wider realm of state authority: administrative procedures, anti-corruption commissions, legislative advocacy, and the courts.

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A final lesson for the legal empowerment community to take from its social accountability counterparts is a commitment to rigorous research and evaluation. As several scholars and practitioners have pointed out, we need a stronger body of evidence on the impact of justice services.²⁶ Perhaps a lag can be attributed to a difference in intellectual tradition: the practice of law is rooted in deontology, with its emphasis on reason and rights, while economists – who have been integral in developing social accountability methodology – find their philosophical basis in utilitarianism, which gives primacy to the weighing of costs and benefits. These are perspectives worth melding.

Randomized controlled trials, like those cited here from social accountability interventions in Uganda, Rajasthan, and Indonesia, provide one valuable way of testing impact. The World



Bank's Justice for the Poor Program in Indonesia is applying similar methods to evaluate a community paralegal program there. But inherent features of legal empowerment work – that the approach varies from case to case and community to community, that the ends of empowerment and accountability are difficult to measure, that legal empowerment programs actively seek “spillover” effects – suggest that other research methods, like qualitative case tracking and analysis of internal program case data bases, will be equally if not more important.²⁷ We need to understand not only whether a given program has an impact but *how* it generates impact, and how it might improve.

Worldwide, the need for both justice services and social accountability interventions far exceeds the supply. A strategic blend of these approaches could increase efficacy and also increase reach by making the most of available civil society presence. Social justice is elusive. Those who struggle to achieve it should wield every tool that works.

Endnotes

- 1 I invoke these terms with some caution, remembering George Orwell's indictment of vague and fashionable phrases in "Politics and the English Language" (*Horizon* 1946) (e.g. "As soon as certain topics are raised, the concrete melts into the abstract [...] prose consists less and less of words chosen for the sake of their meaning, and more and more of phrases tacked together like the sections of a prefabricated henhouse"). Whether or not the phrases "legal empowerment" and "social accountability" survive, the work to which they refer is concrete and, in my view, worthy. The burden of anyone writing on these subjects is to describe that vital work clearly and respectfully.
- 2 The one exception of which I am aware is J Ackerman, *Human Rights and Social Accountability*, World Bank Social Development Paper No. 86 (2005). Ackerman points out that social accountability interventions "constitute a step towards fulfilling a rights based approach to development," and argues for greater integration between social accountability and rights-based approaches in the future, *ibid*, 4. This essay builds on Ackerman's suggestion. Ackerman treats both social accountability and the rights based approach as broad orientations towards development (and as possible frameworks for the World Bank); I focus here in particular on grassroots, civil society interventions to ensure social accountability and to provide what I refer to as legal empowerment or justice services.
- 3 In the earliest years of the Roman republic, advocates and legal advisors were forbidden from accepting payment for their services, so that all citizens would have a chance in court. In the Christian Empire, the Council of Chalcedon decreed in 451 A.D. that the clergy should provide assistance, including legal aid, for widows, orphans, and those who lacked the means to procure counsel on their own. Judges in church courts – and the Pope himself – appointed advocates to argue without fees on behalf of poor and disadvantaged litigants as early as the twelfth century. J Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians and Courts* (2008) 35, 190-191. England's first legal aid law was the enactment of the *forma pauperis* procedure in 1495, which provided for the appointment of free counsel for the indigent. J Mahoney, "Green Forms and Legal Aid Offices: A History of Publicly Funded Legal Aid in Britain and the United States" 17 (1998) *Saint Louis University Public Law Review*, 226. Legal aid efforts in the United States trace back to the founding, including the New York Manumission Society, which provided free legal services to fugitive slaves and free black people from 1790 to the 1830s. L Harris, *In the Shadow of Slavery: African Americans in New York City 1626-1863* (2004) 208.
- 4 Stephen Golub was the first to coin the term "legal empowerment"; he defines it as, "The use of legal services and related development activities to increase disadvantaged populations' control over their lives." S Golub, *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative*, Carnegie Endowment for International Peace Paper No. 41 (2003) 25. Others have conceived of the term more broadly, so as to include structural reforms to strengthen people's capacity to make use of the law (to take one oft-cited example, state recognition of informal claims to land). See, for example, Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone: Vol. 1* (2008) 26. In this paper I follow Golub's narrower definition, taking "legal empowerment" to refer specifically to direct assistance for people who face injustice.
- 5 I describe Timap's methodology in detail, and briefly discuss similar programs from many parts of the world, in "Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide"; 31 (2006) *Yale Journal of International Law* 427. See also, for example, M McClymont & S Golub (eds), *Many Roads to Justice: the Law-Related Work of Ford Foundation Grantees Around the World* (2000).
- 6 Both in its methodological flexibility and in its treatment of clients as active social agents, this approach resonates with what some lawyers working in poor communities in the United States call a creative community problem solving approach to legal services. See, for example, G P Lopez, "Shaping Community Problem Solving Around Community Knowledge" (2004) 79 *New York University Law Review* 59, 67-74; A M Seielstad, "Community Building as a Means of Teaching Creative, Cooperative, and Complex Problem Solving in Clinical Legal Education" (2002) 8 *Clinical Law Review* 445, 448-52. In the Philippines, "alternative law groups" pursue a similar approach. See S Golub, "Participatory Justice in the Philippines", in M McClymont and S Golub, (eds), *Many Roads to Justice: The Law-Related Work of Ford Foundation Grantees Around the World* (2000) 219.
- 7 J S Mill, *Considerations on Representative Government* (1993) 190.
- 8 See J Ackerman, *Social Accountability in the Public Sector: A Conceptual Discussion*, World Bank Social Development Paper No. 82 (2005) 6-7. See also A Przeworski, S Stokes and B Manin (eds), *Democracy, Accountability, and Representation* (1999).
- 9 M Bjorkman and J Svensson, *Power to the People: Evidence from a Randomized Field Experiment of a Community Based Monitoring Project in Uganda*, Center for Economic Policy Research Discussion Paper No. 6344, (2007) 6, citing in part C Malena, R Forster and J Singh, *Social Accountability: An Introduction to the Concept and Emerging Practice*, World Bank Social Development Paper No.76 (2004).
- 10 I focus here on social accountability interventions that involve external monitoring of institutional performance – "extracting accountability" in Bjorkman and Svenson's words. In addition to these monitoring efforts, the term social accountability is also often taken to refer to institutional reforms that make greater space for community input in the setting of government priorities. One of the most famous of these is the participatory budgeting and planning process pioneered in Porto Alegre, Brazil. That process begins with informal citizen meetings to discuss demands and allocations. The contents of the discussions are distilled and conveyed by elected delegates who ultimately develop a budget with the mayor's office for legislative approval. Between 1989, when the participatory budgeting experiment began, and 1996, the percentage of households with access to water services rose from 80 percent to 98 percent; percentage of the population served by the municipal sewage system rose from 46 percent to 85 percent; number of children enrolled in public schools doubled; and revenue increased by nearly 50 percent. As of 2003, over 80 Brazilian cities had begun following the Porto Alegre model of progressive budgeting. S Wagle and P Shah, Porto Alegre, Brazil: Participatory Approaches in Budgeting and Public Expenditure Management (World Bank Social Development Note No. 71, Case Study 2, March 2003). I have not addressed such reforms here because they relate differently to the legal empowerment approach.
- 11 See, for example, World Bank, *From Shouting to Counting: A New Frontier in Social Development* (2004).

- 12 Ibid.
- 13 F Afridi, "Can Community Monitoring Improve the Accountability of Public Officials?" (2008) 43(42) *Economic and Political Weekly* 37.
- 14 J Singh and P Shah, *Community Score Card Process: A Short Note on the General Methodology for Implementation* (World Bank 2005), available at <<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALDEVELOPMENT/EXTPCENG/0,,contentMDK:20507680~pagePK:148956~piPK:216618~theSitePK:410306,00.html>> at 26 November 2009.
- 15 Sample interface meeting templates, provided by Gibwa Kajubi of the World Bank.
- 16 Bjorkman and Svensson, above n 9, 16-23.
- 17 Ackerman states that "existing social accountability initiatives still generally fail to link themselves up to the legal structure." Ackerman, above n 2, 27. Ackerman cites the Indonesia Justice for the Poor Program as an exception; I would characterize that program, which employs a network of paralegals and community lawyers but does not make use of aggregate performance data, as a legal empowerment program. I quote a community lawyer from Justice for Poor Indonesia on the following page.
- 18 A Banerjee and E Duflo, "Addressing Absence" (2006) 20(1) *Journal of Economic Perspectives* 125-127; B Olken, "Monitoring Corruption: Evidence from a Field Experiment in Indonesia" (2007) 115(2) *Journal of Political Economy* 200-204.
- 19 K S Gopal, "NREGA Social Audit: Myths and Reality" (2009) 44(3) *Economic and Political Weekly*, 71.
- 20 Community lawyer Taufik Budiman, speaking at a community meeting in Teratak Village, Central Lombok, Indonesia.
- 21 In 2006, less than four years after the end of an 11-year civil war that left Sierra Leone's already weak institutions ravaged, International Crisis Group wrote about Timap for Justice: "By solving the everyday justice needs of ordinary citizens, it is proving town by town, case by case, that justice need not be a far-off ideal but can be an everyday reality." International Crisis Group, *Liberia: Resurrecting the Justice System*, Africa Report No. 107 (2006). I attempt to describe in detail the way Timap for Justice goes about squeezing justice out of a broken system in "Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide", above n 6. S Golub and K McQuay review a range of legal empowerment efforts in Asia in "Legal Empowerment: Advancing Good Governance and Poverty Reduction" in *Law and Policy Reform at the Asian Development Bank* (Asian Development Bank 2001), available at <http://www.adb.org/Documents/Others/Law_ADB/lpr_2001.pdf> at 26 November 2009.
- 22 A Neier, a legendary figure in the modern human rights movement, who directed the American Civil Liberties Union for eight years, co-founded Human Rights Watch and directed it for 15 years, and is now president of Open Society Institute, argues that the notion of positive social and economic rights risks diminishing the weight and universality attributed to core negative liberties and meddles with democratic process. "Rejection of the idea of economic and social rights reflects a commitment to democracy not only for its own sake but also because it is preferable in substance to what we can expect from platonic guardians." A Neier, *Taking Liberties: Four Decades in the Struggle for Rights* (2003) xxxi.
- 23 V Gauri and D Brinks (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (2008) 30-32.
- 24 World Bank, *2004 World Development Report: Making Services Work for the Poor* (2004) 49.
- 25 On reviewing case statistics from a range of community legal aid NGOs in Bangladesh, the Asia Foundation concluded that "Family related disputes are by far the most common case type, with women subject to physical violence, psychological intimidation, material deprivation, or a combination of problems." Land disputes and rape were also mentioned as comprising significant proportions of the case load; claims involving public services received no mention. The Asia Foundation, *Promoting Improved Access to Justice: Community Legal Service Delivery in Bangladesh* (2007) 15-17, on file with author. In a women's legal aid project in Ecuador implemented by Centro Ecuatoriano de Promoción y Acción de la Mujer, the three issues that comprised the greatest fractions of the overall case load were "accusations," child support, and domestic violence. Failures in service delivery were not mentioned in a list of prominent case types. M Rodriguez, *Empowering Women: An Assessment of Legal Aid Under Ecuador's Judicial Reform Project*, World Bank (2000) 20. Between August 2007 and July 2008, the three largest case categories in the docket of Timap for Justice were child abandonment, marital problems, and breach of contract; together those comprised 32 percent of the total caseload. Cases involving education, for example, comprised less than 4 percent of the docket. Timap database, on file with author.
- 26 See, for example, L Hammergren, *Envisioning Reform: Improving Judicial Performance in Latin America* (2007) 163.
- 27 See, for example, M Ravallion, "Should the Randomistas Rule?" (2009) 6(2) *Economists's Voice* (cautioning against prioritizing randomization over other, non-experimental research tools). At this writing I am working with colleagues in the Justice for the Poor Program on a mixed method, cross-country study of community-based paralegal programs.

Justice reform's new frontier: engaging with customary systems to legally empower the poor

Ewa Wojkowska and Johanna Cunningham

Executive Summary

As the links between poverty and exclusion from justice become increasingly clear, so does the need to redirect justice reform programs to better serve the “bottom four billion” – the people identified by the Commission on Legal Empowerment of the Poor as being excluded from the protection and opportunities of the rule of law. Development agencies are showing modest interest in legal empowerment initiatives and some are beginning to look at using a rights-based approach to justice reform that focuses on experiences of the users – ordinary and often impoverished individuals. Such an approach prioritizes increasing access and awareness, enabling choice and voice, and delivering effective and non-discriminatory remedies for grievances for the users of the law and legal mechanisms. This paper argues that any such attempt to do so should also engage with customary justice systems, recognizing that they are currently the prominent space in which poor and disadvantaged groups seek and receive remedy for their grievances.

This paper adopts the position that access to justice is the foundation of legal empowerment. It then follows, that activities which seek to legally empower the poor to better enable them to access better justice should also be located in the forums they most often use. The effective, efficient and just functioning of customary justice systems has the potential to greatly contribute to the legal empowerment of poor communities; engagement with customary justice systems must therefore focus on promoting their positive aspects while simultaneously addressing their shortcomings.

The paper will discuss the salient characteristics of these systems as enablers of, or barriers to, legal empowerment of the poor. Through a case study on adat systems in Aceh, Indonesia, it will contextualize the opportunities and challenges of working with customary justice. Finally, several considerations, recommendations and lessons learned will be outlined to mark the way forward towards understanding and engaging with these systems to enhance legal empowerment of the poor and disadvantaged.

Introduction

The links between poverty and justice are becoming increasingly clear. The high-profile global study by the Commission on Legal Empowerment of the Poor recently gained support of world leaders, economists, chief justices and development agencies under the premise that four billion people are unlikely to escape poverty because they are excluded from opportunities and protections stemming from the rule of law.¹ In a powerful cycle, groups that experience discrimination and exclusion from the protection of the rule of law are also more likely to fall victim to a range of other social, economic, political and criminal injustices. Even relatively minor disputes and conflicts can go (and grow) unresolved, negatively affecting livelihoods, and economic and social development.

To date, however, justice reform has been largely unsuccessful in including and empowering the global majority to access the protection and opportunities of the rule of law. Programs have remained almost solidly focused on state-centered initiatives, with billions of dollars spent on attempts to stimulate the efficient and effective functioning of state courts. The presumption is that modernized systems of case management, newer buildings and facilities, and business-friendly laws will have a trickle-down effect that will inevitably facilitate better governance, more effective rule of law, better access to justice and economic development. These factors in turn contribute to poverty alleviation and increased opportunities. However, this “inevitable” causality has recently been challenged, and a distinct lack of evidence has been highlighted on the positive effects that this top-down rule of law orthodoxy actually has on poverty alleviation and majority access to justice.²

One pertinent, yet often overlooked reason for the limited impact of rule of law orthodoxy on poverty reduction for the bottom four billion is that most poor people do not experience justice in expensive courthouses under the ruling of a well-trained judge. In many countries, the overwhelming majority use – and often prefer – informal or customary mechanisms.

Development agencies are beginning to show a modest interest in including bottom-up approaches and some are beginning to look at using a rights-based approach to justice reform that focuses on empowering and improving the experiences of the users – ordinary and often impoverished individuals.

This paper takes the position that access to justice is the foundation of legal empowerment and recognizes that customary institutions are the major source of remedy of grievances for poor communities. It then follows, that activities that seek to legally empower the poor to better enable them to access “better” justice should also be located in the forums they themselves use.

- 94** Customary justice systems are double-edged swords for justice reformers and the people they serve. While they avoid many of the burdens of the formal systems and are therefore sources of accessible, efficient and locally legitimate dispute resolution, they are also flawed by a lack of many benefits of formality. It is “a complex mix of variables that constrain these [customary justice] systems”, and one which often combines to maintain power imbalances and perpetuate discrimination and disempowerment of the disadvantaged.

Yet, the effective, efficient and just functioning of customary justice systems has the potential to greatly contribute to the legal empowerment of poor communities. This paper therefore argues that engagement with customary justice systems must focus on promoting their positive aspects while simultaneously addressing their shortcomings.

1. Defining legal empowerment and customary justice systems

1.1 What is legal empowerment?

There has been little clarity and agreement on exact definitions of legal empowerment. Focusing too much on the search for the perfect definition of this complex process and ambitious goal risks miring the discussion in English language semantics and technicalities. Despite challenges with finite definitions, legal empowerment practitioners agree that justice reform must focus more on the ‘users’ of law and legal mechanisms.

For the purposes of this paper and in the context of customary justice, legal empowerment of the individual and the community is fundamentally about access and power. Legally empowered community members have the confidence and capacity to intellectually, financially and physically access the law and legal services. They choose the system with which they feel most comfortable to take their grievances. They receive just remedies in line with national laws and not in contravention of international *human rights standards*. Community members know of other opportunities for *recourse* beyond customary law systems, should the “remedy” they receive violate these laws or their dignity. Legally empowered citizens feel sufficiently secure and capable of expressing their *voice*, using their freedom of association and their rights to *challenge power imbalances and improve their social and economic development*.

1.2 What are customary justice systems?

There has been much debate on the correct terminology and categorization of customary justice systems, sometimes also labeled as informal, traditional, or non-state justice systems. This issue shall be addressed briefly here since it encapsulates some of the challenges practitioners face when engaging with such varied and complex institutions.

The International Council on Human Rights Policy chooses the term “non-state legal orders” to indicate that “these are norms and institutions that tend to draw moral authority more from contemporary or traditional cultural, or customary or religious beliefs, ideas and practices, and less from the political authority of the state. They are ‘law’ to the extent that people who are subject to them, voluntarily or otherwise, consider them to be the authority of the law”. In this manner, customary justice systems, regardless of structure or origin, hold an authoritative status through popular consent or deference.

Customary justice system proceedings may involve mediation or arbitration by a person or people with standing in the community – a village head, elder, religious leader or other community figure. This division between mediation and arbitration, however, is not always clear-cut in practice, as resolution may often be a blend of the two and can vary tremendously according to the society, community, and sometimes even the specific dispute at hand.

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It must be noted that customary justice systems are dynamic and evolve as the community undergoes changes in wealth, population size, urban development and access to natural resources, among others. The state may adopt elements of customary justice, create hybrid structures, or co-opt the institutions to take advantage of their grassroots legitimacy.⁵ This level of state engagement may evolve over time.

Some are reluctant to include state-sponsored or NGO-sponsored alternative dispute resolution (ADR) systems under the rubric of customary justice systems, because they are not organic – that is, outside actors play a role, as opposed to popular courts or community justice systems that have been essentially developed and controlled by the people who participate in them.⁶ From an anthropological perspective, these distinctions may be relevant; however, for practitioners, the goal is to work within the framework of what is already used and found acceptable by the majority.

Similarly, some have sought to exclude religious courts from the customary justice framework. In many jurisdictions, however, the line between customary and religious law is “normatively unclear”⁷ and any such effort to exclude systems of a religious nature would be overly complicated and unnecessary in the face of the goal of ensuring accessible, acceptable justice for all.

While the authors respect the above arguments, this paper is geared toward practical considerations of directing reform to target the fora through which the poor access justice. We accordingly include in our consideration of customary justice systems, state-sponsored and NGO-sponsored ADR and religion-based courts or legal orders.

2. The relationship between customary justice systems and legal empowerment

2.1 Why do the poor use customary justice systems?

Studies have shown that in some states up to 80 percent of the population use localized, informal or customary legal systems.⁸ Understanding why the poor use these systems is integral to any program design. Overall, there are both push and pull factors; attractive elements of customary systems that draw the poor towards resolving their disputes without the authority of the state, and negative elements of the formal justice system that push poor and vulnerable people out of the formal sphere.

2.1.1 Push factors

Factors that push people away from using formal systems stem largely from weakness, dysfunctionality, or both, within the system. This is particularly pertinent in post-conflict societies where formal justice systems have eroded over time or become de-legitimized following lengthy periods of grave human rights abuses. There is some debate as to whether the credibility and authority of customary justice systems are a consequence of weak and oppressive formal justice systems or because they simply reflect the accepted norms of the community. As the Norwegian Refugee Council points out, “[I]ikely, it is a combination of both factors, but while there is no alternative form of justice for the majority of people, the debate is largely irrelevant.”⁹

96 Lack of judicial independence or capacity are significant push factors. Excessive delays due to overloaded and poorly operated case management systems deter people who, faced with living and working together in close circumstances, prefer to resolve disputes as quickly as possible to douse an escalation of conflict. Similarly, high levels of corruption, perceived or otherwise, discourage the poor and powerless from attempting to seek justice within the formal system. A study conducted in East Timor indicated that more than 9 out of 10 respondents claimed that they were comfortable with solving a problem through customary systems; it further found that 50 percent of the respondents thought the formal system favored the rich and powerful, whereas only 15 percent thought similarly of informal systems.¹⁰ The judicial process is often seen “as an accessory (if not instrument) of exclusion, domination, and exploitation of the underprivileged”.¹¹ At times, the formal justice system is used to provide justification for forced evictions, such as those recently carried out in Cambodia,¹² further implicating it as a tool of oppressive power imbalances.

Formal courts are often physically inaccessible to poorer communities even if they would prefer to seek remedy there. Located in larger cities and urban areas, citizens of rural communities may be unable to afford the time and expense to travel to and from court. Fees for lawyers, applications and paperwork can be prohibitively high. The language of the court may be unfamiliar to those who speak only in local dialects. Even with an understanding of the national language, excessive ‘legalese’ in court proceedings can confuse and intimidate

parties.¹³ Similarly, a general lack of awareness of the formal system as an alternative to customary systems may prevent the poor and disadvantaged from knowing where and how to direct their grievances.

Even if the formal justice system is physically accessible and people are aware of its existence, there may be other barriers to access. In the Lao People's Democratic Republic context, for example, a government case-free village policy may have a significant detrimental impact on access to alternatives to customary justice.¹⁴ A case-free village is defined by having no cases reported to the formal justice system during a one-year period. While the policy does not explicitly discourage access and appeals to the courts, it provides incentives for village heads to ensure that no cases proceed beyond the village level, including those beyond the competence of the Village Mediation Unit (VMU).¹⁵ This can have a severe impact on individuals' ability to obtain a just resolution for their grievances. They are either forced to use the customary mechanism or the VMU, and are pressured to accept the decision of these mechanisms with no alternative means of redress.

Women in one of the northern provinces of Lao PDR, for example, recently spoke to an author of this paper about high levels of drug-related crime and theft in their village.¹⁶ They reported that they and other villagers know who the perpetrators are and have reported these crimes on numerous occasions to the village chief and the village-level security officer. The village chief spoke to the alleged thieves, who had subsequently denied any wrongdoing. And this is where the case ends. The village chief is not willing to take the case any further and the women have no other alternatives for seeking justice,¹⁷ since, by law, the VMU is the first port of call, especially for these types of cases. Court and prosecutorial staff in the province report that, since the introduction of the case-free village policy, the number of cases filed had been reduced by around 25 percent.¹⁸

2.1.2 Pull factors

Many positive attributes of customary systems attract, or "pull" populations towards using them. When examining the salient characteristics of customary justice,¹⁹ many of these pull factors are immediately obvious, as are some of the characteristics that are particularly relevant to the goals of legal empowerment for the poor.

Customary justice systems are generally much more accessible and acceptable to the people they serve than are formal state systems. Actors within a customary justice system most often have their roots in the community. They will generally speak the local language or dialect, be more familiar with local customs, and consequently resolve disputes in a manner that is culturally acceptable to the disputing parties. Customary systems fill the service gaps in weak, dysfunctional or overburdened formal systems. Indeed, they are often the only avenue in the aftermath of conflict or natural disaster. With the significant exception of circumstances in which power imbalances are at play, the economic, geographic and intellectual accessibility of customary systems can empower the poor to seek and obtain just remedy for grievances in a familiar, unthreatening and culturally acceptable manner.

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The process of obtaining remedy is usually voluntary, with a high degree of public participation. Customary justice systems are often perceived as fairer than formal systems. The few empirical studies conducted around the world show overwhelmingly that people's preferences hinge on their perceptions of which *procedures* are most fair.²⁰ Typically, fairness is viewed not in terms of outcome, but the procedural manner and degree to which the disputants can voice their own story. The emphasis on voice and expressing one's own story in one's own words in some customary justice systems can enhance empowerment, as the parties to the dispute feel confident and capable of presenting their story. Yet, opportunity to express one's voice is by no means a guarantee of equality and empowerment, particularly as certain voices may be more powerful than others.

Dispute resolution within customary justice systems is generally geared toward resolving disputes and/or addressing what one or both of the contending parties see as an injustice. This restorative characteristic is of great value to those who must get on with the daily business of living and working together in close communities. In some cases, however, it may in fact prevent a disputant from obtaining real justice, since the focus on social harmony is valued more greatly than an individual's rights or freedoms.

In the economic sphere, customary justice systems are often better placed to mediate disputes in the informal sector than the formal justice system. The informal sector is defined as "economic activities by workers and economic units that are – in law or in practice – not covered or insufficiently covered by formal arrangements governing both enterprise and employment relationships",¹¹ and is mostly occupied by the poor and disadvantaged. This gap between the law's protection and the "informal" assets and activities of the poor is a major barrier to poverty reduction. Customary justice systems and the actors within them often operate in the informal sector themselves, and are well placed to understand and protect the rights of informal businesses, informal laborers and property "owners" who lack formal title. While formalized title and contracts are preferable and can provide a higher level of security, these actors' localized knowledge of what the community considers a working agreement when a contract is lacking can support informal laborers, or indeed, informal business owners who enter into agreement with another party. They often make decisions on untitled property, having known the history of the disputing parties as it relates to the land.

2.2 Challenges to legal empowerment

Despite the variety of considerations that make customary systems preferable to the poor, some of the salient characteristics of these systems are clear barriers to legal empowerment.

1. Customary justice leaders are generally selected from within the community on the basis of status or lineage. While this indicates a level of authority and command necessary to mediate or decide on disputes concerning parties in voluntary attendance, it also suggests that this role is subject to elite capture by those who may have a vested interest in maintaining and institutionalizing discriminatory practices. In this regard informal justice systems, usually commanded by older men, may reinforce unequal power imbalances: women, children, minority groups and the disabled are often highly discriminated against in customary proceedings.
2. The potential lack of knowledge and varying degrees of capacity among customary justice leaders, combined with the authority they continue to hold, may mean there are missed opportunities for the poor to gain from the formal system. For example, a 2007 survey of the *Nari Adalat* women's dispute resolution systems in India notes that the inability of the system to comprehend and interpret revenue and legal documents means that the advice provided is often vulnerable to legal disputes.²²
3. As rules of evidence and procedure are non-existent, and as similar cases may not be treated similarly, the customary justice operator(s) usually take into account the nature of the relationship between the disputing parties. The standing and position of the disputing parties or their families,²³ as well as outside interests are taken into account. A poorer member of the community may perform community service for a misdemeanor, while a wealthier member pays a fine. In practice, however, subjective decision-making can carry with it the prejudices of the community or the decision-maker her/himself, whereas for the same crime, a less popular community member may receive a harsher punishment.
4. On occasion, outcomes may be in contravention of human rights standards and may include corporal punishments or excessive retribution, which are considered cruel and inhumane forms of punishment.

5. The notion of “maintaining social harmony” can mask violations of many individual rights. Often, the problem is viewed as affecting the balance of the community or group as a whole. Adherence to the decision reached via a customary justice process then becomes subject to social pressure, even if the decision is unjust. Indeed, the Access to Justice Assessment by the United Nations Development Programme (UNDP) in Indonesia revealed that often the abrogation of a party’s rights by a customary justice decision was “obscured behind the veil of an oft-stated desire to maintain harmonious community relations”.²⁴
6. Typically, there is no professional legal representation in customary justice systems, which has the benefit of reducing costs for the disputing parties. However, equally important rights of due process – the right to adequate representation, and critically the presumption of innocence until guilt is proven – are frequently traded in return. Customary justice systems, therefore, are ill-suited for dealing with serious cases that may require the imprisonment of the defendant, or in cases where mediation is extremely inappropriate under national and international law (although perhaps acceptable to some community residents), such as rape or murder. Arbitrary systems and rulings are unlikely to provide effective protection for victims. Additionally, they may issue severe punishments without the due process of the law.
7. Cases relating to disputes or grievances with government agencies or service providers may be well beyond the capacity of a customary justice system to deal with effectively and fairly.

These barriers to legal empowerment are significant and they do pose serious risks of disabling even the most focused, well-funded efforts to enable the poor to improve their economic and social development. The barriers are largely linked to power relations at the local level and a resistance to change by those who benefit from the discriminatory or unequal status quo. The legal empowerment agenda, with its focus on challenging power imbalances, is well placed to inform engagement in these areas as will be discussed further in the “way forward” below.

3. Aceh, Indonesia

This section discusses many of the aforementioned challenges to legal empowerment in the context of post-conflict and post-tsunami Aceh, a province in western Indonesia.

Even before a tsunami devastated Aceh in December 2004, the formal justice system in the province had virtually collapsed. This was partially due to the 30-year conflict that had afflicted the province and partially as a consequence of broad-scale institutional failure. The human and physical losses resulting from the tsunami (and the offshore earthquake that triggered it) dealt a massive blow to the already weak system. The customary, village-level justice institutions known as *adat*, responsible for the resolution of the bulk of disputes in the province, did not escape the effects of the natural disaster in which many *adat* leaders lost their lives.

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While the justice system was mostly decimated, demand for justice services in the wake of the tsunami was at an all time high. Approximately 130,000 people were killed, over 90,000 went missing and 500,000 were left homeless or were displaced. In addition, 300,000 land parcels were damaged,²⁶ creating thousands of potential disputes over land and inheritance.

3.1 The justice systems in Aceh

The legal framework in Aceh is pluralistic, with three simultaneously functioning and sometimes overlapping justice systems that include formal and customary mechanisms. Within the formal realm there are the general and the *Syariah* (*Sharia*) systems; the former is

informed by positive state law, which has incorporated provisions of international human rights law, while the latter is informed by Islamic legal principles.

The formal justice system is complemented by customary mechanisms called *adat*.²⁷ *Adat* is the largely uncodified, culturally and ethnically specific form of traditional law or custom that governs a community's rules of behavior and is enforced by sanctions. It varies over time and place.²⁸ Many distinct *adat* systems co-exist in Indonesia and thus the content of *adat* can vary significantly across locations. Tim Lindsey observes that in Indonesia "within a few hundred miles the dominant *adat* may alter for example, from Islam to Hinduism, from matrilineal to patrilineal inheritance or from communal to individual land title."²⁹ In Aceh, however, *adat* is heavily influenced by Islam.

Acehnese typically belong to the three different "legal communities" affected by these overlapping systems and are accordingly subject to the authority of three different areas of formal and customary law. First, they are a member of a village (*gampong*), meaning that they are subject to the *adat* of that village, as well as the association of villages (*mukim*) that corresponds to a higher level of *adat* authority. Second, most Acehnese are Muslim and in Aceh, *Syariah* has authority over Muslim citizens. Third, all Acehnese are Indonesian citizens and therefore enjoy the protections of, and are subject to, Indonesian state law.³⁰ This means, at least in theory, that for most disputes, Acehnese can access three different justice mechanisms.

Despite the existence of the three justice systems, *adat* is the mechanism upon which the majority of Acehnese rely for the resolution of their grievances.³¹

3.2 Source of authority

In addition to the powerful influence it exercises through traditional culture, across the Indonesian archipelago *adat* derives its principal formal authority from the transitional provisions annexed to the Indonesian Constitution (1945).³² In Aceh, in recognition of Acehnese culture and its special status, specific local legislation has been passed that formally recognizes the role of *adat* to settle disputes between community members.³³ Although *adat* has formal authority in Indonesia under these legal provisions, it is nevertheless considered a customary justice system.

The legal provisions in the above-mentioned local legislation include setting out the duties, responsibilities and authority of the *keucik* (village head) and other *adat* leaders to resolve disputes between villagers. Recent legislation also lists the types of cases that can be handled by *adat*.³⁴ In addition, the *Majelis Adat Aceh* (Aceh *Adat* Council) has been established, which is a provincial coordinating body mandated to strengthen and develop *adat* values and structures in the community.³⁵

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Despite the legislation, the legal framework in Aceh is still far from clear. In particular, the relevant legislation on the intersection of *adat* with the formal secular and *Syariah* justice systems is vague. For example, one provision requires that cases be dealt with first by *adat* justice providers before they are permitted to be addressed by the formal justice system.³⁶ This provision is inconsistent with the citizens' right to opt for the formal justice system under Indonesian Constitutional Law, as well as the national Human Rights Law.³⁷

3.3 How does Acehnese *adat* work in practice?

Although *adat* processes vary between and even within districts in the province, the basic approach to dispute resolution tends to be consistent throughout Aceh. Generally, at the village level, if a dispute occurs, it is reported to the *keucik* (village chief), who will encourage the parties to discuss and reach compromise on the matter through a *musyawarah* (consultation process). If this is not possible, the *keucik* and other village leaders responsible for *adat*³⁸ at the

local level will then attempt to mediate and assist parties to reach agreement.³⁹ Such meetings at the village level could take place on several occasions. If the dispute is settled, a letter of agreement may sometimes be signed by the disputing parties and kept by the *keucik*. If agreement cannot be reached, the problem is then submitted to the *imeum mukim* (village religious leader) to attempt resolution at a higher level.⁴⁰ A survey of *adat* leaders showed that most cases are resolved within one to seven days of its being reported. *Adat* leaders stated that it could take up to three weeks for more serious cases to be resolved.⁴¹

While there has been no standardized *adat* approach to handling village-level disputes, several processes for gathering evidence have been commonly identified. These include: seeking testimony from several witnesses that can be cross-checked, requiring witness oaths before giving testimony, imposing sanctions for false testimony, re-questioning witnesses whose truthfulness is in doubt to establish consistency, and inspecting physical evidence.⁴²

Typical cases considered to be within the competence of *adat* include land disputes, family disputes, inheritance, appointment of guardians, livestock and irrigation concerns, youth misdemeanors and theft. A recent survey of *adat* leaders shows that in such cases the vast majority of *adat* providers felt that they could resolve these categories of cases effectively.⁴³ While *adat* should not be used for more serious criminal cases, in reality it is often used in cases such as domestic violence, rape, drug-related crimes, and even on some occasions, murder.⁴⁴ Most *adat* leaders surveyed felt that they could not successfully deal with murder, rape and drug-related crimes, although many believed that they could effectively resolve domestic violence cases.⁴⁵

Sanctions and costs related to *adat* dispute resolution vary and depend on the type of dispute. They also hinge on the results of negotiations between the parties involved and the *adat* leader. In one part of Aceh, the resolution of bodily harm cases involves: the guilty party or his/her family assuming the cost of medical treatment, a ritual feast at which a goat is slaughtered and shared by the community, and *peusijuk* (a ritual forgiveness ceremony).⁴⁶

Legislation provides for the following types of sanctions: warning, public apology followed by a *peusijuk* ceremony, fine, paying compensation, isolation by members of the village community, eviction from the village and revocation of *adat* titles.⁴⁷ Research conducted by UNDP concluded that, in practice, however, sanctions imposed through *adat* go beyond those stipulated in legislation. Some such sanctions are clearly in contravention of basic human rights principles - these include physical punishment, detention without due process, seizure of property, removal of property rights, and forced marriage in cases of pre-marital sex, for example.⁴⁸

3.4 Why do people choose *adat*? And how real is this choice?

Many of the push and pull factors associated with customary justice systems in general resonate for *adat* in Aceh. Research conducted in 2003 and 2006 concluded that community members felt more comfortable and confident bringing their grievances to *adat* mechanisms because they are generally more familiar with its procedures and sanctions, and with the *adat* leaders themselves than they are with the analogous elements of the formal justice system. Reasons cited for not using the formal justice system included intimidating procedures and lack of responsiveness to people's needs, fear of ending up "in trouble", illiteracy, inability to speak Indonesian, and likely as a remnant of the 30-year conflict, an entrenched fear of state institutions.⁴⁹

There are other reasons why people in Aceh do not use the formal justice system. These include low levels of awareness of alternatives to *adat* across Aceh and a belief that directly referring disputes to formal justice mechanisms is not permitted. The general perception is that *adat* justice providers, in particular, the *keucik*, constitute the only mechanism for dispute

resolution, or at least a compulsory first port of call,⁵⁰ and that decisions based on *adat* cannot be appealed.⁵¹ This misunderstanding is exacerbated by the fact that *adat* leaders, many of whom have only a minimal understanding of the law,⁵² are the main source of information for the community regarding justice options. In cases where community members are aware of the option to access formal channels and would want to pursue this method, they are often further constrained from doing so because of opportunity costs, expensive legal representation costs and inadequate legal aid services.⁵³

The research found that in several locations, *adat* leaders actively discourage citizens from approaching the formal justice system to resolve their grievances. These leaders explained that, traditionally, it is believed that they should be able to address the problems of their village. Consequently, if a villager takes his/her grievance to another forum, this reflects negatively on their capacity to resolve disputes, compromising their authority and credibility.⁵⁴

3.5 Challenges to obtaining justice through *adat*

As with the above push/pull discussion, the *adat* experience echoes the more general challenges that customary justice in general presents to legal empowerment. First, the quality of the dispute resolution process and outcome strongly depends on the skills and knowledge of the individual(s) supervising the session. Despite the important role that *adat* leaders play in resolving most disputes across the province, there is no formal training or qualifications required to take on this role. An *adat* leader achieves his position either because trust is placed in him by the community or because he is appointed by government – not because he is necessarily skilled at dispute resolution. This is not to say that *adat* leaders are not skilled – in fact, many are highly competent. But there is no systematic means of ensuring that they are sufficiently equipped and informed to carry out this very important role.⁵⁵

Second, research has revealed that *adat* leaders generally lack understanding of their role and the types of cases they can deal with. Most *adat* leaders in Aceh believe – for the most part correctly – that they can process civil and family law cases, land disputes and sometimes minor criminal cases.⁵⁶ In some areas of the province, however, they believe – erroneously – that they can and should handle major criminal cases, including murder, incest and domestic violence. Local legislation now regulates the types of cases that they can deal with,⁵⁷ but there remains a significant gap between law on paper and its implementation on the ground.

Third, as is the case with many customary justice systems, *adat* is heavily dominated by men. One survey revealed that almost 90 percent of *adat* leaders stated that no women were involved in the decision-making or dispute resolution process; 57 percent said that it is “ethically not accepted” for women to be involved in such a process.⁵⁸ It is not particularly surprising, therefore, that research conducted by the International Development Law Organization (IDLO) revealed that inheritance decisions resolved at the village level often unjustly prioritized the rights of male heirs over female heirs, and the rights of a husband’s family over his wife’s family.⁵⁹

This third challenge is a key one for equitable dispute resolution. *Adat* can result in discrimination against vulnerable members of the community. Since it emphasizes restorative justice aimed at maintaining social harmony, as opposed to prioritizing individuals’ interests and rights, the final decision can often be unsatisfactory in terms of human rights, gender equity and other important human development goals. In particular, many domestic violence victims who fell under the purview of *adat* have felt that the outcomes were unjust, but simultaneously felt obliged to accept the decision to preserve social harmony.⁶⁰ UNDP research has found many victims of gender based violence reporting that the violence continued after the *adat* process had supposedly addressed the abuse.⁶¹

Fourth, the same research also found that Javanese trans-migrants in predominantly Acehese areas perceived that they would be treated discriminatorily if they approached *adat*

justice mechanisms. In villages populated by more than one ethnic group, the dominant one would often hold the view that minority communities must subscribe to their *adat* principles.⁶²

Fifth, *adat* is highly susceptible to elite capture and third party interests.⁶³ Decisions and agreements are often not made on merit alone; they flow from outside pressure due to one party's powerful connections or threat of sanctions. As there are no formal oversight and monitoring mechanisms in place for *adat* institutions, the basic rights of disputants are not guaranteed in terms of justice processes and outcome. UNDP research in Aceh has found that those community members most unsatisfied with informal justice outcomes tend to belong to the weakest and most disadvantaged groups. It was typically the case that they lacked sufficient knowledge or resources to go beyond the village level to seek just remedies.⁶⁴

4. A way forward: working with customary justice systems to legally empower the poor

The benefits and shortcomings of customary justice systems, such as those discussed above, are now generally acknowledged in law and development circles. Some development agencies are starting to show modest interest in legal empowerment initiatives and are beginning to look at using a rights-based approach to justice reform that focuses on experiences of the users. As a result, these development agencies also recognize the importance of customary systems.⁶⁵ They realize that ignoring these systems is likely to mean that discriminatory practices go unchallenged. Together with this recognition and modest shift in focus, there is an increased demand by practitioners for means of a constructive and tangible engagement with customary justice systems, as well as for evidence that such engagement positively impacts legal empowerment of the poor. This section accordingly provides some recommendations for how to move forward in this complicated field, as well as examples of ongoing initiatives.

4.1 Know your operating context

Understanding the operations of customary justice systems is a prerequisite to having any major impact in improving their operation. Therefore conducting context-specific research, learning about the norms, procedures and actors involved in customary mechanisms is necessary. Engaging in dialogue with the operators and identifying the strengths and weaknesses of these systems as well as their potential for transformation and adaptation to strengthen aspects of customary justice practice (such as human rights protection) should be a key component of any reform initiative.

Similarly, engagement in access to justice and legal empowerment work must be grounded in the experiences and priorities of the poor; programs must be designed from this perspective. A bottom-up, participatory approach is therefore irreplaceable. Knowing the full spectrum of ways in which customary justice systems affect the lives of the poor and then finding the strengths to focus on and support makes programming sense. Direct communication with the poor is imperative in order to direct benefits towards them. Communication through village chiefs, the government or legal service providers alone leaves too great a gap for misrepresentation – intentional or otherwise. By failing to speak with marginalized groups, or allowing powerful elites to “represent” them, the status quo of disempowering the poor is maintained. This direct communication needs to be conducted by those known and trusted by the community – here is where the role of local civil society organizations (CSOs) and community-based organizations (CBOs) is imperative. This can also be a valuable entry point to begin discussions on rights and justice and their significance to people as individuals and members of the community.

When managing scarce human and financial resources, programs benefit from the analytical capacity provided by empirical evidence. It is worth noting that the process of collecting

empirical data is useful for mobilizing financial resources since, unsurprisingly, donors are more likely to support an initiative with a solid evidence base.

4.2 Align and develop the interface between the customary and formal justice systems

The central conundrum of engaging with customary justice systems is how to support and enhance their many important positive aspects without abandoning or violating the human rights of the most vulnerable members of society, especially women, vulnerable groups and children. The Peacebuilding Initiative⁶⁶ notes that adapting and reconciling the customary and formal justice systems so that they become mutually reinforcing “represents the new frontier” of engaging with these systems.⁶⁷

Blanket approaches risk abolishing culture and tradition, or codifying and institutionalizing potentially bad practices. Most often, the abolition of customary law by the state does not necessarily mean those laws and customs will no longer be used and adhered to by the population.⁶⁸ Therefore, engaging with customary justice systems is necessary and requires a nuanced and reasoned approach grounded in the experiences of the poor. Any moves to align, harmonize or clarify jurisdictional issues will need to be informed by participatory dialogue and public debates in which positive and negative features of both systems are discussed in detail – including how an effective, complementary relationship between the two systems might be forged.

Developing the mutually reinforcing “new frontier” to increase access to justice and legal empowerment of the poor may in fact require a stricter enforcement of limitations on what exactly a customary court or decision-making body may effectively and fairly address. Seeing as this problem is largely one of enforcement, rather than of introducing new formal restrictions, any such move would need to be complemented with extensive awareness-raising, capacity development efforts and community-based discussions to ensure that the law is being implemented correctly.

Clarifying the role and jurisdiction of customary legal systems, however, must not lead to codification of customary law. Such a step could prove to be a problematic and potentially harmful endeavor that freezes customary practices and deprives the mechanisms of fluidity and potential to change over time. Such fluidity and evolution is in fact a strong advantage of customary mechanisms.⁶⁹

4.3 Work towards making customary mechanisms more inclusive

The marginalization of women within customary mechanisms needs to be addressed through greater representation of women in structures and processes.⁷⁰ The mediation mechanisms of *Nari Adalat* in Gujarat State, India, for example, were established by women and for women in response to the *Panchayat* systems established along more patriarchal lines. The *Nari Adalat* operate as “informal, conciliatory, non-adversarial courts with lay participation”.⁷¹ They have a narrow mandate, focusing only on mediation within marriage, and do not address other sources of discrimination, which may contribute to their initial successes and legitimacy.

Programs should seek to engage the support of formal and informal women’s organizations, child protection groups, and other collectives that represent vulnerable groups. Collective voices can be a powerful incentive for accountability, non-discrimination, and leveraging greater bargaining power. The ability and capacity to organize as a collective is fundamental to people’s capacity to choose and voice their values. Such groups then have a critical role to play in real empowerment, “provid[ing] an arena for formulating shared values and preferences and instruments for pursuing them, even in the face of powerful opposition”.⁷²

4.4 Increase and improve legal awareness activities

The lack of awareness of alternatives to customary justice mechanisms and knowledge of rights in general is a serious impediment to legal empowerment. The degree of an individual’s

legal awareness can affect his or her perception of the law and its relevance to him or her, as well as influencing decisions on whether and how to deal with a grievance.

Activities aimed at building legal awareness therefore need to be continued and scaled up. In particular, efforts should be made to increase the availability of information on legal services and dispute resolution methods beyond the customary justice system, while access to alternatives must be a viable option – a legal awareness campaign that does not take into account the constraints of the formal justice system is likely to have limited effect.

When implementing awareness-raising initiatives, it is important to consider also how to raise awareness among both groups in the power struggle. Shalini Trivedi of the Self-Employed Women's Association, a women's union of informal workers in India, has noted that "raising awareness of government officials in relation to legal empowerment is even more important than raising awareness among poor people".⁷³ Results from the Participatory Governance Assessment in Nepal by the Overseas Development Institute showed that poor people emphasized that it would be important to direct awareness-raising efforts not only towards those who face discrimination, but "especially to those who benefit from systems of dominance and injustice – men, the wealthy, 'upper caste' groups".⁷⁴

4.5 Increase access to and strengthen the alternatives to customary mechanisms

Real choice only exists when both options are accessible, efficient, effective and viable. Efforts to improve justice outcomes through customary mechanisms also need to be pursued together with efforts to improve service delivery in the formal system. As Leah Kimanthy points out, "[h]igh usage of non-formal justice systems in rural areas does not automatically lead to the conclusion that those systems are the best; it could simply mean that they are the only ones available."⁷⁵ Reforms to the formal justice sector, to make it more responsive and accessible to the needs of the poor and disadvantaged must continue, to make this a real alternative for accessing justice.

Those using customary justice systems are generally bound by the decision through social pressure. It is imperative that disputants who consider that the outcome through the customary mechanism is unjust be aware, sufficiently confident and capable of taking their grievance to the formal system; paralegals (discussed below) can be a useful resource in this regard.

4.6 Prioritize paralegals

Training paralegals to straddle both formal and informal systems is an effective means of enabling greater user choice. Paralegal programs are now increasingly common and recognized as an effective way of improving access to justice. One example can be found in the work of Sierra Leone's Timap for Justice, an NGO that initiated an experimental community-based paralegal program and provided formal legal training to laypersons already familiar with the social context and customary legal norms. These paralegals could then speak with their clients on familiar terms about choosing the system that better suited their own needs. Where required, the paralegals could also assist them in navigating between systems.⁷⁶

These paralegals in Sierra Leone have been able to challenge entrenched power imbalances by providing persistent advocacy through individual mediations with powerful figures such as police officers and chiefs. Combined with community education programs and other activities, this has led to impressive results.⁷⁷ Vivek Maru, co-founder of Timap for Justice, has noted that often the threat of legal action by well-informed paralegals resulted in positive outcomes for marginalized groups. In one example he cites, the paralegals tracked down people who had been contracted to build wells in an internally displaced persons' camp but had not done so. When threatened with legal action, the contractors returned to the camp and built the wells.

Maru notes that this credible threat of formal action is often “the teeth” behind paralegals on the ground.⁷⁸

4.7 Make basic legal aid readily available

People may require professional help to access alternatives to customary justice systems. Legal counsel, however, is often beyond the reach of poor and disadvantaged communities; free, state-provided legal counsel is often simply not available and where it is offered, it is usually only for criminal cases. Efforts to improve access to legal aid need to be made. They can include supporting non-governmental organizations (NGOs) that provide free legal aid and university-based clinics that provide legal representation and advice. Legal aid programs are often linked to paralegal initiatives, such as those discussed above, which provide paralegals with access to legal expertise and back-up on more complex community grievances.

4.8 Develop minimum standards and guidelines and develop the capacity of customary actors

As discussed throughout the paper, the quality of the justice through customary mechanisms is heavily dependent on the skills and knowledge of the individual operator. In order to effectively resolve disputes, customary leaders must possess a range of skills and knowledge, yet the level of skills among leaders tends to be very inconsistent. Concerted efforts need to be made to develop the capacity of customary leaders. IDLO in post-tsunami Aceh, for example, focused on improving the quality of decision-making through these institutions. The organization developed a training program to improve *adat* leaders' mediation skills and knowledge of land, inheritance and guardianship law. An evaluation conducted after the project concluded that the legal knowledge of participants had indeed improved and there was evidence that the skills acquired were being put into practice.⁷⁹

In the absence of minimum standards and the operators' knowledge of the content of these standards, there is wide scope for discriminatory practices to occur. An initiative currently underway in Aceh seeks to address this very challenge. The *Majelis Adat Aceh* (Aceh *Adat* Council), with support from UNDP, has developed guidelines for *adat* actors across the province, through a consultative process, to inform them of minimum standards, human rights safeguards and the content of recently passed legislation regarding *adat*. The guidelines focus on the *process* of *adat* rather than the *substance*. They also focus on the protection of the rights of disputants, including a special section on women and children. The objectives of this activity are to create greater clarity among *adat* actors on the types of cases that *adat* is allowed to handle, to fortify the relationship between *adat* and the formal justice system, and to improve the quality of the dispute resolution process and outcomes through *adat*. Training is being provided to *adat* actors on the content of the guidelines.

Since the guidelines have only recently been printed and disseminated, it is too soon to discuss the impact of this initiative, although early anecdotal evidence indicates an increased understanding of the types of cases that can be handled by *adat* and improved documentation of cases.⁸⁰ A baseline survey was conducted prior to the implementation of the initiative. Comparing its results with subsequent findings yet to emerge could yield useful data on project impact.

4.9 Focus on monitoring and accountability

The monitoring of customary proceedings can challenge unfavorable power dynamics and assist in preventing abuse of power, corruption and elite capture. It can usefully be carried out by local communities or other institutions, for example: national human rights institutions, NGOs working on women's, children's and indigenous peoples' rights, and organizations providing legal aid, awareness-raising or paralegal initiatives. Monitoring may also help to ensure that customary mechanisms respect certain international human rights standards,

particularly those concerning minorities and women. In this way, external scrutiny can promote more equitable dispute resolution and strengthen the overall accountability of customary mechanisms.

The formal or state system can also act as a source of monitoring and accountability. For example, village headmen in Bhutan have jurisdiction to arbitrate disputes within their villages. Their decisions are then reviewed by a magistrate responsible for a block of villages. Magistrates' decisions can be further appealed to district judges.⁸¹

4.10 Emphasize better case management

Systematic written records of cases handled can serve a number of functions. Written records can allow the customary leader to review past cases and decisions made and lead to increased consistency. They can also support review by an oversight body and community-level/civil society monitoring mechanisms. A written record, while not a legal document, can nevertheless provide some security of decision.⁸²

4.11 Empower the poor to challenge power imbalances

Any attempt to engage with the “bottom four billion” identified by the Commission on Legal Empowerment of the Poor as lacking the protection of the law will need to be aware of the power structures in place.⁸³ The lack of or limited state involvement in customary justice systems by no means suggests that they are not embedded within entrenched and politicized power structures. Even among the poor there are distinct social hierarchies, and power imbalances often dictate justice outcomes.

No single condition is likely to change deeply entrenched power imbalances (which powerful elites have a decided interest in maintaining). Success is more likely through a combination of empowerment tools, so that organized voice(s) and informed choice can meet with access to legal services and awareness of rights to seek just recourse. Strategic timing also plays a key part in challenging the status quo.⁸⁴ Initiatives need to be implemented at a time that does not run the risk of jeopardizing the end-goal of empowerment for all. For example, “law making” or the development of guidelines or codes of conduct should not be attempted where women are denied access to, and participation in, the consultation process.

Instead of attempting to somehow transplant empowerment, donors and international agencies need to find methods of effectively supporting organized groups without hijacking their agendas. In a village in West Sumatra, Indonesia, a women's group originally organized through small business interests began mediating disputes and lobbying effectively against corruption and for improved services. Their success was attributed to a combination of three elements. First, the group was a pre-existing, traditional women's group and did not appear to be as threatening as a new structure. Second, a degree of economic empowerment through their small business interests provided them with influence over village affairs. Third, the women were linked to an established NGO, which helped them to organize as a group and enhanced their legal awareness, thereby “equip[ping] them to move beyond problem solving to securing representation in the village seats of power”.⁸⁵ This example demonstrates a combination of empowerment tools to effect change in local village affairs and gradually erode dominant power structures.

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Collective organization is difficult to transplant. It is most effective where it is organic, but this does not mean that “fertile seeds” cannot or should not be planted. Micro-credit programs, vocational skills training, schools and health clinics are all means of bringing people together around a common purpose. This purpose can lead to a sense of communal identity, which is valuable in lobbying against power imbalances at the local level. Thus, instead of individual A against individual B, the issue becomes mothers, small business owners or female-headed households against injustice.

4.12 Evaluate initiatives on their effectiveness – are they having the intended impact?

This paper supports the assertion that there is a need to move beyond anecdotal best practices of legal empowerment initiatives.⁸⁶ This includes those activities which engage with customary justice mechanisms. Research, comparative analysis of before and after interventions, and effective impact evaluations are necessary to determine the effectiveness of initiatives.

One initiative is the recurring perception assessments conducted by the Asia Foundation in Timor Leste in 2004 and again in 2008. These legal awareness perception surveys provide a means of monitoring where and how reforms have been successful and where initiatives are having little impact. The surveys provide insight on progress, or lack thereof, in a range of areas including: “confidence in formal and local justice systems”, “attitudes on gender”, “legal knowledge and awareness”, “language”, “accessibility of the formal system”, and “impunity and rule of law”.⁸⁷ Combined with stakeholder discussions to analyze the data, the Asia Foundation will develop conclusive policy-relevant recommendations for the Timorese Government and other actors to strengthen the rule of law.⁸⁸

Conclusion

Amartya Sen's argument that development is freedom and capacity to choose⁸⁹ changed international thinking about the value of capability-building institutions in reducing poverty. Justice reform through legal empowerment acknowledges and seeks to enhance this value.

The legally empowered individual should be the new face of justice reform. With the confidence and capacity to access the law and legal services, they make informed choices about the action they take. They join publicly with others who understand and represent their values. Most of all, the effective, efficient and just functioning of both formal and customary systems enable them and their neighbors to develop their full potential under the protection and opportunity of the law.

Sen also eloquently reminded us, “[t]o insist on the mechanical comfort of having just one homogenous ‘good thing’ would be to deny our humanity as reasoning creatures”.⁹⁰ Customary justice systems – as complex and constrained as they may be – host many opportunities to advance the legal empowerment of individuals and communities. Engagement with these systems will benefit from a broad and deep understanding of what works and what does not. On this basis, the critical role of the international community is to strengthen what works and empower the community to change what doesn't.

As Sally Engle-Merry wrote more than 20 years ago, this is “no small project”.⁹¹ But it is time to start it in earnest.

Endnotes

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- 7 Odinkalu, above n 3, 144.
- 8 Department for International Development, *Safety, Security and Accessible Justice: Putting Policy into Practice* (2002), 58.
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- 10 The Asia Foundation, *Law and Justice in East Timor: a survey of citizen awareness and attitudes regarding law and justice in East Timor* (2004).
- 11 A Dias, "Shared Challenges in Securing Access to Justice – the Indian and Sri Lankan Experiences" in The Asia Pacific Judicial Reform Forum (L Armutyge and L Metzner (eds) *Searching for Success in Judicial Reform*, 167.
- 12 Amnesty International, "Cambodia: the People of Group 78" (2009) <<http://www.amnesty.org/en/library/info/ASA23/012/2008/en>> at 28 July 2009.
- 13 The Asia Foundation's 2008 survey in Afghanistan found a direct correlation between the level of education and the individual's propensity to use the formal system. Poorer, less educated citizens were less inclined to seek justice in formal systems. The Asia Foundation, *Afghanistan in 2008: A Survey of the Afghan People* (2009).
- 14 Minister of Justice Directive No. 01/MoJ 19 March 2007.
- 15 In Lao People's Democratic Republic, there are three broad categories of justice mechanisms – formal, semi-formal and customary. The formal system is informed by positive law and includes the courts, the prosecution service and the police. The semi-formal system includes the Village Mediation Units (VMUs), which are established by the state pursuant to a Decision of the Minister of Justice No. 304/MOJ, 7 August 1997, which provides guidelines on the operation of the units and a legal framework for resolving disputes at the village level. VMUs have been set up in most villages across the country. In theory, minor civil and criminal disputes first go before a VMU, while more serious cases should proceed directly to the court. Anecdotal evidence indicates, however, that, in practice, other, more serious cases are also heard by the VMUs. If a case is not settled through the VMU, mediation should then again be attempted by the District Justice Office, which would then refer disputes that are not successfully mediated to the appropriate court.
- 16 Interviews conducted by Ewa Wojkowska, June 2009. Names of interviewees are withheld to maintain confidentiality.
- 17 *Ibid.*
- 18 *Ibid.*
- 19 Salient characteristics that inform this section are taken from E Wojkowska, *Doing Justice: How Informal Systems Can Contribute* (2006); Penal Reform International, *Access to Justice in Sub-Saharan Africa: the Role of Traditional and Informal Justice Systems* (2001); B Connolly, "Non-State Justice Systems and the State: Proposals for a Recognition Typology" (2005) 38(2) *Connecticut Law Review*, 239.
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- 23 Penal Reform International, above n 19, 128.
- 24 UNDP and BAPPENAS, *Justice for All? An Assessment of Access to Justice in Five Provinces of Indonesia* (2006) 72.
- 25 An assessment conducted in 2003 by UNDP concluded: while many factors contribute to the demise of institutional integrity and functioning of the justice system – factors which are present throughout Indonesia – corruption, lack of accountability, transparency, independence and legal expertise among legal personnel, poor regulations governing recruitment and training of judges and weak supporting infrastructure – in Aceh, we find an acute expression of all of these factors. E Wojkowska, G Janssen and E Piza-Lopez, *A review of the justice system in Aceh, Indonesia*, (2003), 6.
- 26 BAPPENAS, *Master Plan for Rehabilitation and Reconstruction for the Regions and People of the Province of NAD and Nias Islands of the Province of North Sumatra – Main Book of Rehabilitation and Reconstruction* (2005) 1.
- 27 The word *adat* is of Arabic origin and means custom. Customary law is the oldest form of law: "rules of law that came into being because a particular community continuously and consciously observed the same rules for the same sort of relationships or conduct of the people, without they ever having been laid down by a legislator" R Haveman, *The Legality of Adat Criminal Law in Modern Indonesia* (2002) 5.
- 28 *Ibid* 31.
- 29 As cited in E Harper, *Guardianship, Inheritance and Land Law in Post-Tsunami Aceh* (2005) 14.
- 30 S Lakhani, *Access to Justice Policy Paper Series* (forthcoming) (2009); A Brouwer and N Husin, *Options Paper on Adat* (unpublished paper) (2008).
- 31 UNDP, BAPPENAS, BRR, UNSYIAH, IDLO, World Bank, *Access to Justice in Aceh* (2007); Wojkowska et al, above n 26; E Harper, *Promoting Legal Empowerment in the Aftermath of Disaster: An Evaluation of Post-Tsunami Legal Assistance Initiatives in Indonesia*, IDLO Legal Empowerment Working Paper No. 3 (2009).
- 32 This states that all valid institutions and regulations at the date of independence would continue, pending the enactment of new legislation and institutions, and provided they are in conformity with the Constitution. The Constitutional recognition of *adat* arose due to the legal pluralism inherited from the Dutch. During the colonial period, *adat* was the default law for the indigenous population; post-independence, the

- transitional provisions in the Constitution ensured that it remained a valid source of law. Further, *adat* is now given additional, but still limited, recognition in the Indonesian Constitution (as amended) through articles 18B(2) and 28I(3). Wojkowska et al, above n 25, 18.
- 33 This legislation includes Perda 7/2000 on the Establishment of Adat Life; Qanun 4/2003 on the Mukim Governance Structures; Qanun 5/2003 on the Gampong Governance Structure; Undang-Undang No.11/2006; Qanun 9/2008 on Nurturing Adat Life; Qanun 10/2008 concerning Adat Institutions.
- 34 Qanun 9/2008.
- 35 Harper, above n 29, 14.
- 36 Article 10 of *Perda 7/2000* on the Establishment of Adat Life.
- 37 Article 28D(1) of the Indonesian Constitution provides for "just legal recognition, guarantees, protection and certainty, and to equal treatment before the law". Article 17 of the Human Rights Law 39/1999 states that every person has the right to "without discrimination, obtain justice by lodging an application, complaint, or claim in a criminal, civil or administrative case, and to have the case heard in a free and impartial judicial process. The process must comply with procedural law and involve an objective examination of the case by an honest and just judge in order to obtain a just and correct decision."
- 38 At the village level, these village leaders include the *keuchik* (village chief), *imeum meunasah* (village religious leader), local *ulama* (religious scholar) and *tuha peut* (village elders).
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- 40 UNDP et al, above n 32; Wojkowska et al, above n 25.
- 41 F Fuady, *Baseline Survey Report on Clarity of Adat Jurisdiction and Procedures* (internal report) (2008).
- 42 UNDP et al, above n 31.
- 43 Fuady, above n 41.
- 44 Lakhani, above n 30; Brouwer and Husin, above n 30; Harper, above n 29.
- 45 Fuady, above n 41.
- 46 Wojkowska et al, above n 25, 18; 33.
- 47 *Perda 7/2000*; IDLO, *The Role of a Mediator in Dispute Resolution under Adat in Aceh*, n.d.
- 48 UNDP et al, above n 31.
- 49 Ibid.
- 50 Ibid.
- 51 Harper, above n 29, 17.
- 52 Fuady, above n 41.
- 53 UNDP et al, above n 31.
- 54 Ibid.
- 55 Lakhani, above n 30.
- 56 UNDP et al, above n 31.
- 57 Harper, above n 29, 17.
- 58 Fuady, above n 41.
- 59 Harper, above n 29.
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- 61 Ibid.
- 62 Ibid.
- 63 Ibid; Lakhani, above n 30.
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- 69 Peacebuilding Initiative, above n 65.
- 70 Lakhani, above n 30.
- 71 Iyengar, above n 22, 103.
- 72 P Evans "Collective Capabilities, Culture and Amartya Sen's *Development as Freedom*" (2002) 37 (2) *Studies in Comparative International Development*, 54
- 73 Quoted in J Cunningham, E Wojkowska and R Sudarshan, *Making Everyone Work for the Law* (2009) 17.
- 74 N Jones, *Governance and Citizenship from Below: Views of Poor and Excluded Groups and their Vision for a New Nepal*, Overseas Development Institute Working Paper 301 (2009) ix.
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- 77 Wojkowska, above n 19, 35.
- 78 Maru, above n 76, 464.
- 79 Harper, above n 29.
- 80 Email correspondence with Mohamad Kusadrianto, Program Officer UNDP Indonesia, 14 July 2009.
- 81 US Department of State, *2008 Human Rights Report: Bhutan* (2009) <<http://www.state.gov/g/drl/rls/hrrpt/2008/sca/119133.htm>> at 24 July, 2009. Further information on the circumstances under which – or indeed, if – the disputing villagers may themselves drive the process to the district court is needed. However, the example points to an interesting potential method for reviewing customary justice decisions and ensuring that they are not in contravention of national or international human rights standards.
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Empowering the disadvantaged after dictatorship and conflict: legal empowerment, transitions and transitional justice

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Executive Summary

Transitions from dictatorship and mass atrocities can provide space for the disadvantaged to use law to expand their influence over their government, their society and their own lives. This paper identifies opportunities for promoting legal empowerment during transitional periods, with particular attention to opportunities related to transitional justice. It also explains how legal empowerment can support transitions by reducing the risk of a return to violence.

The paper takes an expansive view of legal empowerment as including efforts that aim to empower one or more disadvantaged groups and that use a strategy that makes some use of law, understood broadly. Legal empowerment encompasses both one-time reforms of policy and law, such as new constitutional rights, and longer-term initiatives, such as paralegals programs.

This paper recommends that international institutions, foreign donors and NGOs working in any country that is approaching or has just gone through a transition – as well as the country's own government – should work to ensure that:

- peace treaties and other transition agreements mandate specific legal empowerment initiatives and reforms, such as nationwide legal assistance programs and constitutional provisions outlawing discrimination;
- truth commissions analyze and publicize systemic sources of disadvantage that contributed to or were exacerbated by the atrocities they examine, and recommend specific legal empowerment reforms and initiatives to address those problems;
- the needs of victims from traditionally disadvantaged groups are given special attention in the design and implementation of reparations programs;
- community-level transitional justice fora give prominent roles to those usually marginalized from other local decision-making processes and adequately respond to the needs of victims; and
- legal empowerment initiatives and reforms receive the resources necessary to succeed, including political support, technical assistance and funding.

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Practitioners of development and transitional justice, too, should promote legal empowerment during transitions, including by:

- educating local and international actors on the prevalence and causes of systemic disadvantage, its impact and the potential of legal empowerment to address it;
- assessing the potential of each opportunity described in this paper to advance legal empowerment in the society in question, taking into account the cost of pursuing the opportunity and alternative uses of those resources;
- supporting victim organizations and enlisting their support for social change;
- launching bold, but carefully considered, initiatives where a sense of crisis creates unusual openness to them, while discouraging programs based on inadequate understanding of the local context or the dynamics of social change; and
- securing a share of international funding and other resources for legal empowerment initiatives that contribute to recovery and reconstruction.

Introduction

This paper analyzes the relationship between legal empowerment and transitions from dictatorship and mass violence, with particular attention to transitional justice. Since the mid-1970s, dictatorships across the globe have been replaced by more and less democratic regimes and dozens of wars have ended. Numerous international institutions and donors now work with local governments and civil society to consolidate these transitions and avoid the return of dictatorship or conflict.

Transitional justice is an increasingly important component of their efforts. Governments and international organizations expend enormous resources to “deal with the past” after transitions;¹ scholars and policymakers increasingly state that the legacies of past human rights violations cannot be ignored.² In part, these elites are responding to those most affected: victims in scores of countries have mobilized to demand “justice”, often in the form of criminal prosecution of perpetrators, and “truth”, in the form of information about such questions as the fate of loved ones forcibly disappeared by state security forces.

The interactions among transitions, transitional justice and legal empowerment have received little attention, however. This paper suggests that transitional justice initiatives, and transitional periods more generally, create openings and attract resources that can be used to advance legal empowerment. In turn, legal empowerment may support transitions, including by advancing what is arguably the most important goal of transitional justice: preventing the recurrence of atrocities.³

Part 1 defines transitions, transitional justice and legal empowerment as these concepts are used in this paper. Part 2 explores the opportunities that transitional justice measures can create for legal empowerment and recommends how practitioners can take advantage of them. Part 3 identifies opportunities for legal empowerment that arise from the more general context of transition. Part 4 describes how legal empowerment can help prevent the return of violence, using the example of an innovative Sierra Leonean organization, Timap for Justice. The conclusion summarizes the paper’s implications for practitioners.

1. Key concepts: transitions, transitional justice and legal empowerment

1.1 Transitions

The transitions considered in this paper are those that involve a substantial, quick liberalization of a country’s system of government or the end of a period of intense, large-scale violence against civilians.⁴ An example of the former is the sudden collapse of the Argentine military dictatorship in 1983 and its replacement by a democratic regime. An example of the latter is the end of the war in Bosnia, which included extensive attacks on civilians, after the 1995 Dayton Peace Accords. As these examples suggest, the two kinds of transition often coincide: the Argentine transition ended the state’s mass-scale disappearance and torture of its citizens, and the Dayton Accords created a limited democracy to replace the pre-war Titoist system.

Transitions often trigger myriad changes in a country’s politics, law, governance, economy and social relations. New constitutions entrench democratic political processes and individual rights. Increased foreign aid helps rebuild shattered infrastructure. Refugees return to areas from which they were expelled or resettle in another part of the country. Some changes persist indefinitely, while others end after a pre-set time or when a certain goal is met.

The beginning and end of a transition can be defined by any of a number of milestones, depending on the purpose of the analysis. The beginning of Poland’s transition from Communist rule to democracy may have occurred in February 1989, when the government

began negotiations with the opposition Solidarity movement, or in June 1989, when the first democratic elections took place. Some would place it in August 1989, when the first non-Communist prime minister took office, while others look back to 1980, when Solidarity formed and challenged the government's authority. Endpoints are likewise plural: East Timor's transition from Indonesian occupation can be seen as ending in May 2002, when the country declared independence; in May 2005, when foreign peacekeepers withdrew; or in October 2005, when a truth commission delivered its final report on human rights violations during the occupation.⁵ One could even argue that the transition is still in progress, since the East Timorese government relies on an Australian-led peacekeeping force to ensure civil order. The length of transitions varies greatly from country to country, even when their starting and ending points are defined similarly.

In this paper, some analytic points apply to the entire length of a transition, defined most expansively. Others address shorter phases, such as the first few years or a period when foreign aid is pouring in. Some of the analysis applies more to transitions from mass violence than to changes of political regime, or vice versa.

1.2 Transitional justice

Transitional justice encompasses efforts to address the legacies of atrocities committed before a transition – that is, the problems that exist after a period of dictatorship or mass violence and that caused or were caused by atrocities that occurred during the period.⁶ The problems most commonly highlighted by academics and policymakers concerned with transitional justice include:

- the risk that the country will fall back into dictatorship or mass violence;
- a state of “impunity”, in which perpetrators go unpunished and fear no consequences if they commit further atrocities;
- various physical, psychological and material needs of victims of the atrocities;
- victims' desire for information about the abuse they suffered, such as the perpetrators' identities;
- flawed government structures and a weak culture of democracy and respect for the rule of law;
- polarization of ethnic or political groups, based on radically different experiences and interpretations of the past; and
- the continued employment of human rights violators in the state security forces and other positions of power.

Scholars and practitioners of transitional justice seldom devote attention to poverty and other forms of disadvantage, even when these may have contributed to or been exacerbated by the atrocities. A few analysts, however, have begun to argue that transitional justice should address violations of economic and social rights.⁷

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Widely differing countries tend to base their transitional justice programs on the same, small set of institutions and policies. They generally attempt to “prosecut[e] perpetrators, documen[t] and acknowledg[e] violations through non-judicial means such as truth commissions, refor[m] abusive institutions, provid[e] reparations to victims [and/or] facilitat[e] reconciliation processes.”⁸

1.3 Legal empowerment

This paper understands “legal empowerment” broadly, as encompassing the many initiatives and reforms that fulfill two criteria: they are intended to empower at least one disadvantaged group and they employ a strategy that makes some use of law. “Initiative” refers to a process that operates over time to achieve change, such as an organization, a particular foundation grant program or a social movement. “Reform” means a change in policy or law that occurs at a specific time.

The first criterion provides that a primary purpose of the initiative or reform must be to empower one or more specific disadvantaged groups – accidental impact is insufficient. “Empower”, as used here, means to increase the influence that members of the group can exert over their own lives, over social conditions and processes and over politics and governance.⁹ The goals of legal empowerment thus include economic advancement, but extend beyond it.¹⁰

The second criterion requires some use of law, defined broadly. An effort may qualify as legal empowerment even if law is just one element of its strategy for promoting change.¹¹ Furthermore, this paper conceives of law expansively, as the authoritative regulation of human interactions and institutions at any level, from international to local.¹² This conception encompasses actions usually recognized as legal in character, so the enactment of statutes, litigation and provision of legal aid all satisfy the second prong of the legal empowerment definition. But it extends beyond them to include informal norms and processes such as *traditional* or *customary* law.¹³ Efforts that make use of those informal norms and processes therefore may constitute legal empowerment.

Certain legal empowerment reforms and initiatives may be more effective in promoting progressive social change than others.¹⁴ As they take advantage of the opportunities for legal empowerment identified in this paper, practitioners should give particular consideration to reforms and initiatives with one or more of the following characteristics:

- *A well-considered strategy for grassroots impact:* Some reforms and initiatives aim to change specific power dynamics at the grassroots level – for example, to improve the fairness of tribal chiefs’ adjudications – through a fully thought-out strategy informed by detailed knowledge of local context.¹⁵ These efforts may be more successful than ones that operate at elite levels of government or society with the vague hope that benefits will trickle down.
- *A vision beyond the state:* State institutions are important, but legal development programs have over-emphasized them and neglected non-state actors and processes, such as traditional dispute resolution mechanisms.
- *Involvement of the disadvantaged themselves:* Initiatives and movements for reform that are conceived or managed by the intended beneficiaries may better reflect their priorities than those dominated by outsiders. These efforts also may be more effective, because the affected people themselves may have important insights on the sources of their disadvantage, ways to alleviate it and other critical matters.¹⁶
- *Focus on the most disadvantaged:* The vast majority of people worldwide are part of some group that is disadvantaged in their society, but some are more needy than others. In many places, the disadvantaged include women; the poor; members of racial, ethnic and religious minorities; youth; and the disabled. People who are disadvantaged in multiple ways – such as by both poverty and gender discrimination – and those groups that are most deeply subordinated deserve the greatest attention.

2. Transitional justice: opportunities for legal empowerment

Transitional justice initiatives such as truth commissions, prosecutions and reparations programs can facilitate legal empowerment reforms and initiatives in a variety of ways. In some cases, they themselves function as legal empowerment initiatives, because they use law intentionally to empower disadvantaged groups. This Part describes six ways in which particular transitional justice initiatives can advance legal empowerment and suggests concrete steps that practitioners can take to make the most of each opportunity.

- Truth commissions can call attention to the nature and prevalence of problems that legal empowerment can address, such as discrimination.

- Truth commissions can endorse particular legal empowerment reforms or initiatives.
- Reparations programs can function as legal empowerment initiatives under certain circumstances.
- Organizations of victims of human rights violations can both function as legal empowerment initiatives and support other legal empowerment initiatives and reforms.
- Community-level transitional justice fora also can function as legal empowerment.
- By requiring powerful figures to account for their role in past human rights violations, transitional justice mechanisms may inspire ordinary people to stand up to their leaders and the state more generally.

2.1 Truth commissions can draw the attention of policymakers, donors and the public to problems that legal empowerment can address

Countries from Argentina to South Africa to East Timor have created truth commissions to examine recently ended dictatorships or periods of mass violence.¹⁷ Their activities and reports usually attract intense attention from national policymakers, the media, the public, international organizations and foreign donors. A truth commission can highlight problems that legal empowerment often addresses – such as the subordination of particular groups – and link them to the previous regime or spate of mass violence. National and international stakeholders may respond by giving these issues greater attention and resources, some of which may flow to legal empowerment reforms and initiatives.

Truth commissions have various means for raising the profile of particular problems. Commissioners may speak to the press about their research priorities or preliminary findings. A public hearing dedicated to a single issue signals that the commission sees it as central to understanding the atrocities under investigation. For example, Sierra Leone's Truth and Reconciliation Commission (TRC) devoted one session to the impact of the country's civil war on women and another to the role of corruption in the conflict. Dramatic witness testimony can attract media coverage of these hearings.

Nearly every truth commission issues a final report summarizing its analysis of the causes and consequences of the atrocities within its mandate. The report of Guatemala's Commission for Historical Clarification opens with the statement that throughout the country's history, the government directed violence "against the excluded, the poor and above all, the Mayan people".¹⁸ The Commission emphasized that "exclusion", "social injustice" and "inequality", all primary targets of legal empowerment, were central dynamics in the 34-year civil war.¹⁹ Peru's Truth and Reconciliation Commission called attention to the "seriousness of ethno-cultural inequalities that still prevail in the country" between the Spanish-speaking and indigenous populations.²⁰ The most important consequences of the conflict, the Commission said, included "worsened poverty and deepened inequality [and] aggravated forms of discrimination and exclusion".²¹ The Sierra Leone TRC found that the exclusion of rural young people from traditional power structures led many to join a brutal rebellion.²²

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Legal empowerment advocates should not assume that a truth commission will concentrate on the disempowerment of particular groups, even when it was central to the nature of the regime or violence being examined. South Africa's famed Truth and Reconciliation Commission is a striking example. Apartheid was one of the most comprehensive systems of subordination devised in modern times. An extensive, dense web of laws tightly restricted the freedom of non-white South Africans in nearly every area of political, economic and social life. Yet the Commission's multi-volume final report has been widely criticized for focusing on individual incidents of physical brutality, such as torture, and for "deal[ing] with the institutionalized racism of the apartheid system primarily as background ... [R]ace and how it played out through the institutionalized racism of the apartheid system is almost invisible in the report."²³ The same criticism was leveled at the Commission's hearings and public statements.

Legal empowerment advocates should try to ensure that each truth commission devotes sufficient attention to marginalization and discrimination. They can then build on the commission's work to generate support for legal empowerment reforms and initiatives that address these problems. Ideally, advocates should begin as soon as a truth commission is proposed, by lobbying for its mandate to include examining specific kinds of disadvantage.²⁴ Once the commission begins work, advocates can educate its members and staff about those problems and their relationship to the atrocities that the commission is studying. They may make written submissions, testify in public or communicate informally with commissioners and staff. They can also propose dedicated hearings and identify expert witnesses who can testify at them. Finally, advocates can help disadvantaged people themselves engage the commission, for example by arranging for them to meet commissioners or give statements to commission staff.

2.2 Truth commissions can recommend specific legal empowerment reforms or initiatives

Nearly every truth commission issues recommendations as well as findings. These identify steps that the state and other actors should take toward goals such as preventing a return to dictatorship or violence, addressing victims' needs and healing social divisions created by past conflict.

Some truth commissions recommend that the government institute specific legal empowerment reforms. The Sierra Leone TRC urged the repeal of a constitutional provision permitting discrimination against women in customary law.²⁵ It also called on the formal judiciary to more closely supervise the traditional "local courts", which handle disputes in most of the country and are frequently criticized as arbitrary and abusive.²⁶ The truth commission in East Timor recommended that the government revise laws to comply with the International Convention on the Elimination of All Forms of Discrimination Against Women and enact new laws against domestic violence.²⁷

In addition to recommending reforms like these, truth commissions can support initiatives for legal empowerment. The Sierra Leone TRC criticized the lack of access to justice for ordinary Sierra Leoneans.²⁸ It urged Fourah Bay College to require all law students to participate in its Human Rights Clinic, the only university law clinic in Sierra Leone, and called on other universities to create their own clinics.²⁹ The commission also recommended that courts simplify their rules and allow indigent petitioners to request relief through informal communications, such as letters.³⁰ The East Timor truth commission proposed court sessions outside the main cities, translation services for litigants who did not speak any of the country's official languages and paralegals to supplement the meager number of defense lawyers.³¹

The disadvantaged, and their supporters, should educate truth commissioners and their staff about how legal empowerment can address problems within the commission's mandate. They should also suggest specific reforms and initiatives that the commission can recommend in its report. If the commission takes these suggestions, then advocates and disadvantaged people can use its endorsement to build support for those legal empowerment efforts.

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2.3 Reparations programs can function as legal empowerment initiatives

Many truth commissions recommend that the state provide material reparations to certain victims of past human rights violations. States respond unevenly to these proposals. The governments of Argentina and Chile have paid extensive reparations to victims of their military regimes. South Africa has partially implemented the program its TRC proposed. El Salvador has made no reparations at all. Reparations may take one of several forms, including cash in the form of lump sum payments or recurring pensions; in-kind benefits such as mental health treatment or free education; and infrastructure for particularly hard-hit communities such as school buildings.

Under some circumstances, reparations programs meet the definition of legal empowerment articulated above.³² They are usually implemented by new statutes or executive orders and thus fulfill the legal element of the definition. Some reparations programs substitute for legal remedies; for example, Argentina's reparations program pre-empts lawsuits against the state for its role in dictatorship-era human rights violations.

Whether a reparations program satisfies the other requirement of this paper's definition of legal empowerment – that it be intended to empower one or more disadvantaged groups – depends on whether one sees the victims it aids as "disadvantaged".³³ In some cases, they clearly are, because the human rights violations targeted or disproportionately affected certain groups that already were disadvantaged in other respects, such as by poverty or ethnic discrimination. For example, most of the 200,000 people massacred in Guatemala, some of whose families are now receiving government reparations, were from historically marginalized indigenous groups.

Other victims may appear privileged, but are disadvantaged by hidden wounds that undermine their control over their own lives. Many victims of the kinds of atrocities commonly covered by reparations programs – such as torture survivors and family members of the disappeared – suffer severe economic, physical and psychological consequences for years or even the rest of their lives.³⁴ For example, a person who has been forcibly "disappeared" may have been his or her family's primary wage earner, while a torture victim may emerge unable to maintain close relationships due to extreme anxiety and depression. The East Timor truth commission therefore recommended that a reparations program be designed to "empower those who have suffered gross human rights violations to take control over their own lives and to free themselves of both the practical constraints and the psychological and emotional feelings of victimhood."³⁵

Advocates of legal empowerment should consider working to translate both reparations into legal empowerment and legal empowerment into reparation. Thus, where a government is considering making financial or other reparations to victims of past atrocities, advocates can try to shape the program to focus on those most disadvantaged. At the same time, they should determine whether the past atrocities have left victims significantly disadvantaged in comparison with the rest of the population. If so, they should support measures, including reparations programs, to assist them. It may be appropriate to extend existing legal empowerment initiatives to include those victims or create new ones specifically for them.

2.4 Victim organizations can function as legal empowerment initiatives and advocate for additional legal empowerment efforts

Victims of dictatorships or mass violence often come together for mutual support and to advance shared goals. Those goals often include halting atrocities, pressing for a transition to democracy, securing reparations and ensuring that society does not forget what they suffered. Victim groups constitute an important vehicle for legal empowerment in societies in transition. In addition, they may support other legal empowerment initiatives and reforms.

Many victim groups clearly satisfy the definition of legal empowerment used here. First, as discussed in the previous section, many victims of severe human rights violations merit the label "disadvantaged" and are thus appropriate subjects of legal empowerment. Second, victim groups generally empower their members, for example by using collective action to influence their government on issues important to them. Many groups train their members as activists, transforming the hopeless passivity that some felt after losing a loved one or suffering brutality into vigorous civic engagement. Finally, the empowerment many victim groups provide has a specifically legal element: law is a key part of their strategies. Criminal prosecution of perpetrators, for example, is a top priority for many groups. Some pursue civil lawsuits; South Africa's Khulumani Support Group is suing IBM, Barclays Bank and six other multinational corporations for facilitating torture and other human rights violations by the

apartheid regime. In addition, victim groups generally rely heavily on the language of human rights to explain their suffering to the world and to advance their agendas.

It appears that victims themselves create, lead and staff most victim groups, although comprehensive information on this is hard to find.³⁶ For instance, the Argentine group Mothers of the Plaza de Mayo was formed by women who frequently crossed paths at various government offices, as each desperately sought information about her disappeared child. Non-victims often assist victim groups, but tend to play supporting roles.

Victim groups can advance legal empowerment in areas unrelated to past atrocities. Some pursue broad political agendas. The Mothers of the Plaza de Mayo, for example, advocate an emphatically left-wing program of social change. Many members had children who apparently were forcibly disappeared for organizing the poor or working for other progressive goals; their mothers honor them by continuing the work for which they died. For example, the group backed the 2008 nationalization of Argentina's pension system on the ground that it would provide greater security for poor workers.

Practitioners of legal empowerment can both bolster victim groups and draw support from them. They should consider helping victims organize themselves and develop advocacy skills. If a group is receptive, then practitioners can suggest connections between the group's priorities and wider empowerment goals. Some victim groups may also be willing to deploy moral authority or political connections to support legal empowerment initiatives or reforms unrelated to their own core goals.

2.5 Community-level transitional justice fora can function as legal empowerment initiatives

Community-level transitional justice fora are among the most innovative recent developments in transitional justice. They build on traditional dispute resolution processes to provide a mechanism for helping perpetrators and victims of atrocities live together after war and other periods of mass violence.³⁷ Subsection 1 explains how community-level fora can empower the disadvantaged. A case study of East Timor's Community Reconciliation Process (CRP) in Subsection 2 provides an example of their mechanics, value and risks. Subsection 3 suggests how development practitioners and affected people should interact with community-level transitional justice fora.

2.5.1 Potential for empowerment

Community-level fora may have two kinds of empowering effects. First, ordinary people are given a greater role in some community-level fora than they are allowed to play in the day-to-day governance of their communities. This experience may give them confidence and inspire them to press for greater popular participation in local decision-making structures. This process partly fits the definition of legal empowerment provided here: the fora are legal mechanisms, in a broad sense, and provide knowledge and inspiration that help those excluded from decision-making to gain a greater role. If those who design and run the fora intend them to have this general empowering effect, then the fora fully qualify as legal empowerment as this paper defines it.

Second, the fora can effect legal empowerment by alleviating some of the long-term effects of atrocities on victims and perpetrators.³⁸ Victims and alleged perpetrators are disadvantaged by recent violence, rather than long-standing exclusionary social norms and structures. For example, after the cataclysmic violence surrounding East Timor's 1999 independence referendum, independence opponents lived in the same villages as independence supporters whom they had assaulted and whose houses they had burned. Many feared vigilante violence, felt ostracized or believed they were suspected of crimes they had not committed. At the same time, victims felt anger, terror and a longing to know more, for example about where massacred

loved ones were buried. Some wanted vengeance. Communities in other countries emerging from conflict, such as Sierra Leone and Mozambique, have experienced similar tensions.

These conditions undermine the capacity of victims and both actual and suspected perpetrators to function on a day-to-day basis. Community-level transitional justice fora attempt to bring together victims and alleged perpetrators, help them reconcile and begin to heal their debilitating psychological wounds. As the next subsection shows, however, they can also do harm.

2.5.2 The Community Reconciliation Process

The CRP was created by East Timor's truth commission primarily to help reconcile alleged perpetrators and victims of violence that occurred during the 1974-99 Indonesian occupation, including around the independence referendum.³⁹ It conducted 217 community-level hearings involving 1,403 applicants.⁴⁰

The program was open to people who had committed acts such as theft, minor assault, arson and crop destruction, but not perpetrators of the most serious crimes, such as murder and sexual assault. Participation was voluntary. Perpetrators could receive immunity from criminal prosecution and civil liability if they gave a full account of their wrongful acts and the surrounding circumstances, identified others involved, renounced the use of violence for political ends and performed acts of reconciliation set by a community panel.

The CRP blended elements of formal criminal law and procedure with features of traditional dispute resolution processes. The process centered on hearings before panels of respected local people. The entire community was encouraged to attend. Lawyers and paralegals played no role. The applicant described what he or she had and had not done, then was questioned by panelists, victims and other members of the community. Communities varied the hearing format, often providing a role for traditional leaders and incorporating rituals such as chewing betel nut or sacrificing a chicken or pig.

The panel consulted with victims and the wider assembly, then prescribed acts of reconciliation tailored to the applicant. Panels tended to require acts such as community service, small material reparations and public apologies. The applicant could accept or reject the proposal. If he or she accepted it and completed the acts, then the local district court entered an order granting legal immunity.

The CRP seems to have had mixed success in empowering perpetrators and victims by alleviating the psychological burdens caused by violence. A leading Timorese NGO interviewed 46 victims and perpetrators who had participated in the CRP.⁴¹ Most of the perpetrators felt relieved. They no longer feared that their children would be punished for their acts. Many felt they had cleared their names and were more accepted by their communities.

Victims apparently benefitted less. Some of those interviewed by the NGO reported that the CRP had reconciled them with perpetrators. Others did not, because they believed applicants had held back information about their own or others' crimes. The truth commission itself conceded that victims should have had a greater role in setting the required acts of reconciliation for each applicant.⁴² Finally, some victims reported that community pressure had led them to say publicly that the CRP had reconciled them with a perpetrator, when they in fact remained angry and unresolved.

It is too early to assess whether the CRP empowered groups traditionally sidelined from local decision-making in East Timor, such as women, by inspiring them to demand a greater role in community governance. Women played a more visible role in the CRP than in traditional dispute resolution processes. The hearings were chaired by truth commissioners, some of

whom were women. When communities selected panel members, CRP staff pressed them to include women. As it turned out, however, community leaders dominated the panels and victims deferred to the panel or the village chief when it came to determining acts of reconciliation for an applicant.⁴³

2.5.3 Role of the disadvantaged and their supporters

The disadvantaged and their supporters may be able to shape community-level transitional justice fora like the CRP to make them more inclusive than other local judicial and political processes. The East Timor truth commission spent ten months designing the CRP and consulted widely. Government bodies that are considering creating community-level transitional justice fora can be pressured to design them in ways that maximize their empowering potential. Officials may welcome information on possible models, including similar fora from other countries. Legal empowerment advocates should support community-level fora that do, in practice, empower groups usually excluded from local decision-making. They can urge the public to participate and may be able to provide needed logistical or technical support. Publicizing the forum as an example of participatory justice and democratic decision-making can spur ordinary people to press for change in regular decision-making structures.

Development practitioners need to tread carefully in engaging community-level transitional justice fora, however. Traditional authority figures may dominate the fora as much as they do other decision-making structures. Furthermore, evidence is mixed on the value of these processes for both perpetrators and victims. Restorative justice mechanisms, including community-level transitional justice fora, stress social harmony over retribution and may neglect the needs of victims. Some, including the CRP and the South African TRC, have been criticized for pressuring victims to forgive perpetrators, or at least to acquiesce in absolving them. Forcing forgiveness betrays victims, many of whom have spent years longing for society to comprehend the impact of what was done to them, condemn it and acknowledge the legitimacy of their feelings and wishes. Practitioners with expertise in legal empowerment may be able to help community-level transitional justice fora avoid these dangers.

2.6 By securing accountability for specific violations of human rights, transitional justice initiatives may inspire citizens to stand up to leaders and the state

Many countries emerging from dictatorship or a period of mass atrocities have suffered under despots for generations. Ordinary citizens have never seen them held responsible for their actions, even when they cause shocking injustice and suffering. For example, Sierra Leone's politicians and generals have treated the country largely as a personal fiefdom since independence, diverting diamonds and other wealth for their personal use and driving the country into a brutal war.

Some analysts argue that transitional justice can erode this culture of impunity and inspire citizens to demand better from their leaders. They point out that some transitional justice mechanisms – such as war crimes courts, truth commissions and vetting procedures that remove human rights violators from official positions – require leaders to explain their actions and may inflict punishment, from humiliation to execution. If citizens understand these dramas to mean that the powerful can be held accountable, then they may begin to stand up to despotism, at least in small ways. Where other conditions, such as opportunities for association and expression, are favorable, transitional justice may contribute in this way to a gradual shift toward popular sovereignty in political culture and practice.⁴⁴

When a transitional justice program requires powerful people to answer for their actions, advocates of legal empowerment can help it inspire the population by publicizing the fact that it has held leaders accountable. Advocates also may be able to help a court or truth commission explain its work to the population.

3. Legal empowerment during transitions

Transitions from dictatorship and periods of mass violence provide additional opportunities to advance legal empowerment reforms and initiatives, beyond those offered by transitional justice initiatives in particular. As noted above, transitions typically generate dramatic changes in politics, law, social relations and economic conditions. Some of these changes involve the intentional use of law to assist particular disadvantaged groups. Others make it easier, temporarily or permanently, to secure legal empowerment reforms or to create or expand legal empowerment programs.

This Part describes four such changes:

- Empowering certain disadvantaged groups may be a primary purpose of the transition.
- Peace treaties or other transition agreements can mandate legal empowerment, in the form of specific reforms or initiatives.
- After a transition, international organizations and donors may provide increased aid and attention, which can be tapped for legal empowerment.
- The omnipresence, during some transitions, of acute needs and dramatic efforts to address them may make international and local actors more comfortable with the far-reaching change that some legal empowerment efforts seek.

3.1 Empowerment of disadvantaged groups may be a primary purpose of the transition

In some transitions, the empowerment of particular disadvantaged groups is a primary goal. In a few cases, it may be synonymous with the transition itself: the shift from apartheid to democracy in South Africa was *defined* by the empowerment of the non-white majority. That transition may be the ultimate example of empowerment that takes a legal form. The comprehensive subjugation of non-white South Africans was enforced by an elaborate system of discriminatory laws. Those laws, and thus in a sense the apartheid system itself, were abolished by the 1993 Interim Constitution, the 1996 final Constitution and numerous statutes. While non-whites continue to suffer disproportionately from poverty and other legacies of apartheid, their influence over their own lives, their society and their government was dramatically enhanced by those liberating legal instruments.

The South African case is not unique. Kosovar Albanians sought autonomy in the late 1990s to end the years of discrimination they had suffered under the government of Serbia. The long political transition lasted from 1999, when an international civil administration took over the territory, to 2008, when Kosovar Albanians declared independence from Serbia. This transformation of Kosovo's international legal status was undertaken with the primary purpose of empowering a previously disadvantaged ethnic group.⁴⁵

3.2 Peace treaties and other transition agreements can mandate additional empowering reforms or initiatives

Many transitions to democracy are negotiated between an authoritarian government and its domestic opponents and many wars also end in negotiations rather than victory by one side. Transition pacts and peace treaties, which are legal instruments, often include provisions requiring certain reforms or initiatives to address the needs of specific disadvantaged groups.

Some clauses in these agreements address broad social injustices. The fall of Nepal's monarchy led quickly to a settlement of the country's long-running civil war. In the 2006 Comprehensive Peace Accord (CPA), Maoist guerrillas and the main civilian political parties agreed to pursue policies to "en[d] discrimination based on class, caste, language, gender, culture, religion and region", in particular against women, Dalits and several ethnic minorities.⁴⁶ The negotiations over South Africa's transition to democracy were memorialized in the 1993 Interim Constitution. It forbade discrimination based on race and ethnicity, of course – but also

added gender, sexual orientation, disability and several other protected statuses. (The previous, apartheid-era constitution had contained no anti-discrimination clause at all.)

Transition agreements can also address specific areas of disadvantage. Peace negotiators in Guatemala filled an entire agreement with specific measures that the government would take to redress the oppression of indigenous Mayans. In the area of access to justice, these included creating “legal offices for the defense of indigenous rights and ... popular law offices to provide free legal assistance for persons of limited economic means,” as well as training judges and court translators in indigenous languages.⁴⁷ Because El Salvador’s elite controls a hugely disproportionate share of agricultural land, rebels pressed for a peace treaty that obligated the government to provide “technical assistance to help increase the productivity of peasant farmers and smallholders.”⁴⁸ The parties to the Nepal CPA agreed to “provide land and other economic protection to landless squatters.”⁴⁹

Like many progressive laws, the provisions of these transition agreements have been implemented inconsistently.⁵⁰ However, the legitimacy that stems from their inclusion in foundational legal documents may sometimes help the disadvantaged and their allies translate them into change on the ground. The disadvantaged and their supporters should consider trying to influence transition negotiators to mandate legal empowerment reforms and initiatives in the agreements they reach.

3.3 After a transition, international organizations and donors may provide a country with additional resources, which can be used for legal empowerment

Societies in transition sometimes receive a flood of money, human resources and political attention from international actors. Legal empowerment advocates may be able to harness these to support reforms or initiatives. Of course, legal empowerment cannot succeed without firm local support and often must be initiated by local citizens or officials themselves. Foreign resources are sometimes essential, though: money for social change programs is usually scarce and foreigners may fill in when qualified local people are spread thin. On occasion, a foreign government, international agency or international NGO may be able to provide political support for an important legal empowerment reform, as well as money or personnel for a legal reform initiative.⁵¹

The determinants of aid flows are complex, but countries tend to secure significantly more aid per capita immediately after the end of a conflict. Researchers from the World Bank and Harvard University examined low-income countries with weak institutions and found that those emerging from conflict received, on average, 30 percent more aid per capita than those that had long enjoyed peace.⁵² Bilateral donors and international institutions that substantially increase their financial investment in a country may also send personnel and devote high-level attention to supporting its recovery. For example, the United Kingdom has provided all three to Sierra Leone since former Prime Minister Tony Blair made the country’s reconstruction a centerpiece of his “ethical foreign policy” early in this decade.

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Anecdotal evidence suggests that international aid and attention may increase after a transition from dictatorship, as well as after conflict. Foundations such as the Open Society Institute and the Ford Foundation spend millions of dollars each year on consolidating democracy after transitions. The United States Agency for International Development (USAID) increased its aid to Ukraine by 44 percent after the 2004 Orange Revolution in order to “solidify democratic gains and build on them to improve the economic and social well-being” of the population.⁵³

These new resources can support legal empowerment. The Office of the United Nations High Commissioner for Refugees (UNHCR) created a network of legal aid organizations in Bosnia just after the civil war ended.⁵⁴ After Guatemala’s civil war, the World Bank identified a “new

consensus” between civil society and the government that “judicial reform is essential to post-conflict reconstruction, social stability and economic growth.”⁵⁵ The Bank responded by funding an access to justice program in regions not reached by the formal court system.⁵⁶

3.4 Legal or political flux may create temporary opportunities to introduce or entrench progressive reforms and initiatives

Policymakers, international actors and the public may be more open during transitions than during normal periods to extensive social change, including through legal empowerment, because enormous needs and dramatic actions to address them are commonplace. Transitions generally leave law and politics in flux for several months or years. During this time, government, the economy and aspects of society are often reformed to suit new democratic norms and peacetime conditions. At the same time, novel or drastic programs address severe problems created by the just-ended war or dictatorship, such as mass displacement, destroyed infrastructure and individual psychological trauma. Juxtaposed with these reforms and programs, many legal empowerment efforts may seem less radical than they would seem in ordinary times. Therefore, actors who would normally be skeptical of far-reaching legal empowerment may see it as appropriate.

For example, in the first years after South Africa’s 1994 transition to democratic rule, many South Africans referred to themselves as “transforming” their country into “the new South Africa.” They reversed an uncountable number of public policies and social norms and hoped to rapidly lift millions out of poverty. Some of the legal empowerment reforms that South African advocates secured while Parliament was drafting a new constitution, between 1994 and 1996, might have been more difficult a few years later, after this euphoria had subsided.

Climates of radical change may especially facilitate one-off reforms, like the enactment of new laws, but longer term initiatives, too, may become more feasible. Groups that would have blocked certain programs may lose influence, making the programs viable. Once established, they may be difficult to eliminate even if conservative forces regain their previous strength. The disadvantaged and their advocates also may be able to change public attitudes over the course of transitional periods, in ways that are difficult to roll back later. For example, women may become accustomed to greater freedom in public spaces or generally more assertive of their rights.

The Community Empowerment Program (CEP) in East Timor illustrates the potential and limits of situations in which resistance to radical initiatives has temporarily diminished. The CEP challenged the power of local traditional leaders across East Timor for several years beginning in early 2000. If officials of the World Bank and the United Nations (UN) in East Timor had not become inured to extraordinary needs and policy responses in late 1999, they might never have created the Program.⁵⁷ At that time, staff of the two organizations concluded that local authority had collapsed as a result of the cataclysmic violence around the August 1999 independence referendum.⁵⁸ This sweeping conclusion was erroneous⁵⁹ – but Bank and UN staff members seem to have reached it because nearly every other component of government and the economy had been eviscerated. For example, Indonesian-backed militias had destroyed over 90 percent of the territory’s physical infrastructure.

The CEP created new, elected councils in each hamlet and empowered them to decide which local projects would receive World Bank development aid. It aimed to promote democratic governance at the local level, reduce power inequalities, efficiently allocate resources and expand local support for development projects. Under CEP rules, none of the council members could be traditional leaders and half had to be women. It turned out that many of those elected were young. CEP councils thus included many people who were marginalized from their communities’ traditional decision-making structures.

Outside of an emergency situation, large international institutions would be unlikely to leap to the conclusion that entire level of government had evaporated, or to presume that they could rebuild it on the basis of novel egalitarian principles. In East Timor in early 2000, however, creating brand-new organs of local government in a few months was no more radical than other actions being taken by East Timorese leaders and internationals. For example, the UN Security Council had taken the nearly unprecedented step of giving a single UN official unlimited authority over East Timor – effectively creating a viceroy answerable only to the Secretary General and the Security Council. At the same time, UN lawyers were hastily assembling a judicial system.

In practice, the CEP councils did not supplant existing power structures during their approximately six years in operation.⁶⁰ Traditional leaders had retained the loyalty of the population throughout the violence. The members of the community who were already prominent – village chiefs, teachers and church representatives – tended to dominate communities' discussions of how to use the development aid. In some cases, the CEP councils simply ratified decisions made by these traditional authorities.

Nonetheless, the CEP may have sown seeds of empowerment among the rest of the citizenry, including women and youth. The anthropologists who evaluated it for the World Bank concluded that it had not changed local socio-political dynamics, but that it had created a system “that gives new people the framework and support to establish themselves in a new power position.”⁶¹ The format of the CEP at least introduced the practice of democracy to ordinary citizens throughout East Timor in a concrete form and enabled some of them to engage in it. For some East Timorese, even the image of women and young people making important decisions for the community may have been new. The evaluators reported that citizens thought carefully about what qualities the council members should have before electing them.⁶² In some villages, a range of community members participated in the debates over allocation of aid. Even if leaders ultimately decided which projects to fund, the CEP format may have required them to explain those decisions to their constituents.

The CEP illustrates how a transitional environment in which policymakers, international actors and the public are focused on acute needs and accustomed to extraordinary responses can create space for initiatives that might seem too radical during ordinary times. At the same time, it highlights the difficulty of transforming existing power structures through rapid, top-down efforts. Timap for Justice, profiled in the next Part, takes a very different approach.

4. Preventing the recurrence of atrocities: a contribution of legal empowerment to transitional justice

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Ensuring that atrocities do not recur is one of the highest priorities of societies emerging from a period of conflict or dictatorship. Where violence was caused or sustained in part by exclusion, discrimination or disempowerment, legal empowerment reforms and initiatives can help prevent it from breaking out again.⁶³ Section 1 below describes how exclusion can contribute to atrocities, using Sierra Leone as a primary example. Section 2 analyzes how Timap for Justice, a Sierra Leonean paralegal organization, promotes both fair outcomes in individual cases and long-term social change.

4.1 Exclusion and atrocities

Disadvantage can make violence more likely and more brutal.⁶⁴ In Sierra Leone and Peru, for example, members of groups marginalized from political and social life were receptive to rebel leaders' calls to arms. Some were willing to commit shocking atrocities against government officials and others who embodied the status quo. In Peru, the truth commission found that the Shining Path movement “‘exploited fractures and rifts in Peruvian society’ by recruiting

marginalized and frustrated members of poor communities living without the 'irreducible ethical minimum' of living conditions."⁶⁵ "[T]housands of youth ... were seduced by a proposal that set out the profound problems of the country and proclaimed that ... 'rebellion is justified.'"⁶⁶ Sierra Leone's TRC joined many analysts in concluding that the exploitation of rural youth by traditional chiefs helped trigger and sustain a decade-long conflict marked by horrific violence against civilians, especially authority figures such as the chiefs.⁶⁷

The sociopolitical dynamics of rural society in Sierra Leone played a central role in the conflict and have changed little since it ended in 2002.⁶⁸ The country has never had a strong central state that fairly governed and consistently delivered services to the rural population. Its war began and was fought almost entirely outside the major cities. The "vast majority of combatants across factions were uneducated and poor"⁶⁹ and most were young. The British colonial regime and post-independence governments have ruled indirectly, through traditional leaders. Indirect rule transferred the chiefs' allegiance from the people they ruled – who traditionally had been able to curb abuses of power – to the national government, which allowed the chiefs to exploit their subjects as long as they obeyed the central authorities.

Elders and traditional chiefs dominate rural social, economic and political life. They distribute paid work and even assign marital partners to young men according to their whim. Women have little influence in public life. "Local courts" run by chiefs are the primary forum for dispute resolution for much of the rural population. Customary law officers appointed by the national government have supervisory authority over the local courts, but are stretched too thin to provide meaningful oversight. The formal courts are distant, slow and expensive. Chiefs themselves keep the fines they levy through the local courts, which compromises their impartiality. They rely on the fines as a primary source of income and often set them at levels the parties find crushing. Youths can be forced on pain of imprisonment to work for free for the benefit of the community or of the chiefs personally.

The grievances felt by rural young men include a scarcity of marriage-age women caused by older men taking multiple wives. The most common kind of suit in local courts involves a husband charging a young man with "woman damage" for sleeping with his wife. The husband usually wins a judgment paid in the form of free labor. Taking up arms in the war allowed some youth, male and female, to solve this problem through a form of slavery: many ex-combatants told researchers in 2003 that their commanders had allowed them to force a civilian to serve as their "wife" or "husband".⁷⁰

4.2 Timap for Justice

The Sierra Leonean NGO Timap for Justice exemplifies the potential of legal empowerment initiatives to shift deeply entrenched social practices that can fuel violence, such as those just described. How Timap works on a day-to-day basis and why it can influence powerful institutions and individuals are the subjects of Subsection 1. Subsection 2 describes the role of international actors in creating and supporting the organization. Subsection 3 explains the philosophy of social change that, in the author's view, underlies Timap's approach and gives it such promise.

4.2.1 Methods and influence

Timap operates 12 advice offices across Sierra Leone, each staffed by paralegals from the local area, plus a combined headquarters and advice office in Freetown. The organization addresses the problems described in the previous section and other injustices, working at three levels.⁷¹ First, paralegals help individual clients resolve particular disputes with other private parties, traditional authorities or organs of the central government such as the police. Second, they tackle problems affecting entire communities, such as widespread domestic violence, at a systemic but still local level. Third, the paralegals help citizens organize to promote change on their own.

The paralegals employ a wide range of techniques. Mediation is one of the most common. They also advise individual clients on the fora available in the customary and formal legal systems, the procedures of each, and applicable legal rights and customary norms. The paralegals often communicate directly with authorities, seeking information relevant to a client's case, querying dubious decisions or demanding redress to which the client is entitled. In rare cases, Timap's director, an attorney, files a lawsuit in the formal court system. Beyond individual cases, paralegals "engage in community education and dialogue, advocate for change with both traditional and formal authorities, and organize community members to undertake collective action."⁷²

Timap often succeeds in resolving unjust situations, such as an unwed father's refusal to support his child or a chief's imposition of unconscionable fines in the local court. The organization does not always succeed, of course, even where the law is on its client's side. In Sierra Leone, as in many countries, outcomes are determined more by relationships and power than by principle, and the formal justice system often fails to enforce even clearly established law.

Timap draws its power from several sources.⁷³ First, the paralegals advocate for their individual clients and for systemic change with creativity and persistence, often combining numerous techniques over weeks or months. Second, they are experts in formal law and institutions, local culture and power dynamics, and community structures. Timap paralegals combine norms and practices from all of these sources as they work on individual cases and for systemic change. Third, the paralegals gain the respect of ordinary people and officials through a professional demeanor and polish that are rare in Sierra Leone. Fourth, the paralegals are seen as embodying the authority of the law because they know its rules and are unafraid to invoke them. Other aspects of their methods and self-presentation, such as including the label "human rights" on their identity cards, are designed to create this impression.⁷⁴ Finally, Timap can suggest – or directly threaten – that it will sue opponents in the formal courts if less confrontational methods fail.

4.2.2 Origins and international support

Timap began as a collaborative venture of Sierra Leonean human rights activists and the international Open Society Justice Initiative. Programs in other countries had convinced Justice Initiative staff that paralegals offered a lower cost, more accessible model for supporting the poor and other disadvantaged groups as they engaged with formal and traditional dispute resolution systems, ultimately helping them achieve more just outcomes. In 2002, the Justice Initiative's Zaza Namoradze visited Sierra Leone to build relationships with Sierra Leonean human rights activists and study the country's needs. In conversations with him, the activists highlighted discrimination against women, youth and the poor in local courts and other traditional fora. They also noted the inaccessibility of the formal justice system to most of the population, in part because nearly all of the country's lawyers worked in the capital.

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The Justice Initiative and the activists, working through the National Forum for Human Rights, spent the following year designing Timap, in consultation with other civil society organizations, ordinary citizens around the country, community leaders and local attorneys. Simeon Koroma, a Sierra Leonean, and Justice Initiative Resident Fellow Vivek Maru, an American, founded Timap in 2003 with Justice Initiative seed funding. They began with six offices, each staffed by two or three paralegals from the local area.⁷⁵

Timap's success in the field has brought additional recognition and funding. The United States-based Carter Center looked to Timap when it designed a new paralegals program for Liberia after the civil war ended in 2004.⁷⁶ In 2006, Timap received a three-year, US\$880,000 grant from the World Bank. The Fund for Global Human Rights and the United States Embassy in Sierra Leone have provided additional support.

4.2.3 Contribution to peace and philosophy of social change

Timap and other legal empowerment initiatives can strengthen the foundation of peace by helping dismantle systems of exclusion and discrimination that can fuel violence.⁷⁷ If Sierra Leone is to enjoy a peaceful future, its political and social structures and norms must change profoundly. Yet traditional tools of transitional justice, such as truth commissions and courts, cannot stimulate such a dramatic transformation.⁷⁸

The design and day-to-day operations of Timap reflect a vision of social change that can be applied beyond Sierra Leone.⁷⁹ This vision acknowledges that most deep reform comes only slowly, through complex processes that we only partially understand. Powerful interests tenaciously defend the status quo. Most social change occurs at the grassroots level over a long period, through myriad, small-scale shifts in social practices, with little central coordination. Outsiders can help, but local people generally know best what change should occur and how it can be achieved.⁸⁰

Who drives change and how fast are vital questions. Timap undeniably represents an outside intervention in the mostly rural communities in which it works – its attorneys are based in the national capital, and one co-founder and nearly all funding come from abroad. But the organization is responding to demands for fair treatment made by local people themselves, not imposing an outside agenda that lacks grassroots support. Timap's strategy is patient, too: it does not attempt to transform local norms and structures wholesale. Instead, it supports local agents of change, first by hiring some as paralegals and then by helping the paralegals teach and organize their neighbors so the neighbors, in turn, can press for change. Thus, Timap helps local people shift the balance of power within their own communities, gradually transforming social and political norms and structures.

Pragmatism as well as principle relegates outsiders to this secondary role. The paralegals, working in their own areas, understand crucial aspects of local context that the organization's Freetown-based directors and foreign supporters do not. Timap's effectiveness depends on sensitivity to local norms and power dynamics – the paralegals and their clients can push the status quo somewhat, but not so hard that they provoke fierce opposition. Maru comments: "We work hard to cultivate positive relationships with paramount chiefs, and challenging one is a delicate business. An angry paramount chief could shut one of our offices down in one day."⁸¹ Timap places authority in the hands of the people in the organization who are closest to the problems it addresses: the paralegals have wide latitude in determining when and how to act to promote change, taking into account personalities, relationships, norms, history and other factors specific to each community.

Leaders of countries recovering from conflicts fed by exclusion and discrimination, and the international actors who assist them, often focus on short-term needs, including preventing the immediate recurrence of war and reconstructing physical infrastructure. These activities are important, but the causes of the conflict also require attention. In the long run, initiatives that reflect Timap's philosophy of social change have the potential to help transform social and political norms and structures, and thus contribute to long-term peace.

Conclusion: legal empowerment during transitional periods

Societies emerging from dictatorships and periods of mass atrocity confront extensive problems that often include fundamental inequities in political, social and economic life. The disadvantaged and those who wish to support them should seize the opportunities to expand legal empowerment during transitional periods that this paper has identified. In particular, international institutions, foreign donors and NGOs working in any country that is approaching or that has just gone through a transition – as well as the country's own government – should strive to ensure that:

- peace treaties and other transition agreements mandate specific legal empowerment initiatives and reforms, such as nationwide legal assistance programs and constitutional provisions outlawing discrimination;
- truth commissions analyze and publicize systemic sources of disadvantage that contributed to or were exacerbated by the atrocities they examine, and recommend specific legal empowerment reforms and initiatives to address those problems;
- the needs of victims from traditionally disadvantaged groups are given special attention in the design and implementation of reparations programs;
- community-level transitional justice fora give prominent roles to those usually marginalized from other local decision-making processes and adequately respond to the needs of victims; and
- legal empowerment initiatives and reforms receive the resources necessary to succeed, including political support, technical assistance and funding.

Practitioners of development and transitional justice, too, should promote legal empowerment during transitions, including by:

- educating local and international actors on the prevalence and causes of systemic disadvantage, its impact and the potential of legal empowerment to address it;
- assessing the potential of each opportunity described in this paper to advance legal empowerment in the society in question, taking into account the cost of pursuing the opportunity and alternative uses of those resources;
- supporting victim organizations and enlisting their support for social change;
- launching bold, but carefully considered, initiatives where a sense of crisis creates unusual openness to them, while discouraging programs based on inadequate understanding of the local context or the dynamics of social change; and
- securing a share of international funding and other resources for legal empowerment initiatives that contribute to recovery and reconstruction.

The fall of a dictator or end of a brutal war may stop much suffering, but in most societies chronic injustices remain. Transitional justice ventures sometimes touch on these profound troubles, but seldom have a significant impact on them. Legal empowerment can play an important role in combating poverty, discrimination and other forms of disadvantage, and thus advancing democracy and equality.

Endnotes

- 1 A recent study estimates that in the last 40 years over 100 countries have implemented more than 800 transitional justice arrangements, such as prosecutions of perpetrators, truth commissions and reparations programs. See T D Olsen, L A Payne, and A G Reiter, "At What Cost?" in *Engaging the Past to Safeguard the Future*, unpublished book manuscript, on file with author, 7. Global spending on transitional justice totals hundreds of millions of US dollars per year for criminal prosecutions alone. For example, the International Criminal Tribunals for the former Yugoslavia and Rwanda cost over US\$300 million per year. International Criminal Tribunal for Rwanda, *General Information* <<http://69.94.11.53/ENGLISH/geninfo/index.htm>> at 21 June 2009; International Criminal Tribunal for the former Yugoslavia, *The Cost of Justice* <<http://www.icty.org/sid/325>> at 21 June 2009. In Argentina, over 400 people face criminal charges for atrocities committed during the country's 1976-83 dictatorship. Human Rights Watch, *World Report: Argentina, Events of 2008* <<http://www.hrw.org/en/node/79336>> at 21 June 2009.
- 2 This general statement masks divergent views on what these lingering effects are and how they must be addressed. Furthermore, the assertion has insufficient empirical foundation: most analyses leave key concepts vague and provide anecdotal support, at best, for causal claims. See O N T Thoms, J Ron, and R Paris, *The Effects of Transitional Justice Mechanisms: A Summary of Empirical Research Findings and Implications for Analysts and Practitioners*, University of Ottawa, Centre for International Policy Studies Working Paper (2008) 32. On the other hand, no major method of addressing past atrocities has been definitively shown to be ineffective or counterproductive.
- 3 Additional, systematic research is needed to establish the extent to which transitions and legal empowerment support each other, as well as the impact of particular legal empowerment efforts.
- 4 The variations and definitional issues noted here have been explored in depth by scholars, although gaps and disagreements remain. Thomas Carothers and Larry J Diamond are highly respected scholars whose work is accessible to non-specialists. See, for example, T Carothers, "Why Dictators

- Aren't Dominoes" (July/August 2003) *Foreign Policy*, available at <<http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=1309>> at 6 November 2009; T Carothers, "The End of the Transition Paradigm" (2002) 13(1) *Journal of Democracy* 5, available at <<http://www.journalofdemocracy.org/articles/gratis/Carothers-13-1.pdf>> at 27 June 2009; L Diamond, "Building Democracy after Conflict: Lessons from Iraq" (2005) 16(1) *Journal of Democracy* 9, available at <<http://www.journalofdemocracy.org/articles/gratis/Diamond-16-1.pdf>> at 27 June 2009. Most pieces in *Journal of Democracy* are clear to non-academics and many take a practical perspective.
- 5 This paper refers to "East Timor", as that territory was known internationally until it became independent, rather than "Timor Leste", its official name as an independent country, because most of the events in that area's history that are discussed here occurred before independence.
 - 6 Scholars and practitioners have not reached consensus about the name and exact boundaries of this field of practice and inquiry. Some refer to what this paper calls "transitional justice" as "dealing with the past", "facing history", "the politics of memory" or post-war and post-dictatorship "reconciliation", rather than "transitional justice". Some define it as encompassing only certain institutions or policy responses – such as criminal trials, amnesties and truth commissions – rather than including all responses to particular problems, as this paper does.
 - 7 See, for example, L Arbour, "Economic and Social Justice for Societies in Transition" (lecture delivered at New York University School of Law, 25 October 2006) available at <http://www.ictj.org/static/Events/AnnualLecture_Arbour.pdf> at 6 November 2009; R Mani, "Dilemmas of Expanding Transitional Justice, or Forging the Nexus between Transitional Justice and Development" (2008) 2(3) *International Journal of Transitional Justice* 253; Z Miller, "Effects of Invisibility: In Search of the 'Economic' in Transitional Justice" (2008) 2(3) *International Journal of Transitional Justice* 266. For a different perspective, see N Roht-Arriaza, "The New Landscape of Transitional Justice" in N Roht-Arriaza and J Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century* (2006).
 - 8 International Center for Transitional Justice, *Mission and History*

<<http://www.ictj.org/en/about/mission/>> at 10 August 2009.

- 9 For example, a law that required government agencies to solicit citizen input before taking certain actions would increase the power of all citizens, including impoverished ones, to influence government policies. The law would qualify as a legal empowerment reform if lawmakers had enacted it in order to amplify the voices of the poor (even if they were aware it would benefit all citizens), but not if their purpose had been to aid all citizens (even though some of those intended beneficiaries would be poor).
- 10 The Commission on Legal Empowerment of the Poor, by contrast, examined legal empowerment primarily as a means to alleviate poverty. See S Golub, "The Commission on Legal Empowerment of the Poor: One Big Step Forward and A Few Steps Back for Development Policy and Practice" (2009) 1 *Hague Journal on the Rule of Law* 101, 112. This paper's conception of empowerment tracks that suggested by Golub, who describes legal empowerment as helping the disadvantaged "improve their influence on government actions and services, or otherwise increase their freedom", as well as alleviate their poverty. Ibid 105.
- 11 A group that tried to change power structures in a particular village by encouraging ordinary citizens to participate more assertively in community meetings would therefore qualify as a "legal empowerment" initiative, as would a campaign that used the language of rights to promote certain reforms, even if it did not aim to change any law.
- 12 Cf. W M Reisman, *Law in Brief Encounters* (1999); W M Reisman, "International Law-making: A Process of Communication", Harold D. Lasswell Memorial Lecture (1981) 75 *American Society of International Law Proceedings* 101.
- 13 On the problems these terms present, see L Huyse, "Introduction: tradition-based approaches in peacemaking, transitional justice and reconciliation policies" in L Huyse and M Salter (eds), *Transitional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (2008) 8.
- 14 Indeed, the term legal empowerment is sometimes defined as including only this smaller subset. See S Golub, "The Legal Empowerment Alternative" in T Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006) 161-62.
- 15 Timap for Justice, profiled below in Part 4, is a good example.

- 16 Uganda's Land Rights Information Centers are an intermediate case. They were created by national and international NGOs, but the ordinary Ugandans they serve play central roles in the centers' operations, for example by working as paralegals. See R Aciro-Lakor, "Land Rights Information Centers in Uganda" in L Cotula and P Mathieu (eds), *Legal Empowerment in Practice: Using Legal Tools to Secure Land Rights in Africa* (2008) 72-74.
- 17 These bodies go by various names, such as "Truth and Reconciliation Commission" (Chile, South Africa and Sierra Leone, among others), "Commission for Historical Clarification" (Guatemala) and "National Commission on the Disappearance of Persons" (Argentina).
- 18 Commission for Historical Clarification, *Guatemala: Memory of Silence, Report of the Commission for Historical Clarification: Conclusions and Recommendations* (1998) Conclusions, para. 3, available at <<http://shr.aaas.org/guatemala/ceh/report/english/toc.html>> at 6 November 2009.
- 19 Ibid Conclusions, pt. I, paras 3, 5, 8.
- 20 Truth and Reconciliation Commission (TRC) of Peru, *Final Report* (2003) General Conclusions, para. 6, available at <<http://www.cverdad.org.pe/ingles/infinal/conclusiones.php>> at 29 June 2009.
- 21 Ibid para. 153.
- 22 Truth and Reconciliation Commission (TRC) of Sierra Leone, *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission* (2004) vol. 3B, ch. 5, para. 20; *ibid* vol. 2, ch. 2, para. 141.
- 23 A R Chapman and H van der Merwe, "Conclusion: Did the TRC Deliver?" in A Chapman and H van der Merwe (eds) *Truth and Reconciliation in South Africa: Did the TRC Deliver?* (2008) 241, 249. The authors continue: "There is little in the way of a comprehensive, in-depth analytical effort to characterize apartheid as a system rather than as an idea or an ideology ... [T]he commission failed to link the structural dynamics of the apartheid system to the [individual] abuses" on which it focused. See also R Duthie, "Toward a Development-Sensitive Approach to Transitional Justice" (2009) 2(3) *International Journal of Transitional Justice* 292, 305.
- 24 For example, legislation creating a truth commission to study a recently ended civil war could instruct the commission specifically to consider "the impact of prejudice against traditionally disadvantaged ethnic groups on the outbreak, nature, severity, impact and duration" of violence.
- 25 Sierra Leone TRC, above n 22, vol. 2, ch. 3, para. 342.
- 26 *Ibid* vol. 2, ch. 3, para. 157.
- 27 Commission for Reception, Truth and Reconciliation in East Timor (CAVR), *Chega!* (2006) pt. 11, paras. 4.1.5, 4.1.8.
- 28 Sierra Leone TRC, above n 22, vol. 2, ch. 2, para. 439.
- 29 *Ibid* vol. 2, ch. 3, para. 168.
- 30 *Ibid* vol. 2, ch. 3, paras. 178, 181.
- 31 CAVR, above n 27, pt. 11, para. 5.3.3.
- 32 See Section 1.3.
- 33 This prong of the definition requires that the reform or initiative *aim* to empower, not that it succeeds in practice. It is nonetheless worth noting that material reparations to individuals can have an empowering effect: for example, greater financial resources generally translate into increased influence over one's life conditions, society and government. The impact on particular communities can be more profound: "A judicious combination of individual and collective reparations...[may] help rebalance power at the local level by altering the dynamic between victims and the local power structure." N Roht-Arriaza and K Orlovsky, "Reparations and Development" in P de Greiff and R Duthie (eds), *Transitional Justice and Development: Making Connections* (2009) 194.
- 34 See J O'Connell, "Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?" (2005) 46(2) *Harvard Journal of International Law* 295, 306-16, available at <<http://www.harvardilj.org/attach.php?id=41>> at 1 November 2009.
- 35 CAVR, above n 27, pt. 11, para. 12.6. A further definitional wrinkle stems from the question of whether a reparations program's purpose is to aid victims specifically because they are disadvantaged. If not, then the program would technically fall outside this paper's definition of legal empowerment. (It would resemble the hypothetical law that was intended to empower all citizens, including those who happened to be poor. See above n 10.) This paper generally conceives of individuals or groups as "disadvantaged" in comparison with others at the same time. To the extent that the creation of reparations programs is driven by fact that victims have acute needs in the present – and this is probably a significant factor in many cases – those programs are intended to benefit a disadvantaged group as such and thus fall within this paper's definition of legal empowerment. However, the concept of reparations arises from the principle that those who are unjustly harmed should be restored to their position before the injustice. Reparations programs therefore consider the disadvantage a victim suffers *compared to herself at an earlier time*, i.e., before the human rights violation. One could refine the definition of legal empowerment offered in Section 1.3 to include or exclude efforts that aim to empower people who are disadvantaged in this sense. If one excluded them, then reparations programs would not qualify as legal empowerment if they had been motivated primarily by the victims' individual losses, rather than their post-transition need. It is important to note that the factors leading a government to enact a reparations program may diverge from the principles it cites to justify the program. For example, a government could be moved to create a reparations program by victims' current needs, yet portray it as redress for the harm they had unjustly suffered from the predecessor regime's human rights violations.
- 36 This is one of the characteristics of especially promising legal empowerment efforts identified at the end of Section 1.3 above.
- 37 The fora may arise spontaneously in individual communities, as in Sierra Leone, or be created systematically by the state as a transitional justice program, as in East Timor. This Section focuses on state-created fora, because they are designed and implemented through a more-or-less centralized policy process that legal empowerment advocates may be able to influence. Rwanda's gacaca courts resemble these community-level fora and have been touted by some observers as models of "restorative justice". However, fundamental aspects of the courts' design and implementation reflect the government's tight control of the population and undermine their potential to empower victims, perpetrators or their communities. The ruling Rwandan Patriotic Front has excluded mass atrocities perpetrated by its own forces from the gacaca courts' jurisdiction. The available evidence suggests that these courts have brought little comfort to victims or reconciliation to communities. Indeed, the government has failed to protect victims who

testify and some have been killed. Rather than clearing the country's backlog of 100,000 genocide-related cases, the gacaca courts have generated allegations against 600,000 more potential defendants. See B Ingelaere, 'The gacaca courts in Rwanda' in L Huysse and M Salter (eds), *Traditional Justice and Reconciliation after Violent Conflict* (2008) 42. The gacaca courts are so unpopular in many places that the government has resorted to threats to compel members of the community to attend the proceedings. Ibid 49.

- 38 Addressing these problems is their main purpose, so they satisfy the requirement that the empowering impact be intended. See Section 1.3 above (defining legal empowerment).
- 39 This account of the CRP relies on CAVR, above n 27, pt. 9, and Judicial Systems Monitoring Program, *Unfulfilled Expectations: Community Views on CAVR's Community Reconciliation Process* (2004) 11-12, available at <[http://www.jsmp.minihub.org/Reports/s/Other%20Reports/CAVR_%20LIA/cavr_evaluation\(e\).pdf](http://www.jsmp.minihub.org/Reports/s/Other%20Reports/CAVR_%20LIA/cavr_evaluation(e).pdf)> at 8 November 2009.
- 40 CAVR, above n 27, pt. 9, table 3.
- 41 See *ibid*.
- 42 CAVR, above n 27, pt. 9, para. 133.
- 43 The Judicial Systems Monitoring Program report, which makes this observation, does not clarify whether village chiefs were generally members of the panels or expressed their views as members of the public.
- 44 This impact has not been demonstrated by compelling evidence in any particular case, but may nonetheless exist. Several factors make it difficult to assess. Any shift in political culture could take decades, yet most transitions in societies pervaded by impunity have occurred relatively recently. Even such a shift were apparent, it would be difficult to determine its causes.
- 45 These cases suggest that law may sometimes be merely the form taken by an empowering process that is in fact driven by other factors, such as battlefield success or long-term shifts in public attitudes. Where law is not a significant part of the strategy for certain change, the change could not constitute "legal empowerment" as that term is defined in Section 1.3 above. The movements for democracy in South Africa and independence for Kosovo did not rely primarily on law, but the proponents of both made significant use of it. For example, apartheid opponents secured legal restrictions on

the operation of U.S. and European businesses in South Africa, while Kosovars had to argue that international law permitted them to secede from Serbia. See Peterson Institute for International Economics, Case 62-2 (UN v South Africa) and Case 85-1 (US, Commonwealth v South Africa), *Case Studies in Sanctions and Terrorism*, available at <<http://www.iese.com/research/topics/sanctions/southafrica.cfm>> at 8 November 2009; C J Borgen, 'Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition' (2008) 12(2) *ASIL Insights* <<http://www.asil.org/insights080229.cfm>> at 8 November 2009.

- 46 *Comprehensive Peace Accord Concluded between the Government of Nepal and The Communist Party of Nepal (Maoist)* (2006) art. 3.5, available at <http://www.peace.gov.np/admin/doc/CPA_eng-ver-corrected.pdf> at 8 November 2009.
- 47 Government of Guatemala, Unidad Revolucionaria Nacional Guatemalteca, and United Nations, *Agreement on Identity and Rights of Indigenous Peoples* (1995) arts. II(A)(2)(d), III(A)(2)(e), available at <http://www.usip.org/files/file/resources/collections/peace_agreements/gu_at_950331.pdf> at 8 November 2009.
- 48 Government of El Salvador and Farabundo Martí National Liberation Front, *Peace Agreement* (1992) ch. 5, art. 6(C), available at <<http://www.usip.org/resources/peace-agreements-el-salvador>> at 8 November 2009.
- 49 *Comprehensive Peace Accord*, above n 46, art. 3.10.
- 50 See Arbour, above n 7, 22; A de Bremond, 'The Politics of Peace and Resettlement through El Salvador's Land Transfer Programme: Caught between the State and the Market' (2007) 28(8) *Third World Quarterly* 1537.
- 51 For example, the government of Guyana enacted a law to combat human trafficking under pressure from the United States Government. Of course, outside pressure can be inappropriate, if it infringes on national sovereignty, or counterproductive, if it provokes a backlash against reform.
- 52 See V Levin and D Dollar, *The Forgotten States: Aid Volumes and Volatility in Difficult Partnership Countries (1992-2002)*, Summary Paper for the Development Assistance Committee, Organisation for Economic Cooperation and Development (DAC-OECD) Learning and Advisory Process on

Difficult Partnerships (2005) 14-15, available at <<http://siteresources.worldbank.org/INTLICUSSPANISH/Resources/34687926.pdf>> at 8 November 2009.

- 53 USAID, 2007 *Budget: Ukraine* <<http://www.usaid.gov/policy/budget/cbj2007/ee/ua.html>> at 10 August 2009. The pattern is not universal: USAID assistance to Georgia actually fell 17 percent in the first year of Mikhail Saakashvili's presidency, even though the Agency later described its goals as supporting democratic reform and economic development under his administration. USAID, 2006 *Georgia Program Profile* 2, 4 <http://www.usaid.gov/policy/budget/cbj2006/ee/pdf/ge_complete05.pdf> at 10 August 2009.
- 54 See Dan Manning, *Supporting Stability and Justice: A Case Study of NGO Legal Services in Post-conflict Bosnia-Herzegovina*, International Development Law Organization Legal Empowerment Working Paper No. 1 (2009) 3-4.
- 55 World Bank, *Project Profiles: Improving Access to Justice in Guatemala: Judicial Reform Project* <<http://www.worldbank.org/gt>> at 10 August 2009.
- 56 *Ibid*. The program included 177 justices of the peace, who served a para-judicial function, and 25 mediation centers that provided services in indigenous languages.
- 57 Except where otherwise sourced, this discussion and analysis of the CEP relies on T Hohe, "Local Governance after Conflict: Community Empowerment in East Timor" (2004) 1(3) *Journal of Peacebuilding and Development* 45 and S Ospina and T Hohe, *Traditional Power Structures and Local Governance in East Timor: A Case Study of the Community Empowerment Project*, Graduate Institute of Development Studies (2002), available at <http://www.graduateinstitute.ch/webdav/site/development/shared/development/362/itineraires%20IUED/IUED_EC5_Ospina_Timor.pdf> at 10 August 2009. Ospina and Hohe were independent anthropologists contracted to evaluate the CEP for the World Bank.
- 58 Hohe, above n 57, 48.
- 59 *Ibid*.
- 60 See World Bank, *Timor-Leste: Project Performance Assessment Report* (2006), para. 3.31 <http://www-wds.worldbank.org/external/default/WDSContentServer/WDS/IB/2006/08/10/000310607_20060810115713/Rendered/PDF/36590.pdf> at 10 August

- 2009 (stating that the councils were no longer functioning).
- 61 Ospina and Hohe, above n 57, 114.
- 62 See *ibid* 82-85.
- 63 Legal empowerment may support transitional justice in other ways as well. A legal empowerment project may be a valuable component of a reparations package if it is directed at victims. A legal aid organization may help reconcile opposing groups if it promotes solutions that people on both sides consider fair.
- 64 The causes of conflict are complex and vary by context. Social scientists vigorously debate the relative importance of poverty, weak state institutions, corruption, ethnic tensions, natural resource shortages and other factors. See, for example, E Wayne Nafziger, F Stewart and R Väyrynen (eds), *War, Hunger, and Displacement: The Origins of Humanitarian Emergencies* (2000); P Collier et al, *Breaking the Conflict Trap: Civil War and Development Policy* (2003). The claim made here is modest: that in some contexts, disempowerment contributes to the outbreak, continuation and/or brutality of violent conflict.
- 65 L J Laplante, "On the Indivisibility of Rights: Truth Commissions, Reparations, and the Right to Development" (2007) 10 *Yale Human Rights and Development Law Journal* 141, 154 (quoting TRC of Peru).
- 66 TRC of Peru, above n 20, para. 32; see also *ibid* paras. 22-23.
- 67 See TRC of Sierra Leone, above n 22, vol. 2, ch. 2, para. 141 ("[M]any young men joined the [rebel Revolutionary United Front] voluntarily because they were disaffected."); *ibid* vol. 3B, ch. 5, para. 20.
- 68 Except where otherwise sourced, the facts about Sierra Leone in this Section are synthesized from JP Chauveau and P Richards, "West African Insurgencies in Agrarian Perspective: Côte d'Ivoire and Sierra Leone Compared" (2008) 8(4) *Journal of Agrarian Change* 515; P Dale, *Access to Justice in Sierra Leone: A Review of the Literature*, World Bank Justice for the Poor Program (2007) 7-19; R Fanthorpe, "On the Limits of Liberal Peace: Chiefs and Democratic Decentralization in Post-War Sierra Leone" (2006) 105 *African Affairs* 27; and V Maru, "Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide" (2006) 31 *Yale Journal of International Law* 427, 434-40.
- 69 M Humphreys and J M Weinstein, *What the Fighters Say: A Survey of Ex-Combatants in Sierra Leone*, Columbia University Center on Globalization and Sustainable Development Working Paper No. 20 (2004) 2.
- 70 *Ibid* 27. These "bush wives" and husbands generally suffered terribly, in myriad ways. See Human Rights Watch, "We'll Kill You If You Cry": *Sexual Violence in the Sierra Leone Conflict* (2003) 42-45, 50-53.
- 71 This case study of Timap is based primarily on Maru, above n 69, supplemented by Lotta Teale, 'An Evaluation of the Way that Paralegals at the Timap Programme in Magburaka, Sierra Leone, Deal with Family Cases', unpublished report funded by Family Law Association of England and Wales (2007), available at <<http://www.timapforjustice.org/news/>> at 10 August 2009. This paper also draws on the author's own experience helping design Timap in 2002 and 2003, when he served as a Yale Law School/Open Society Justice Initiative Resident Fellow, based in Freetown. Maru's invaluable article combines examples of Timap's work on particular cases with analysis of its method and relevance for other countries. It is available at <http://www.yale.edu/yjil/PDFs/vol_31/Maru.pdf>.
- 72 Maru, above n 68, 442.
- 73 See *ibid* 464.
- 74 On one occasion, a corrupt official demanded a bribe for seed-rice to which a particular village was entitled. When the village leaders returned with a Timap paralegal, the words "human rights" on the paralegal's identity card caused the official to "trembl[e]" and he quickly backed down. *Ibid* 451.
- 75 The Justice Initiative is now working with the government of Sierra Leone to explore whether Timap can serve as the model for a national legal services program that features paralegals backed by lawyers.
- 76 See J Carter, "Reconstructing the Rule of Law: Post-Conflict Liberia" (2008) 30(3) *Harvard International Review* 14, 17.
- 77 They are not, of course, panaceas. Keeping the peace in Sierra Leone so far has required efforts on a wide range of fronts by Sierra Leoneans and foreign supporters, such as job training for demobilized combatants and an enormous UN peacekeeping force. See J O'Connell, "Here Interest Meets Humanity: How to End the War and Support Reconstruction in Liberia, and the Case for Modest American Leadership" (2004) 17 *Harvard Human Rights Journal* 207, 218-31.
- 78 See, for example, Mani, above n 7.
- 79 Although the author contributed to this process (see above n 71), this account of the vision underlying Timap's work is his own interpretation and has not been endorsed by the Open Society Justice Initiative or Timap.
- 80 This vision shares much with the analysis advanced by anthropologist James C. Scott. See J C Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (1998). It contrasts with a top-down approach that aims for quick, dramatic change and has – in combination with other factors – produced failures such as the first U.S. efforts to create democracy in Iraq after 2003 and the collectivization of agriculture in the former Soviet Union.
- 81 Maru, above n 68, 444.

Supporting stability and justice: a case study of NGO legal services in post-conflict Bosnia-Herzegovina

Dan Manning*

Executive Summary

The international community struggles with the challenge of repairing the harms that haunt post-conflict societies, including restoring the homes, property and other kinds of well-being of traumatized populations. The work of Vasa Prava, a nongovernmental organization (NGO) that has helped heal such wounds in Bosnia and Herzegovina by providing legal services to the displaced and disadvantaged, constitutes a case study of success in a difficult context.

Thirteen years after the Dayton Peace Agreement that ended the war in Bosnia and Herzegovina, the future of the country remains uncertain. While a return to armed conflict seems remote, the country remains divided on ethnic lines and the devastating impact of the war remains palpable. But much has been accomplished as well. Over two and a half million people were forced to leave their homes during the war. By 2007 over a million had been able to return home and many of the others had established new lives elsewhere. Likewise the war ruined the Bosnian economy, but the recovery process is underway. The international community retains ultimate control over the Bosnian government, through the Office of the High Representative, but sufficient progress has been made in restoring government to enable the signing of a Stabilization and Association Agreement in June 2008, the first major step toward joining the European Union.

Progress has been possible through the work of Bosnians themselves and with major support from the international community. This article argues that a relatively small legal aid NGO – fewer than 50 total staff throughout the country as of 2008 – the Association Vaša Prava BiH (“Your Rights”), is making a significant contribution toward achieving stability and prosperity through its advocacy on behalf of poor and disenfranchised Bosnians. Vaša Prava’s work directly addresses the legacy of the war by dealing with problems with housing, income, health care and social services. It promotes individual human rights, helps to build a legal system that holds government to account and advocates for systemic changes to address real problems. It is helping to build an active civil society and a culture of rights. Perhaps most fundamentally, it is playing a vital role in making recovery-oriented legal reforms a reality for Bosnia’s disadvantaged, dispossessed and disenfranchised populations, thus helping to rebuild their lives and their country. Obviously Vasa Prava alone cannot determine the future for BiH, but without it the risk of failure would be greater.

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Bosnia is not the only country struggling with its past. While each country has its own unique history, the lessons learned from Vaša Prava’s work suggest the need for international support for similar organizations wherever rebuilding efforts are underway. More broadly, the Vasa Prava experience shows that legal advice, representation and advocacy can hold governments to account for meeting the needs poor and disenfranchised. That lesson applies everywhere.

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Introduction

The international community struggles with the challenge of repairing the harms that haunt post-conflict societies, including restoring the homes, property and well-being of traumatized populations. The work of Vaša Prava, a non-governmental organization (NGO) that has helped heal such wounds in Bosnia-Herzegovina by providing legal services to the displaced and disadvantaged, constitutes a case study of success in a difficult context.

The future of Bosnia and Herzegovina remains the subject of international speculation. On 2 June 2006 *The Times* of London published an article entitled “Calls For Freedom Make The Jigsaw Of Europe More Complicated Than Ever”, pointing out that 18 new countries had been created in Europe since 1989 and speculating that:

In the Balkans, Montenegro’s independence drive is likely to be followed by Kosovo, a predominantly ethnic Albanian province of Serbia. That could spark fresh moves by the ethnic Serb Republika Srpska to break away from Bosnia, and Herceg-Bosna’s Croats to join Croatia.¹

The article included a map of newly independent countries as of 2006 and, under the caption “2020? Ones That Could Be Next”, a map in which Bosnia and Herzegovina is replaced by Republika Srpska and Herceg-Bosna. In other words, the goal of the people who started the war in 1992 to create ethnic states through ethnic cleansing would be achieved. More than two years after *The Times* speculation, the future of Bosnia and Herzegovina remains uncertain.

The Constitution of Bosnia and Herzegovina,² which was adopted as part of the Dayton Peace Agreement (DPA),³ recognized Bosniacs, Croats and Serbs as “constituent peoples” and divided the country into two officially designated entities: the Republika Srpska (RS) and the Federation of Bosnia and Herzegovina (the Federation).⁴ The RS is overwhelmingly Serb, and the Federation is predominantly Bosniac with a significant number of Croats.⁵ The DPA also created the Office of the High Representative and EU Special Representative (OHR), an international institution that oversees the implementation of the civilian aspects of the peace agreement.⁶

In his most recent report to the Peace Implementation Council,⁷ the High Representative emphasized that while BiH had taken an important step toward European integration by signing a Stabilization and Association Agreement,⁸

Regrettably, this important step has not led to a change in the way politics are conducted in Bosnia and Herzegovina. Instead, nationalist, anti-Dayton rhetoric challenging the sovereignty, territorial integrity and constitutional order of Bosnia and Herzegovina, as well as the authority of the High Representative and the Steering Board of the Peace Implementation Council, have continued to dominate politics in Bosnia and Herzegovina. Of particular note are the ongoing attacks by the Republika Srpska government against State institutions, competencies and laws. Together with provocative statements from the Bosniac side questioning the right of the Republika Srpska to exist, this has served to further undermine inter-ethnic trust, creating a cycle where it is more and more difficult for the country’s political leaders to meet each other half way so that they may make the decisions needed to take the country forward.⁹

As the High Representative’s report shows, although the war ended more than 14 years ago, the future of the country is far from certain. No one expects a return to the killing and ethnic cleansing, and most observers consider the break-up of BiH unlikely. But there is no guarantee that the country is headed towards stability and prosperity in the near future. The legacy of the war is everywhere: the missing and the dead have not been fully accounted for; many homes have still not been rebuilt; segregation and discrimination are rampant; unemployment is

widespread; the Government is bloated, fragmented and ineffective; and politics are dominated by nationalist gridlock.

Although there is a possibility that widespread recognition of Kosovo's independence could precipitate the break-up of BiH,¹⁰ it seems more likely that there will be either steady, slow progress or steady, slow decline. The formula for progress has been spelled out repeatedly. In essence it requires building the economy, respecting human rights, building democratic institutions and making government truly responsive to all citizens. Decline will come if nothing is done to change the current situation.

This article argues that a relatively small legal aid NGO – it had fewer than 50 staff throughout the country as of 2008 – the Association Vaša Prava BiH (“Your Rights”) is making a significant contribution to achieving stability and prosperity through its advocacy on behalf of poor and disenfranchised Bosnians. Vaša Prava's work directly addresses the legacy of the war by dealing with problems with housing, income, health care and social services. It promotes individual human rights, helps to build a legal system that holds the Government to account and advocates for systemic changes to address real problems. It is helping to build an active civil society and a culture of rights. Perhaps most fundamentally, it is playing a vital role in making recovery-oriented legal reforms a reality for Bosnia's disadvantaged, dispossessed and disenfranchised populations, thus helping to rebuild their lives and their country. Obviously Vaša Prava alone cannot determine the future for BiH, but without it the risk of failure would be greater.

1. Vaša Prava: a brief background

Vaša Prava is a domestic NGO that provides free legal assistance on civil matters for refugees, displaced people and other poor and disadvantaged Bosniacs. Vaša Prava traces its roots back to the Legal Aid and Information Center (LAIC) network created by the Office of the United Nations High Commissioner for Refugees (UNHCR) in 1996, soon after the end of the war. At its largest, LAIC had 60 offices in the country providing community legal education, legal advice, assistance in preparing documents, and representation before administrative agencies and courts to enable refugees and displaced persons to re-establish their lives in their communities. At first, LAIC offices were run by international NGOs using local staff. Between 1996 and 2002, LAIC created a smaller number of larger offices combined with outreach teams to handle more complex matters more efficiently. By 2003, the LAIC network had become an entirely Bosnian operation. A group of Bosnian NGOs created Vaša Prava as a new Bosnian NGO and took over operation of the system.¹¹

As of late 2008, Vaša Prava had about 50 staff members, 16 offices and 60 mobile teams serving all municipalities. It provides legal advice and representation in court, conducts public awareness sessions, gives media presentations, trains local officials, prepares brochures on legal issues, operates a website and publishes a magazine. Since its founding as the LAIC network in 1996, Vaša Prava has assisted over 340,000 people with legal problems concerning housing, employment, education, health care, asylum and many other issues.

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The main goals of Vaša Prava are to:

- support the rule of law and reinforce civil society;
- provide free legal assistance and information;
- facilitate the right of all refugees and displaced persons to return freely to their pre-war homes;
- raise public awareness on civil, socio-economic, cultural and human rights, and promote access to justice for the enjoyment of rights;
- monitor human rights violations;

- serve as a resource for individuals, communities and the nation; and
- become a nationally and regionally recognized legal aid network known for excellence, non-partisan service delivery, advocacy and public education.¹²

2. The situation in Bosnia and Herzegovina

Vaša Prava's importance is best understood in light of the legacy of the war and the current economic, social and political situation.

2.1 The impact of the 1992-1995 War

At least 100,000 people were killed during the war.¹³ The infamous massacre at Srebrenica at which Serb paramilitary forces killed an estimated 7,000 Bosnian Muslim men and boys is the most notorious example of the death and destruction that ravaged the country. And there are widows, widowers, orphans and elderly parents throughout BiH whose family members are gone. The emotional and economic impact of these deaths has devastated the lives of hundreds of thousands of people and deeply wounded the entire country.

According to the 1991 census, Bosnia had a population of 4,354,911. Approximately 2.5 million people, almost 60 percent of the population, were forced to leave their homes during the war: 1.2 million fled to other countries, and 1.3 million were displaced internally. Hundreds of thousands of people spent years living in unsafe, unsanitary and overcrowded public buildings.¹⁴

Half a million homes were damaged or destroyed during the war, out of a total of 1.3 million, causing damage estimated at US\$4 billion.¹⁵ The destruction was widespread and part of a deliberate campaign to drive people from their communities. Roads, water systems, telephone lines and power lines were all attacked. The war ravaged the social as well as the physical environment: in Zvornik, for example, "...expulsions were followed by the destruction of houses, religious sites and community buildings in an effort to render return impossible ... The destruction of cultural objects was even more thorough: all 26 mosques and some other property belonging to the Islamic community in Zvornik were destroyed."¹⁶ Similar destruction occurred all over the country.

By the end of the war in 1995, whole regions were in fact ethnically cleansed. Before the war there had been a relatively large degree of residential and social integration. In what is now the RS, the population was 55 percent Serb, 28 percent Bosniac, 9 percent Croat, 5 percent who self-identified as Yugoslav and 3 percent other. In what is now the Federation, the population was 52 percent Bosniac, 22 percent Croat, 18 percent Serb, 6 percent Yugoslav and 3 percent other. The war changed all that: estimates made in 1997, two years after the end of the war, showed that 97 percent of the people in the RS were Bosnian Serbs and 73 percent in the Federation were Bosniacs, with Croats mostly segregated in their own regions.¹⁷

2.2 Rebuilding and return

The parties to the DPA were required to "...create in their territories the political, economic, and social conditions conducive to the voluntary return and harmonious reintegration of refugees and displaced persons, without preference for any particular group."¹⁸ In effect, the two Entities were obliged to reverse the effects of ethnic cleansing. But there were enormous obstacles: houses had been taken over by the "victors" in particular regions; property had been damaged or destroyed, and funds were needed to rebuild; there were no jobs; there was no guarantee of safety. Legal obstacles had been created because the governments had declared property abandoned and given it to members of the new "majority."

Despite these obstacles, by December 2007 over 1 million refugees and internally displaced persons (IDPs) had been recorded as having recovered their pre-war homes. These included

465,733 “minority” returns and 559,278 “majority” returns. Approximately 739,000 people returned to the Federation and 264,000 to the RS. The return process has since slowed substantially: from over 100,000 returns in 2002, the number fell to less than 7,000 in 2007.¹⁹ Although the official figures on returns represent a significant accomplishment, they do not mean that the effects of ethnic cleansing have been reversed. At least 1 million people have not returned to their homes. In 2008 the State Ministry for Human Rights and Refugees (MHRR) of Bosnia estimated that the number of people registered as applicants for the status of an IDP was 125,000. In view of the limited number of returns in recent years the MHRR felt that that this figure was likely to remain stable.²⁰ A significant number of the returnees are elderly, and many use their homes only on a part-time basis. There have been numerous sales of “returned” property, often at reduced prices.²¹

Those who have returned face continuing discrimination. Many are unable to obtain electricity, gas or telephone services. Destroyed water pipes to minority areas have not been repaired. Illegally constructed buildings prevent the use of property. Roads have not been repaired. The Helsinki Committee for Human Rights in Bosnia and Herzegovina noted that: “Disharmonized systems in the field of health care, pension funds, the existence of different school curricula, difference in the entity and cantonal legislation, the large number of subordinate decisions and legislation bring returnees in all the parts of the country into a discriminatory position.”²²

2.3 Poverty, employment and social welfare

The United Nations Development Programme (UNDP) estimates that the poverty rate may be as high as 24 percent,²³ but the poverty rate does not fully describe the vulnerability of BiH residents. On the basis of the World Bank Living Standards Measurement Survey, it has been estimated that “...72 percent of adults in BiH are poor in some aspect of life: material consumption, education, health care, employment, housing, or property rights.” In BiH the poor “...are also seriously affected by the feeling of powerlessness and inability to make their voices heard in communication either with other members of the community or with the authorities. Even given the extensive decentralization of the resources distribution system, the poor frequently have difficulty gaining access to the institutions responsible for the decisions and rulings that have a significant impact on their lives.”²⁴

Estimates of unemployment range from 20 percent to 40 percent. In addition, “...endemic discrimination against members of minority communities continues to disproportionately affect returnees, denying them equal access to employment. Without employment many returnees are unable to ensure or maintain an adequate standard of living and, facing destitution, many either decide to go back to their area of displacement, or commute there to continue working.”²⁵

The social assistance system is “...incapable of providing for the large numbers of the poor.”²⁶ Before the war, the World Bank described the social protection system as “very highly developed”; after the war it was fragmented and localized, lacking any coordinated social policy. Once basic international humanitarian assistance had ended, deep-rooted problems emerged. Because the financing of social assistance is not related to policy or implementation, “[t]he system thus promotes the creation of substantial but unrealizable social rights, completely disconnected from the revenue base...[leading to] fundamental inequities in the implementation of rights and entitlements...”²⁷

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2.4 Government, politics and discrimination

An investigation by UNDP found much wrong with governance, in terms of systems and performance, as the following quotations show:

- “BiH citizens still face a raft of discriminatory practices which circumscribe access to basic services and weaken the wider democratic process.”

- “[There is] routine disregard and patchy application of the rule of law. Citizens are deprived of legal certainty and equal treatment in the enforcement of regulations and administrative decisions.”
- “Portions of the population are denied decent educational and employment opportunities and access to a variety of other entitlements is often limited. This situation both threatens to undermine BiH’s human development inheritance, and the political settlement upon which peace was secured in 1995.”
- “The political and administrative framework created by the DPA has failed to bring effective solutions in many domains.”
- “BiH is still a fragmented country split along ethnic lines and burdened with a huge and ineffective public administration system.”
- “The weak Bosnian economy and its people of less than 4 million, have to support 14 governments, 150 ministries, 200 ministers and 146 local governments. This administrative structure results in a high level of complexity and a huge redundant bureaucracy.”
- “BiH has one of the highest numbers of administrative workers per capita in the region, yet at the same time the public sector does not provide a sufficient or effective service to citizens.”²⁸

As a result local government is dominated by ethnic interests, leading to the discriminatory denial of basic services. A report by the UNDP Rights-Based Municipal Assessment and Planning Project (RMAP) found “...favoritism toward the ethnic majority ... when it comes to allocating financial resources [and] property rights. This is direct discrimination against those groups that are not in favor, in terms of a whole range of rights.”²⁹

An assessment by the Office of the United Nations High Commissioner for Human Rights (OHCHR) in December 2005 describes the general climate:

Discrimination on the basis of gender, age, ethnicity, religion and social status is still widespread. Such discrimination is caused by a number of obstacles, i.e. the constitutional framework, inadequate laws, lack of implementation of laws, lack of financial resources, unjust allocations of existing financial resources, lack of political will, lack of awareness among citizens of their rights, lack of government accountability and overall insensitivity to human rights issues.³⁰

2.5 Moving forward

A report by the Secretary-General of the United Nations on justice in post-conflict countries laid out the challenges facing Bosnia: “Peace and stability can only prevail if the population perceives that politically charged issues, such as ethnic discrimination, unequal distribution of wealth and social services, abuse of power, denial of the right to property or citizenship and territorial disputes between States, can be addressed in a legitimate and fair manner.”³¹

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Admission to the European Union (EU) has become the shorthand way of describing what many people want Bosnia to become.³² To join the EU, the country must achieve “...stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.”³³ In 2003, a European Commission Feasibility Report listed 16 priorities that must be addressed before EU accession negotiations could begin, including more effective governance, more effective public administration, an effective judiciary and effective human rights provisions.³⁴ Given the enduring legacy of the war and the multitude of economic, social and political challenges ahead, what difference can a relatively small legal aid NGO make? This article argues that Vaša Prava is a vital, and perhaps necessary, part of the solution to the country’s problems. In view of the failure of political leadership, creating a culture of rights in which all citizens are treated equally by a responsive government can only come about through active involvement by citizens themselves. For poor and marginalized people, which in BiH includes a substantial portion of the population, active involvement is hard to achieve without assistance. Vaša Prava provides that assistance.

3. Vaša Prava's work

The core functions of Vaša Prava are to educate people about their rights, provide advice and representation, and work for systemic change on behalf of all disadvantaged people in BiH. Vaša Prava is the only legal services organization operating in the country. Most of its work involves providing direct legal assistance for individuals, which provides a significant amount of information about the problems people face. Vaša Prava clients are the poorest, most disenfranchised and excluded members of Bosnian society.³⁵

In 2005, Vaša Prava had approximately 80 employees in 16 offices throughout the country. Outreach was done at over 120 locations. Financial limitations reduced the staff to 36 in 9 offices in 2009, with 50 mobile outreach locations. Despite becoming smaller since then, Vaša Prava has continued to provide services in all areas of BiH.

In 2007, Vaša Prava assisted 27,556 people, of whom over 15,000 were new clients. Of the new clients 3,420 were IDPs, 4,222 were returnees, 754 were refugees, 6,555 were vulnerable local residents and 169 were in other categories. Vaša Prava handled 35,686 cases, including legal advice and preparation of documents in 18,870 cases, legal representation in administrative proceedings in 7,892 cases, legal representation in court in 7,451 cases, legal representation before human rights institutions in 368 cases, and other types of actions in 1,105 cases.³⁶ Civil legal assistance is provided for poor and marginalized people in almost all areas of concern, including property rights, utilities, family and marital rights, pensions, labor rights, and social welfare.

Vaša Prava's significance comes as much from the way it provides services as the type of cases it handles. It does everything from publishing brochures to presenting cases to the European Court of Human Rights. Much of its work involves letting people know of their rights. The idea that people have rights and can actually do things to enforce them is a new concept for many in Bosnia. Simply getting the word out is an important task. Vaša Prava lawyers appear constantly on radio and TV. Topics have included labor laws, utility services and bills, illegal construction, temporary refugee status, the freedom of access to Information law, veterans' benefits, disability benefits, administrative appeal procedures, civilian victims of war and gender-based violence. Similar information is distributed through brochures and leaflets, *Vaša Prava Magazine* and the website.

Nearly 7,000 people attended 661 Vaša Prava workshops and information sessions in 2007. The discussions at these workshops were practical: how to maintain your status as a refugee. How to apply for medical care and social welfare benefits. How to get your utility service restored. How to file an administrative appeal. Because Vaša Prava works throughout the country, it is able to tailor its public education efforts to the needs of the people it serves.

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The goals of the outreach are to let people know their rights so that they can exercise them on their own, and to let people know that Vaša Prava is there to assist them if they need help. Help can take the form of a simple advice session, or assistance in filing out a form. When more is needed, Vaša Prava will actually take on the case and do whatever is necessary from calling a local official to filing a case in court. When systemic problems are identified, advocacy can take the form of "test case" lawsuits intended to change laws or practices, negotiating with government officials or lobbying for legislative changes.

All these services complement and build on one another. Vaša Prava is able to do systemic work because it sees patterns of problems through its many individual contacts. It can provide effective training because of its extensive experience with so many communities. In short, Vaša Prava uses the entire range of legal strategies to meet the needs of the poor and disadvantaged in BiH.

A review of the substantive work done by Vaša Prava and the LAIC network, its predecessor organization, shows their involvement in many of the critical issues facing BiH in its effort to achieve more effective governance.

3.1 Refugees and IDPs

In keeping with its humanitarian role in repatriating refugees and IDPs, UNHCR established the LAIC network "...to provide Bosnian refugees and displaced persons, as well as third-country asylum seekers and refugees, with information and advice on existing services and the enforcement of individual rights."³⁷ Throughout the existence of the LAIC network and in the first years of Vaša Prava's operations, virtually all the work focused on enabling refugees and IDPs to meet basic human needs.

3.2 Property repossession

One of the most critical and complicated issues in rebuilding BiH has been property repossession. Trying to undo the effects of the war and restore pre-war rights in a climate of unrelenting hostility and inadequate resources has been a colossal undertaking. Considering that by May 2006 over 1 million refugees and IDPs had recovered their pre-war homes, the degree of success has been remarkable, even if repossession of property has not always meant actually moving back home. Vaša Prava and the LAIC network played an essential role in this effort.

Restoration of legal rights to property was a necessary first step for people to return home. In October 2000, five major international organizations³⁸ adopted the Property Law Implementation Plan (PLIP) to ensure that all outstanding claims by refugees and displaced persons to repossess their properties were resolved. The intention was to create domestic legal procedures to apply the laws fairly. It treated property issues as a matter of the rule of law and respect for civil rights, not the subject of political contention.^{39,40}

Even after a proper legal framework had been established, huge obstacles remained. Nationalistic political leaders seeking to preserve their political bases resisted implementation of property laws. Local officials went to "...considerable lengths to prevent, hinder, disrupt and delay return..."⁴¹ and in any case most municipalities lacked the administrative capacity to process claims. On top of all this there was, and remains, a housing shortage in some areas.

PLIP addressed the problem through political intervention, capacity-building and the provision of housing assistance. Monitoring of actual implementation of property laws, determining how and why particular municipalities obstructed the laws, and taking necessary legal enforcement measures were essential. The LAIC network was in the best position to do detailed monitoring and enforcement because it was working with thousands of people seeking to get their homes back.

144 Many claims were denied for political reasons or because of misapplication of the laws. LAIC lawyers and advocates took such cases through the administrative and sometimes judicial dispute-resolution processes. Because the property laws are complex and the property ownership regime was being transformed from social to private ownership, municipal officials often did not know what to do. The LAIC staff provided training throughout the country. Getting the word out to refugees and IDPs was also important. Again, the centers were key players in the public information campaigns.

A typical LAIC case illustrates some of the barriers encountered:

N.R., a refugee, filed a request for property repossession in August 1998. Two years later she got a positive decision, which ordered the occupant of her apartment to vacate in 90 days. The temporary occupant refused to leave, even after a complaint to the Cantonal Ministry had resulted in an order to the municipal authorities to proceed with eviction within seven days. The municipal officials refused on the grounds that there was no

adequate alternative accommodation available. N.R. went to her local LAIC, which complained to the Federal administrative inspector. Again, no action was taken. Only after the case had been brought to the Municipal Court and an order had been issued in October 2002 requiring the police to evict did the temporary occupant finally decide to leave.⁴²

At the same time, LAIC offices provided information and advice for families needing alternative accommodation when faced with eviction. They held numerous public information sessions and distributed brochures explaining exactly what the eligibility requirements were and describing what actions disqualified people from receiving alternative accommodation. In country-wide surveys of conditions, they were able to identify the quantity and quality of available accommodation and document the practices of various municipalities.

As late as 2005, Vaša Prava was still devoting substantial efforts to restoration of property rights. Another case example serves to illustrate the need for sustained legal advocacy to solve the problems:

J.B. an elderly single individual, had obtained an apartment in Zenica in 1984. Having been forced out during the war, J.B. applied for return of her apartment in 1999. The local authorities denied her request on the grounds that her documentation was incomplete. She attempted an administrative appeal on her own and it took until 2002 for the first instance body to reject her claim. She then sought assistance from the legal aid office in Dobož. On behalf of J.B., the Vaša Prava lawyer requested that the competent ministry provide the required documentation, filed an appeal to the second instance administrative body, filed three complaints with the Federation Ombudsman and filed a complaint with the Federal Administration Inspector challenging the administrative appeal body's refusal to act on the appeal. Once a favorable decision had been obtained from the second instance body, the lawyer had to get the Ombudsman's office to intervene to require that the administrative officials be instructed to implement the decision. Finally, in July 2005, six years after the process had started, J.B. received the keys to her apartment.⁴³

The themes in the cases were always the same: administrative bodies made incorrect decisions, refused to hold hearings, refused to make decisions and/or refused to implement decisions of higher authorities. In order to get relief for their clients, the lawyers had to be fully aware of all the intricacies of the real property laws, know all about administrative procedure law and know what relief was available from the Ombudsman, the Federal inspectors and the courts. Getting property back required constant advocacy. Although the degree of success in property returns is primarily due to the international organizations that created the Property Law Implementation Plan, the plan could not have been executed without Vaša Prava and LAIC.

3.3 Reintegration into communities

Establishing legal ownership of a house or apartment and getting the wartime occupants out were critical steps to returning home, but it was rarely enough. Over 50 percent of the homes in the Federation and about 25 percent in the RS had been damaged during the war, and at least 5 percent in each Entity had been demolished; power lines, water pipes and roads had been destroyed.

But the biggest problem for hundreds of thousands of people was that they were trying to return to an area that had been ethnically cleansed. Labeled "minority returns", these people were trying to go back to places where they would face deep hatred and where municipal governments were controlled by the "majority".⁴⁴ In addition to the huge psychological problems of trying to live where they were not wanted, these returnees were the victims of discrimination in their efforts to get utilities restored, register as residents, enroll their children in school, establish the right to health care and social services and get approval to rebuild their homes.

The LAIC network and Vaša Prava took on all the problems encountered by people trying to return home, whether they were in the minority or the majority. A seemingly simple first step, registering as a resident, was often very difficult. People were required to register in the municipality to which they wanted to return in order to be eligible for essential benefits and services. But decisions about registration were hard to make because people risked losing assistance in their temporary settlements, only to encounter insurmountable barriers to returning to their former homes. There were also many problems in getting the required documents, often from hostile officials. Legal advice and advocacy were often required. Vaša Prava did many cases of this type.

Restoring electrical and water services was also crucial. The experience of M.J., an LAIC client from Ključ municipality, was typical. Although his house had been rebuilt, the electricity company, Elektrodistribucija, said he would have to pay the equivalent of well over €1,000 to get power lines run to his house. After some bargaining, he was told that if he installed the poles himself the company would run the cables. After he had done the work he was told he still had to pay a large amount of money, well beyond his means. It took intervention by LAIC to restore power to the entire village.⁴⁵

Having encountered many variations of the electricity problem, Vaša Prava took part in negotiations between the BiH Ministry for Refugees and Displaced Persons, the BiH Ministry of Energy and Public Enterprises and representatives of the international community on ways to restore power throughout the country. As with the property issues, the international organizations played the lead role, but because Vaša Prava had represented thousands of individual property owners, it was able to show patterns of discriminatory actions by the power companies. This information was essential in forcing an agreement to give returnees across BiH equal access to the electricity system, without having to pay for electricity meters or the labor cost of connections to their homes, and without being taxed for restoration of power. Since the memorandum of understanding was signed, Vaša Prava lawyers have been involved in implementing it, and often file complaints with the government ministries to ensure compliance with the agreement.⁴⁶

While the number of people who returned to their pre-war homes will not be known until there is a new census, it is certain that many people are back in their old communities.⁴⁷ That would not have happened without the promise in Annex 7 of the DPA and the strong backing of the international community; it also required the immensely practical education, advice and advocacy of LAIC and Vaša Prava.

4. Vaša Prava's expansion of services and populations served

146 From its establishment in 2003, Vaša Prava has continuously broadened its reach beyond refugees and IDPs. At the start, almost all of Vaša Prava's beneficiaries were refugees and IDPs; by 2007 close to half of those served were other vulnerable people. The categories of people now provided with free legal aid, except in criminal matters, include asylum seekers, human trafficking victims, refugees/recognized refugees, returnees, IDPs, stateless persons, persons under temporary admission, torture victims, prison camp survivors, persons under humanitarian residence, children without parental care, minorities, single parents, victims of domestic violence, and local vulnerable populations such as welfare beneficiaries, civilian victims of war, disabled war veterans and disabled peacetime military, unemployed persons, pensioners, and employees deprived of their labor rights.⁴⁸

The case breakdown for 2007 by type of service was: (i) labor rights – 19 percent; (ii) family and marital rights – 9 percent; (iii) pensions – 10 percent; (iv) personal property – 6 percent; (v) public documents – 6 percent; (vi) utilities – 9 percent; (vii) private property – 15 percent; (viii) social welfare – 7 percent; and (ix) other – 19 percent.

There is no reliable way to determine the number of people who would qualify for Vaša Prava's services, but it is certain that the organization can only provide direct services for a modest percentage of those in need.⁴⁹ To broaden its reach, Vaša Prava seeks to do its work in a strategic way by advocating for systemic changes through its representation of individuals. Strategic advocacy focuses on overall systems – the functioning of municipal government – and substantive issues such as pensions and social welfare programs.

4.1 Administrative justice

Discriminatory practices, disregard of the rule of law, ethnic fragmentation, and a complex and redundant bureaucracy extend to almost every encounter Bosnians have with their government. Officials ignore requests from citizens, fail to comply with deadlines, refuse to collect information required by law and refuse to respond to complaints from inspectors and ombudsmen. The administrative appeals system does not correct these problems, because first and second instance appeals bodies often do not issue decisions, first-instance bodies often ignore decisions of second-instance bodies, second-instance bodies often ignore court decisions and courts often send cases back to administrators without making decisions on the merits of the claim.

In general the legal framework for oversight and control of government functions is adequate, but in practice it has not worked. To address these problems, the United States Agency for International Development (USAID) funded the Administrative and Procedural Systems Reform Project. Vaša Prava played a central role in one component, the Administrative Justice Initiative. Working with the Center for Institutional Reform and the Informal Sector (IRIS),⁵⁰ Vaša Prava focused on the more than 40 municipalities covered by their offices in Sarajevo and Dobož. The immediate objective was to improve the way government officials resolved the multitude of administrative cases dealing with essential government benefits; the longer term objective was to change the way government functions in serving citizens throughout BiH.

Vaša Prava adopted a three-part strategy: (i) aggressive pursuit of individual cases; (ii) public awareness and education; and (iii) strategic advocacy. Individual cases were tracked to measure compliance with legal requirements, and appropriate interventions were made when violations were identified. Disciplinary and minor offence proceedings were initiated against offending officials. In some instances, damages actions were filed to recover compensation for harm suffered as a result of illegal practices. Vaša Prava lawyers regularly invoked the European Convention on Human Rights in seeking judicial relief from unlawful actions. The organization also conducted numerous seminars and training sessions for government officials to educate them about their responsibilities.

Recognizing that advocacy on behalf of individuals and educating the public and government officials was not enough, Vaša Prava broadened its reach by launching systemic advocacy campaigns to address problems with the "civilian war victims benefits program" and the pension system. The intention was to use these campaigns to develop an advocacy model to be applied to other issues.

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4.2 Civilian victims of war

The Civilian Victims of War program⁵¹ provides cash assistance, medical care and other services to surviving family members of civilians killed during the war and to civilians who became disabled because of the war. As a result of under-funding, maladministration and outright discrimination, the program falls far short of meeting its goals.

The case of S.S., a Vaša Prava client, shows one of the problems with the program:

S.S. and her family, all Bosniacs, lived in Dobož, now part of the Republika Srpska, before the war. Her husband was compelled to serve in a work squad for the RS army during

the war. He was killed in 1995. S.S. and her children had been forced to leave Doboj because they were Bosniacs. When she was finally able to return to Doboj in 2005, long after the end of the war, she applied for assistance under the civilian victims program. Her application was denied because under RS law she was required to apply within 6 months of her husband's death, an impossibility because there is no way a Bosniac could have returned to Doboj that soon after the war.⁵²

In addition to the deadlines encountered by S.S., there are many other barriers to receiving assistance: applications are ignored, excessive documentation is required, government departments do not produce the documents they have, appeals are never decided, corrupt officials demand bribes and so on. There is ample evidence of outright discrimination against members of the "wrong" ethnic groups who apply. Rigid documentation requirements provide no alternative methods of proof when documents were destroyed during the war. Funding is inadequate.

Clearly a case-by-case approach alone would not be sufficient. While continuing to do individual cases, Vaša Prava has embarked on a broader campaign. A publicity campaign, particularly through radio and TV appearances, has raised awareness of the issues. Vaša Prava has allied itself with several organizations concerned with the program such as the Landmine Survivors Network, which has many members seeking assistance. The publicity led to an invitation for Vaša Prava to participate in a legislative effort to reform the program. Members of the national legislature asked Vaša Prava to assist in drafting a statute that would (i) create uniform eligibility requirements and benefit levels throughout the country, (ii) remove control of the program from the Entities, (iii) provide adequate funding and (iv) establish fair procedures for administering the program. Although the changes have not yet been adopted, the fact that representatives of civilian victims are lobbying for amendments is significant in a country with no history of citizen involvement in the legislative process.

4.3 Pension contributions

There are serious problems with the pension system in BiH. The system uses payments for current workers to support current pensioners. The widespread failure of employers to pay contributions means there is not enough money to pay pensions, disability payments and related healthcare benefits. Armed with the information showing that employers regularly defaulted on their obligations, Vaša Prava began pressuring the pension authorities to enforce the employer contribution laws. The lawyers filed individual claims, initiated legal proceedings and brought media attention to the problem. This led to high level meetings between Vaša Prava lawyers and pension and tax officials, which in turn led to greater enforcement action. The Federation Pension Bureau began a media campaign to let employers know they were going to be taking legal measures to collect contributions. At the same time the Cantonal Court for Sarajevo issued rulings in several cases that required to the Employment Bureau to take action to ensure that beneficiaries' rights were protected.

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In 2005 the Constitutional Court issued a judgment holding that individual pensioners had standing to sue to enforce the right to pension contributions from employers. This provided Vaša Prava with another tool to use for their clients and enhanced their power in negotiating with government officials. Advocacy by Vaša Prava and increased public attention to the issue caused the RS Pension and Disability Insurance Fund to issue a formal public call to all joint stock companies to provide the data on contributions going back to 1998, with a goal of resolving outstanding pension and disability claims.

The pension contribution issue is far from resolved, but Vaša Prava has been able to assist many individuals in establishing their rights, has educated many more about what their rights are, has made significant changes to the behavior of government agencies that will help all pensioners and applicants for health, disability and unemployment assistance, and has raised the importance of the issue on the public agenda.

4.4 Asylum and trafficking

In 2004 Vaša Prava signed a protocol with the BiH Ministry of Security on provision of free legal aid to asylum seekers, persons with temporary resident status based on humanitarian grounds and victims of trafficking. In a statement that could apply to many areas of Vaša Prava's work, the Office to Monitor and Combat Trafficking in Persons of the United States Department of State commended their efforts on trafficking:

Vaša Prava is the only NGO providing pro bono legal assistance to victims of human trafficking in Bosnia and Herzegovina.... Attorneys from Vaša Prava are available to domestic victims from the time they arrive at a shelter, even if they are not formally registered by the state, and arrange all residency permits and asylum applications for foreign victims. If a victim chooses to testify, Vaša Prava represents the individual from the first statement until trial completion.

Through its uniform approach and intermediary work between victims and government, Vaša Prava has also helped to strengthen the rule of law in Bosnia and Herzegovina. Victims assisted by Vaša Prava are more likely to testify against their traffickers in criminal proceedings and have provided critical testimony leading to the conviction of several notorious traffickers and organized crime rings. Vaša Prava performs an integral civil role that the Bosnian Government, due to funding and logistical restraints, cannot fulfill, and has given a voice to those previously silenced.⁵³

4.5 Legal aid

Vaša Prava is a leading member of a coalition of NGOs advocating for the creation of a state-funded, domestic legal aid program. Since 2003, with the support of the Public Interest Law Institute (PILI), UNHCR and the Organization for Security and Cooperation in Europe (OSCE), the coalition has lobbied the Ministry of Justice and the State Parliament for adoption of a comprehensive legal aid law. The draft law prepared by the coalition provided the basis for a law now being considered by the RS Assembly. Vaša Prava's substantial experience in providing civil legal aid has provided evidence of the need for a comprehensive legal aid program and direction in fashioning a program that responds to the needs of people in BiH. While much remains to be done to establish a legal aid program, a solid foundation has been built.

4.6 Anti-discrimination advocacy

Vaša Prava again collaborated with PILI on a major project entitled "Promoting Anti-Discrimination Laws and Practice in BiH"⁵⁴ to ensure that vulnerable ethnic and religious minorities have equal access to employment, education, and other basic human rights. The overall objectives of the project are to raise public awareness of problems of discrimination, promote the adoption of anti-discrimination legislation, policies and practices in BiH, and increase the capacity of civil society to combat discrimination.

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During 2007 and 2008, Vaša Prava and PILI conducted a series of workshops at the regional and national levels to hear from stakeholders about the problems they encountered and to begin to fashion remedies. At the same time there was a media campaign using posters, brochures, and television and radio public service announcements to educate the public about discrimination. An important aspect of the project has been to increase the capacity of Vaša Prava and other advocacy NGOs to use strategic litigation to attack discrimination on a systemic basis.⁵⁵ Litigation efforts are still in the development stage, but a number of issues such as discrimination in employment practices and provision of municipal services have been identified as likely subjects of lawsuits.

Although the BiH Constitution explicitly adopts the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols (ECHR),⁵⁶ which includes anti-

discrimination provisions,⁵⁷ there is no comprehensive domestic anti-discrimination legislation. Vaša Prava is now a member of the Ministry of Human Rights and Refugees' working group, which is drafting legislation to fill this major gap. By October 2008, a proposed law had been drafted using European models and was being circulated for public comment. If adopted, the law would create new administrative remedies and give the courts substantial powers to force government agencies and private organizations to end discriminatory practices on a systemic basis.⁵⁸

No one involved in the anti-discrimination project expects major changes soon, but they do believe that the groundwork has been laid for a long-term campaign to realize the promise of equal treatment for all in BiH. Vaša Prava will be a central player in that campaign.

5. The importance of Vaša Prava

The necessity of doing the kind of work Vaša Prava does in post-conflict societies has been recognized by the United Nations. The United Nations Secretary-General's report on transitional justice⁵⁹ stressed the need to support domestic reform constituencies: "Civil society organizations, national legal associations, human rights groups and advocates for victims and the vulnerable must all be given a voice in..." rule-of-law reforms, justice reconstruction and transitional justice initiatives; "Effective rule of law and justice strategies must be comprehensive, engaging all institutions of the justice sector, both official and non-governmental..."; "Beyond the criminal law realm, such strategies must also ensure effective legal mechanisms for redressing civil claims and disputes, including property disputes, administrative law challenges, nationality and citizenship claims and other key legal issues arising in post-conflict settings"; there must be support for "...access to justice to overcome common cultural, linguistic, economic, logistical or gender-specific impediments. Legal aid and public representation programs are essential in this regard."⁶⁰

A substantial part of Vaša Prava's work helps to ameliorate the practical consequences of the war. As described in detail above, the organization helps people to return to their homes, rebuild them, obtain utilities, establish residency, obtain financial assistance and health care, and register their children for school. In future it will be dealing with emerging issues such as care for children with disabilities or protection for victims of trafficking. These activities clearly benefit the people who come to Vaša Prava for help. The question is, does Vaša Prava's work promote stability and help alleviate poverty for society as a whole? A review of the type of work it does strongly suggests that the answer is yes.

150 Vaša Prava promotes government improvement in several ways. Through advocacy, its lawyers force government departments to deal with issues that they have ignored. By constantly invoking the law, they educate officials about their obligations; this is often supplemented with informal and formal training. Administrative appeals, however inadequate at times, force additional scrutiny of department operations. Judicial review brings even more attention, as does the use of the inspectorates and ombudsmen. The use of offense and disciplinary proceedings has a direct impact on the behavior of recalcitrant officials. The failure of officials to do their work properly can be the result of lack of training, lack of resources, lack of knowledge of the law, indifference, hostility, discrimination or in some cases outright corruption. Vaša Prava takes on all these issues to varying degrees.

Justice systems encompass not just courts, judges, police and prosecutors, but all the means of resolving disputes and enforcing the rule of law. Government agencies and the corresponding administrative appeals systems, and ombudsmen and inspectors, are all vital components of the justice system. Poor, disenfranchised and dispossessed members of society are even more dependent than most people on the proper functioning of these

oversight bodies, because their very survival often depends on the help they get from government. Proper treatment, in turn, often depends on the effective functioning of appeals systems and judicial review and oversight.

On paper, BiH has a good justice system. The Law on Administrative Procedures and the Law on Administrative Disputes provide for the timely, fair and inexpensive administrative and judicial review of government agency actions. The practice clearly falls well short of the legal requirements. One of Vaša Prava's primary goals is to make that system work at both the administrative and judicial levels. No system functions properly without outside pressure to make it follow the rules. That pressure is most effective when it combines the real-life needs of claimants with the knowledge and skill of trained advocates.

The laws in BiH are often exceedingly complex and ineffective because many originated during the communist era. They were sometimes adopted with overtly discriminatory purposes, may conflict with other laws, may not provide real solutions to problems addressed, or are simply poorly drafted. With 14 legislative bodies in operation in BiH, confusion and conflict are inevitable.

Vaša Prava's work highlights problems with existing laws; its expertise and experience helps in fashioning more effective laws. Its work on the Civilian Victims of War program demonstrates this point. The statutes creating the program trace directly to pre-war Yugoslavia. They have been amended to varying degrees in each Entity, but many of the provisions simply do not apply properly to the 1992-1995 war. Also, each Entity made changes that were either overtly or indirectly discriminatory. Vaša Prava's work with many applicants for civilian victims' benefits put it in an excellent position to develop a new law, which they were asked to do. Lobbying by citizen's groups and advocacy organizations is relatively new to BiH, and Vaša Prava is helping to pave the way through this effort and others.

Through its extensive outreach and media and public education work, Vaša Prava is helping to create a culture of rights in which citizens understand that they have rights as individuals and that there are actions they can take to protect and enforce those rights. As a corollary to this, Vaša Prava is supporting the development of an active civil society through its work with law students, citizens' groups, advocacy groups and service organizations. It does this by sometimes representing the groups and their members and sometimes by collaborating on projects.

Vaša Prava has several other qualities that make it effective. First, it is a thoroughly Bosnian organization: it is a registered national NGO with its own board of directors and Bosnian staff. Because it is part of the Bosnian community, the staff are thoroughly familiar with the history and current problems of the country. It is one of the few NGOs that provides services throughout the country, which gives it a broad perspective on the issues.

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Equally important, Vaša Prava has a deep commitment to creating a pluralistic society where everyone's rights are protected. This commitment comes from the shared values of the staff and board and permeates all aspects of Vaša Prava's work. They know personally and from their clients how harmful it is to have a political structure that puts ethnicity first. They are working hard to create democratic institutions that serve everyone, regardless of ethnicity.

Conclusion: possible lessons and implications

The BiH Constitution gives pride of place to human rights by declaring that: “Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms.”⁶¹ Vaša Prava represents individuals in order to realize those rights and freedoms. Vaša Prava’s core mission is to promote civil, socio-economic, cultural and human rights and to provide fair access to justice for the realization of those rights. The preamble to the Universal Declaration of Human rights acknowledges that “disregard and contempt for human rights [has] resulted in barbarous acts which have outraged the conscience of mankind”; a statement that applies with full force to the 1992-1995 war. Correspondingly, recognition of human rights is the “...foundation of freedom, justice and peace in the world.” Vaša Prava helps to turn those lofty principles into day-to-day reality for ordinary citizens of BiH.

Vaša Prava’s significance extends beyond the work it does for individuals and even beyond the benefit to individuals who are not its direct clients. It is helping to create links between ordinary people and the government institutions that are intended to serve their needs. In forging those links it is, step by step, improving the performance of the institutions and helping to create a climate in which there is transparency and accountability. Vaša Prava cannot directly address the serious political failures in Bosnia, but by helping build responsive institutions it can show people that change is possible and give them more reason to demand political change.

One possible criticism of support for civil society organizations such as Vaša Prava, whether in Bosnia or elsewhere, is that they are not sustainable – that is, they require outside support to continue operating, and in the absence of such support they cannot sustain their work. There are several powerful counter-arguments to this criticism.⁶² For the sake of brevity, suffice to say that the sustainability of a country’s recovery can be influenced by the kind of services offered by Vaša Prava. Furthermore, such civil society services can be far superior to any potentially offered by a government by virtue of an NGO’s greater flexibility and a government agency’s greater susceptibility to corruption and political control. In many societies, legal service NGOs do prove sustainable because they diversify their funding sources. In a situation such as that in Bosnia, helping to sustain recovery through NGO support trumps any quibbling over whether a civil society group is sustainable in the long term.

Lessons from Vaša Prava’s Work

- **Advocacy Matters**
No matter how good the laws or the system for enforcing them, real change requires that individuals and disadvantaged groups have knowledgeable and skilled legal representation.
- **A Small Organization Can Make a Big Difference**
Whether at its peak of over 120 staff or at its current size of fewer than 60, Vaša Prava has demonstrated that a small organization with the right skills, commitment and focus can have a major influence on government and private actions.
- **The Method for Providing Legal Aid is Important**
Legal Aid NGOs can accomplish much more than systems that rely on individual private lawyers. Publicly funded legal aid systems using private lawyers cannot develop the knowledge base or provide the range of services such as public education, outreach, advice, individual representation and systemic advocacy that can be provided by legal aid NGOs.
- **Advocacy for the Disadvantaged Promotes Justice Sector Reform**
The justice sector includes not only courts but all levels of government. Equal justice for all cannot be achieved unless the poor and disadvantaged have a voice in the system. Legal aid NGOs help those voices to be heard.

- **Advocacy Promotes Post-Conflict Reconciliation and Economic Development**
Resolution of immediate post-conflict issues such as housing, documentation and social welfare services lays the groundwork for longer-term economic development. Legal aid NGOs help with short-term and long-term issues and can adjust their services as needs evolve.
- **Long Term International Support is a Good Investment**
Building an effective system to represent the poor and disadvantaged takes time and money. Outside support is necessary to provide the services when they are most needed; but such support must also last long enough to establish domestically-supported systems.

Bosnia is not the only country struggling with its past. Each country has its unique history, but the lessons learned from Vaša Prava's work suggest the need for international support for similar organizations wherever rebuilding is underway. More broadly, the Vaša Prava experience shows that legal advice, representation and advocacy can hold governments to account for meeting the needs of the poor and disenfranchised. That lesson applies everywhere.

Endnotes

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Promoting legal empowerment in the aftermath of disaster: an evaluation of post-tsunami legal assistance initiatives in Indonesia

Erica Harper*

Executive Summary

The Indonesian province of Aceh has experienced two devastating events in recent years: the 1976-2005 separatist conflict and the earthquake and tsunami in 2004. These events damaged major elements of the legal, social and physical infrastructures in the province. Ironically, the tsunami contributed to a reconciliation process that culminated in a lasting peace settlement. The many consequences for Aceh include developments involving the interface between law, post-disaster reconstruction and post-conflict recovery. In this context, the present chapter discusses the International Development Law Organization's (IDLO's) *Post-Tsunami Legal Assistance Initiative for Indonesia* (February 2006 – September 2007) and its follow-on operation *Supporting the Development of the Justice Sector in Aceh Program*, which started in January 2008. In particular, this chapter highlights the challenges encountered in undertaking a legal empowerment program – one that involves the use of rights to benefit disadvantaged populations directly – in the aftermath of a natural disaster and a conflict and identifies lessons learned and possible best practices.

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Introduction

The Indonesian province of Aceh lies at the northern extremity of the island of Sumatra. Aceh's relative isolation, particularly during the Dutch colonial period, and strong Islamic identity contributed to the development of a unique legal tradition inextricably linked to *shari'a* (Islamic law). The province's physical isolation was exacerbated by an armed conflict between the separatist movement *Gerakan Aceh Merdeka* (GAM) and the Government of Indonesia (GOI) that commenced in 1976. The conflict intensified between 1990 and 1998 when the Government declared the province an "area of military operations" (*Daerah Operasi Militer*).

The development of the Acehnese legal system has been influenced by the various degrees of autonomy granted by the Indonesian Government. In 1999, in an effort to halt the conflict, *Law 44/1999 On the Special Status of the Province of Aceh* was promulgated. "Special Status" allowed for the implementation of *shari'a* in social life and the education system, facilitated policies designed to preserve and empower customary institutions and permitted the establishment of an institutionalized body of *ulamā* (religious scholars) to advise on regional policy.¹ Two years later, amid growing tensions between GAM and the Indonesian military, a second autonomy package was introduced. Law 18/2001 on *Special Autonomy for the Province of Nanggroe Aceh Darussalam* formally created the province of *Nanggroe Aceh Darussalam*, otherwise known as Aceh or NAD, and granted it a more extensive form of self-government.² Powers devolved by the central Government included substantive control in the areas of policing and law and order,³ and the establishment of *shari'a* courts (*Mahkamah Syar'iyah*) with jurisdiction over family, inter-family and social matters for Muslims.⁴ Of particular importance was the power granted to the Acehnese provincial legislature (*Dewan Perwakilan Rakyat Daerah*) to pass regional regulations (*qanun*).⁵ The subsequently promulgated *qanun* introduced a more codified form of Islamic law and established new Islamic legal institutions such as religious prosecutors and the *Wilayatul Hisbah* (*shari'a* police).⁶ In May 2003, following a breakdown in peace negotiations, then President Megawati Soekarnoputri declared martial law in Aceh.⁷ At that time Aceh's new Islamic legal institutions were still in their infancy and only partially operational.

On 26 December 2004 an earthquake and tsunami struck Indonesia causing massive loss of life and widespread destruction. In 2006 the death toll stood at 126,000, with a further 93,600 persons missing presumed dead. The districts of Aceh Besar and Aceh Jaya and the municipality of Banda Aceh were most severely affected by the disaster. In addition to the dead and missing, the tsunami displaced 514,150 persons and affected over 300,000 land parcels; 252,223 houses were partially or completely damaged.⁸ The United Nations Development Programme (UNDP) estimated that 34 percent of justice-related infrastructure including police stations, prosecution offices, court houses and prisons had been gravely damaged.⁹ Six courts, together with computers, libraries and archives, were completely destroyed. The *shari'a court* lost 85 staff members, including 5 judges and 13 administrative staff.¹⁰

In the wake of the tsunami, the GOI and GAM agreed to recommence negotiations to end the conflict in Aceh. These negotiations took place in Finland and resulted in the signing of a *Memorandum of Understanding between the GOI and the Free Aceh Movement* on 15 August 2005 in Helsinki. The memorandum of understanding stipulated that a new Law on the Governing of Aceh (LOGA) would come into force no later than 31 March 2006.¹¹ The LOGA was passed by the Indonesian House of Representatives on 11 July 2006 and signed by President Soekarnoputri on 1 August 2006. Rather than modify Aceh's legal structures, the LOGA enhanced the legitimacy of existing institutions, particularly the *shari'a* courts.¹² This law, together with *qanun* subsequently passed, created a new legal framework unique to Aceh and strongly Islamic in nature. The pillars of this framework most relevant to the resolution of tsunami-related disputes are discussed below.

The General Courts (*Pengadilan Negeri*)

Aceh has general state courts in each district and an appellant court in Banda Aceh. These courts have jurisdiction over a range of matters including criminal and civil offences, industrial relations, trade and tax. Pure land disputes would normally be dealt with by the general courts as part of their general jurisdiction pursuant to Article 50 of Law No. 2 of 1986 *On the General Court*.¹³ In Aceh, however, there was uncertainty following a Letter of Decision of the Chief Justice of the Supreme Court dated 6 October 2004, which purported to confirm a transfer of jurisdiction to the *shari'a courts* for criminal (*jinayah*) and civil-commercial (*muamalah*) cases covered under *qanun*.¹⁴ Following the tsunami, the *shari'a courts* asserted their reliance on the Supreme Court letter and Qanun No. 10/2002 to claim jurisdiction over any land dispute that formed part of a broader inheritance dispute.¹⁵

The Shari'a Courts (*Mahkamah Syar'iyah*)

It is important to emphasize that Aceh is not a "shari'a state". That is, Islamic law is not binding on every citizen or every element of its legal system to the exclusion of secular law. Aceh remains a province within Indonesia's secular governmental and legal systems. Throughout the country religious courts (*Pengadilan Agama*) operate with jurisdiction over Muslims in the areas of marriage, divorce, inheritance, guardianship and *wakaf* (charitable trusts/endowments).¹⁶ In Aceh, the religious courts were replaced by *shari'a courts* in 2003 by way of a Presidential Decree. These courts sit in each district, with appeals heard by the provincial-level *shari'a court* in Banda Aceh and finally by the Supreme Court of Indonesia (*Mahkamah Agung*) in Jakarta. The *shari'a courts* share the same jurisdiction as the religious courts, although *qanun* passed by the regional legislature have extended this to include authority over *ibadah* (Islamic worship) and *Syar Islam* (activities undertaken to enhance the good image of Islam) and certain criminal matters.¹⁷

Customary Courts (*adat*)

Adat is roughly translated as customary or traditional law. It refers to a set of beliefs, norms or customs that traditionally apply in societies across Indonesia. Its content comprises descriptions of what a community does as much as a set of commands as to what its members should do. For these reasons, the substance of *adat* varies between and sometimes within districts, and any written version of *adat* may become outdated in a relatively short time.¹⁸ The chief authority regarding the legal standing of *adat* is found in Article II of the transitional provisions annexed to the Indonesian Constitution (1945). This states that all existing institutions and regulations valid at the date of independence would continue, pending the enactment of new legislation and the establishment of new institutions, and provided that they were in conformity with the Constitution.¹⁹ In Aceh, the *adat* is strongly influenced by Islamic principles and *shari'a*. Increased autonomy has led to the creation of new institutions that promote and strengthen the role of *adat* in public life: these include the *Majelis Adat Aceh* (Aceh Adat Council), which is empowered to deal with aspects of *adat* law that are seen as distinct from *shari'a* or *fiqh*. Other reforms have focused on the administration of *adat* justice (*peradilan*) at the village level.²⁰ *Perda (regional regulation) 7/2000 On the Establishment of Adat Life* clarifies the function of *adat* institutions – to resolve community and inter-community disputes – and articulates the types of cases that can be heard.²¹ Significantly, it requires that police give the *geuchik* (village leader) and *imeum mukim* (inter-village leader) the opportunity to settle disputes falling within their jurisdiction before commencing investigations.²² Other provisions introduced through *qanun* include:

- the *camat* (sub-district leader) having the authority to resolve land disputes, strengthen women's empowerment and promote *shari'a*;²³
- *gampong* (village) leaders being empowered to promulgate and codify village-level rules, guidelines and *adat* customs, which are then forwarded to the *bupati* (district leader) for approval;²⁴ and
- the final and binding nature of the decisions of the *mukim* (inter-village leader).²⁵

1. The IDLO Post-Tsunami Legal Assistance Initiative for Indonesia

In the wake of the tsunami, Aceh's legal context was at a complex crossroads of an emerging set of Islamic laws and legal institutions, an unprecedented natural disaster, a fledgling peace process, and a regional government with new and increased autonomy. While it was clear that Aceh's legal institutions needed to play a key role in the post-tsunami and post-conflict rehabilitation process, these institutions were far from fully developed. Thirty years of separatist conflict had led to court closures and the departure of court personnel-both of which had contributed to a widespread lack of confidence in and chronic under-utilization of the legal system. This lack of confidence was exacerbated by the corruption and lack of training that plague Indonesia's courts and related institutions. In view of these challenges and with funding from the governments of Finland and Ireland, IDLO resolved to undertake an initiative to help survivors to address their legal needs and contribute to wider justice sector development. Between December 2004 and January 2006, IDLO undertook five needs assessment missions to Aceh with a view to increasing its understanding of the situation. The conclusion was that four issues were interrupting the fair and equitable resolution of tsunami related disputes:

1. The main areas of legal dispute faced by tsunami-affected communities concerned land ownership, inheritance distribution and the appointment of guardians. A year after the disaster, however, very few tsunami-related cases had been referred to the *shari'a courts*;²⁶ instead, communities chose to resolve matters at the village level through *adat*. Such local dispute resolution had a grounding in legislation, but research conducted by UNDP suggested that some *adat* leaders were attempting to resolve cases that were outside their jurisdiction (principally because they misunderstood their role),²⁷ and that due process standards were not always upheld. A further cause for concern was that the quality of *adat* decision-making was believed to be related, at least in part, to village leaders' understanding of applicable law and their knowledge of disputants' personal circumstances such as the origins of family wealth, lineage and community relationships. Widespread loss of life, however, meant that new *geuchik*, who were often unqualified and unfamiliar with such issues, had been appointed. These issues added to concerns as to whether the rights of vulnerable groups were being adequately protected.

2. Women faced particular challenges in protecting their legal rights in the post-tsunami context:

- The lack of gender parity in Islamic inheritance distribution, normally corrected through the custom of gifting,²⁸ was exacerbated by the tsunami, leaving women more vulnerable and with reduced access to physical and financial resources.
- Widows and divorcees were at risk of being denied their inheritance shares by male relatives, particularly in the area of joint matrimonial property, as a result of power imbalances, lack of awareness regarding the applicable law and lack of documentation of wives' rights to particular parcels of property.
- Women do not automatically become the legal guardians of their own children in Aceh; accordingly, they were required to go through the courts in order to have that role legally recognized.
- There was widespread perception that women could not be appointed as legal guardians to orphans under their care: this created new economic burdens such as women being unable to access orphans' inherited assets to assist in their upbringing.

3. Low levels of awareness regarding the applicable law and procedures constituted a barrier to individuals protecting their legal rights. Particular areas of deficit included:

- land, inheritance and guardianship law;
- resolution of disputes relating to post-tsunami land certification or post-construction housing disputes;

- procedures for accessing formal justice institutions, particularly legal aid services;
- the legal rights of women, particularly in relation to marriage, divorce, domestic violence and guardianship; and
- the differences between *adat* law, Islamic law and secular law and how to resolve incompatibilities.

These findings were supported by other agencies. According to UNDP, "... levels of legal awareness relating to rights, duties and procedures within the formal and informal justice systems remain low among Acehnese. Villagers do not have information on laws that are relevant to them, nor processes to access the General and *Syariah* justice systems and are largely unaware of the limited existing legal aid services."²⁹ Lack of knowledge appeared to be endemic, affecting individuals, village-level decision-makers and formal legal actors. It was particularly low among vulnerable groups such as women, tsunami-affected groups and those living in isolated areas. One consequence was that individuals were unaware of and hence unable to exercise their constitutional right to choose between informal and formal dispute resolution. Further, individuals were unable to assess the quality or procedural correctness of both informal and formal dispute resolution processes, increasing the probability that outcomes might be arbitrary, discriminatory or not grounded in law.

4. Poor access to justice was preventing disputants from obtaining fair, law-based decisions. At the formal level, IDLO identified significant capacity and development weaknesses that prevented the courts from handling grievances satisfactorily: these included the high cost of accessing formal justice sector institutions, linguistic barriers³⁰ and physical isolation. A further issue was the shortage of licensed lawyers, particularly women, and lawyers providing legal aid for poor people.³¹ In 2006 there were only three sources of legal aid in Banda Aceh, all of them NGOs: (i) YLBH, a national legal aid service that concentrates on human rights and land rights cases; (ii) LBH-ANAK, which provides legal aid services for children; and (iii) KKTGA, which offers legal counseling to women in Banda Aceh and Aceh Besar. A final factor was that district and provincial judges exhibited varying levels of knowledge with respect to applicable law and procedures, which resulted in unsatisfactory dispute handling and uncertainty for litigants, particularly with respect to domestic violence, divorce, rape and *shari'a* offences.

Access to justice via customary law was similarly questionable. UNDP research suggested that *adat* processes were at times corrupt and unaccountable and led to unfair decisions that did not produce lasting resolutions.³² The enforcement of *adat* decisions was found to be weak, with powerful figures often ignoring decisions – a situation that encouraged "forum shopping" among some segments of the population.³³ A final conclusion was that women, minorities and other vulnerable groups were disadvantaged and discriminated against under *adat* processes.³⁴ A major impediment to effective dispute resolution was that *adat* leaders lacked sufficient knowledge of the applicable law, the jurisdiction of *adat* law and, in particular, the alternative options and services available to resolve grievances. A further issue was the predominance of cultural norms that promote harmony over individual rights and adversarial processes; such norms merit respect for many reasons, not least that they promote social cohesion and stability by integrating different actors and factors. Nevertheless, individuals who sought recourse through the formal justice system, particularly vulnerable groups, were stigmatized, which created a strong disincentive to seek formal solutions outside *adat*.³⁵

1.1 Developing a change model for justice sector assistance

IDLO adopted a strategy of geographically-targeted justice sector development focusing on 100 tsunami-affected villages in Banda Aceh and Aceh Besar. The focus on a target number of beneficiaries facilitated a comprehensive and integrated response to the three major areas of weakness affecting the fair and equitable resolution of tsunami-related disputes: community legal awareness, the quality of customary dispute resolution and access to legal aid services. Concentrating on these complex interrelated issues in 100 communities was expected to have

greater impact in terms of legal empowerment than addressing a single issue over a wider area. A holistic approach was also deemed essential in view of the interrelated nature of the problems faced in Aceh with regard to building and in some cases rebuilding equitable, effective justice systems. The strategy had the following goals:

1.1.1 Heightened community legal awareness, particularly with respect to the rights of women

IDLO determined that communities would benefit in three ways from increased awareness of legal rights, dispute-resolution mechanisms and the nature and availability of legal services. First, strong community legal awareness would act as a safeguard on the quality of informal and formal legal processes in that individuals would be more likely hold formal and informal justice sector actors to account. Second, greater awareness would increase the level of access to formal dispute-resolution mechanisms. Third, with greater knowledge, attitudes of powerlessness, resignation and legal disenfranchisement would gradually be replaced by a legal culture of empowerment that protects individual rights.

1.1.2 Improved customary dispute resolution

The reality of post-tsunami Aceh was that the vast majority of land, inheritance and guardianship disputes were being resolved at the customary level. There were several reasons for this. Most Achenese found *adat* to be fast, familiar, simple, inexpensive and culturally relevant; it was also considered to be preferable to court-based litigation, which was seen as expensive and bureaucratic. A final factor was that the conflict period had left many with an entrenched fear of state-based institutions. Rather than attempt to alter this situation, IDLO determined that a more effective way to enhance legal empowerment would be to work to improve the quality of customary decision-making: fairer outcomes that upheld due process standards would offer a higher level of protection to vulnerable groups and shield the nascent and tsunami-affected courts from a mass of litigation.

1.1.3 Enhanced access to justice for vulnerable groups.

IDLO was aware that not all disputants would receive a satisfactory solution at the village level, even with improved customary decision-making. These persons needed to be able to exercise their right to formal justice. The most immediate need was for women, who were particularly vulnerable under *adat*, to be able to access the courts. IDLO planned to facilitate this by augmenting the supply of available legal aid actors and services.

2. Evaluating the Impact of IDLO Activities

It must be emphasized that the evaluation data discussed in this section relates only to the first phase of the IDLO Post-Tsunami Legal Assistance Initiative for Indonesia (February 2006-September 2007).³⁶ The activities continued through until December 2008 under a follow-up program entitled Supporting the Development of the Justice Sector in Aceh. Evaluation data for that period, however, was not available at the time of writing.

2.1 Raising community legal awareness

As discussed above, poor legal awareness was identified as a major impediment to individuals protecting and asserting their legal rights. Despite this, there were no centralized mechanisms to disseminate legal information, and legal institutions such as courts and NGOs did not have the resources or capacity to undertake comprehensive awareness-raising programs. In response, IDLO implemented three activities designed to give people a basis of knowledge to help them to defend their rights and obtain access to legal solutions.

2.1.1 The legal research and documentation exercise

Pre-program consultations concluded that there was no clear and accessible information about the laws regulating land, inheritance and guardianship matters, and no information on national and internationally-led reconstruction and compensation programs. The existing information related largely to official state law, but there was evidence that disputes were being resolved in villages in accordance with customary law. Further, the rapidly evolving jurisdiction of the *shari'a* courts meant that the extent to which secular laws applied in Aceh was poorly understood and somewhat controversial. There was evidently a pressing need for information resources that explained the applicable laws and the options available for resolving tsunami-related disputes. These resources needed to be suitable for use by legal practitioners, humanitarian agencies and communities.

IDLO responded by publishing the *Guidebook on Land, Inheritance and Guardianship Law in Post-Tsunami Aceh* and booklets of *10 Frequently Asked Questions*. These resources, available in both English and Indonesian, set out the legal principles, processes and institutions relevant to the resolution of tsunami-related disputes under *shari'a*, *adat* and secular law. To ensure technical accuracy and obtain the support of local stakeholders, the publications drew on three months of field research and were subject to extensive peer review.³⁷ Over 18 months, 3,684 information resources were distributed to NGOs, courts and communities. Of the Indonesian-language resources, 764 (22.55 percent) were delivered to legal professionals and NGOs and 2,055 (74 percent) to communities. It should be noted that apart from the resources provided to communities, which were disseminated as part of IDLO training programs, all books were disseminated upon direct request as opposed to unsolicited delivery.

Breakdown of Distribution (Indonesian-language resources only)

Resource	NGOs	Communities	Court	Other	Total Distributed
Guidebook	426 49%	317 36%	112 13%	15 2%	872 100%
10 FAQ Guardianship	82 12%	621 87%	4 0.5%	3 0.5%	710 100%
10 FAQ Inheritance	57 8%	651 91%	4 0.5%	3 0.5%	715 100%
10 FAQ Land	75 14%	466 85%	4 0.5%	3 0.5%	548 100%
Total	640	2,055	124	24	2,845

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Although important information, data on the number of information resources disseminated does not necessarily give clear or unequivocal evidence regarding changed behavior. To better assess the impact, IDLO conducted a survey of beneficiaries and interviews with legal stakeholders. The results indicated that the resources were widely recognized and relevant to community needs. Interviewees noted their simplicity, practicality and user-friendly format. A recurring comment was that the resources, specifically the matrices of applicable law, were particularly useful given the dearth of legislation available. The three judges interviewed as part of this survey noted that many court staff were using the *Guidebook* in court as a reference tool. Likewise, the two legal aid representatives interviewed stated that they used the *Guidebook* to provide legal advice and develop clients' defenses.³⁸ Further evidence of the

resources' utility was that local and international agencies had used the books to develop their own programs or to supplement existing programs. For example, the *Guidebook* was used as the curriculum of a training course for district court judges organized by the local NGO Putroe Kande.³⁹ The following survey participant response was indicative of the general reaction to the materials:

We recommend, endorse the use of the books, and also use the books as a reference for other projects ... such as the development of the Provincial Child Protection Law, a research/assessment paper that became a background of a programme design, and for two manuals being developed on woman and child rights.⁴⁰

While such data does not demonstrate impact on outcomes of disputes as a result of the resources, it suggests changes in behavior involving widespread use of the materials-which in turn could affect outcomes.

2.1.2 Raising community legal awareness through the Print Media Project

In this activity, IDLO published in cooperation with the state and *shari'a* courts a weekly column in the *Serambi* newspaper entitled "Anda dan Hukum dalam Keseharian" (The Law and You in Practice). Topics were selected based upon the keys areas of information deficiency identified through IDLO's research, suggestions from legal stakeholders and a strategic decision to include "success stories" from individuals who had resolved a legal problem through the courts – a move intended to eliminate common misconceptions and strengthen confidence in formal legal institutions. All 52 articles were posted on the IDLO website and distributed through various electronic mailing lists in both English and Indonesian.

IDLO selected print media as the medium for disseminating information, first because the awareness problem appeared to be endemic (not restricted to any particular group or area) and because the *Serambi* circulated 30,000 copies per day and was available throughout Aceh. Second, IDLO's consultations with other agencies indicated that reading newspapers was a common pastime among men in Aceh, and that such resources were usually "recycled" – being passed between several readers prior to disposal.⁴¹ Research also indicated relatively high literacy rates in Aceh, particularly in more urbanized areas such as Banda Aceh and Aceh Besar.⁴²

A post-project legal awareness survey of 415 people was undertaken to evaluate the impact of the program.⁴³ Twenty-three percent of the people surveyed (33 percent of men and 11 percent of women) stated that they read the newspaper "frequently". When asked if they had ever read the IDLO newspaper column, 21 percent respondents stated that they had done so (25 percent of men and 15 percent of women), which indicated (i) that most frequent readers also read the IDLO column, suggesting that the column was interesting, relevant and accessible, and (ii) that the estimated readership of the IDLO column was 63,000 per issue.⁴⁴ This was an extremely positive outcome given the low cost of the program (approximately US\$330 per issue), the low levels of awareness about legal rights, and the fact that the weekly column was the only organized system for transmitting legal information to the public on a regular basis.

Anecdotal evaluation indicators also supported the utility of the articles. An interviewed legal aid service provider stated that the *Serambi* article profiling his organization *Free Legal Aid from the Legal Aid Foundation Lembaga Bantuan Hukum* resulted in "several new clients".⁴⁵ A law lecturer from the national University UNSYIAH stated that he regularly read the *Serambi* articles, found them helpful and accurate, and often used information from the articles in his lectures.⁴⁶

Q.1 Do you frequently read the newspaper?

Total Responses	Male Responses	Female Responses
Yes: 23%	Yes: 33%	Yes: 11%
No: 77%	No: 67%	No: 89%

Q.2 Have you ever read Update Keadilan in the Serambi Newspaper?

Total Responses	Male Responses	Female Responses
Yes: 21%	Yes: 25%	Yes: 15%
No: 79%	No: 75%	No: 85%

2.1.3 Raising women's legal awareness through film

In view of concerns that poor legal awareness was limiting women's capacity to protect their legal rights, IDLO consulted local stakeholders to identify potential entry points for enhancing women's knowledge of the law. The consultations revealed that film was an appropriate educational tool for women, particularly given Aceh's strong culture of oral and visual communication, women's decreased access to mass media and lower literacy levels, and the fact that women had limited opportunity to become involved in civil society activities. IDLO went on to produce a 30-minute educational film *The Stories of Aisha, Rauda and Ainun: Protecting Women's Legal Rights in Aceh Post-Tsunami*. The film tracked the lives of three women struggling to overcome common legal problems in the aftermath of the tsunami. Through the narratives, the film examined the law relevant to land, inheritance and guardianship, and outlined the solutions that might be found.⁴⁷ To ensure that the film was legally accurate and culturally appropriate, the draft script was subject to two rounds of peer review by local and international stakeholders.⁴⁸ Filming took place in Banda Aceh and Aceh Besar using local actors and venues such as the legal aid office and *shari'a* court.

Over 18 months, the film was screened in 102 tsunami-affected villages in Banda Aceh and Aceh Besar, reaching 3,003 beneficiaries at a cost of US\$10 per beneficiary. Film screenings were followed by half-day information and training sessions facilitated by two female Acehese experts in Islamic Law and Islamic philosophy (*Aqidah*). A post-project legal awareness test was given to 84 beneficiaries two months after the training. The test was also administered to a control group of 240 persons who had not been involved in the activity. Within the control group, the overall percentage of correct answers was 47 percent. When the same questions were posed to participants in the project the percentage of correct answers was 74 percent, suggesting a far superior knowledge of women's rights issues when compared to the general population.⁴⁹

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In terms of anecdotal indicators, focus group discussions with selected beneficiaries two months after the activity indicated that 25 percent of participants had acted upon or knew someone who had acted upon the knowledge they had gained through the film to resolve a legal issue.⁵⁰ One *shari'a* court judge had received several inquiries from people who had seen the film, particularly with regard to their right to be appointed guardians to orphans under their care.⁵¹ Feedback from facilitators' reports and the project managers' observation of screenings also supported the film's relevance. In particular, many participants noted that the program had been their first opportunity to obtain information about their legal rights.

BOX 1 – Participant learns that *Patah Titi* does not apply under Islamic law

By participating in IDLO's film program, X learned that under Indonesian law a grandchild can inherit from his/her grandmother or grandfather, even where the child's parent has predeceased the grandparent. This is inconsistent with the Acehese custom of *patah titi* whereby a grandchild's inheritance rights are severed at the death of the parent(s). X believed that she was entitled to inherit from her recently deceased grandfather, but her uncle had taken her share of the inheritance. Following the film screening, X approached her village leader and explained what she had learned. Her village leader stated that he was unable to assist and that she was to adhere to the *patah titi* custom. X then approached the *Mahkamah Syar'iyah*, who confirmed that she was in fact entitled to inherit from her grandparents.

Finally, it should be noted that the cost-effectiveness of the activity (US\$10/beneficiary) was enhanced because the film was integrated into the community education programs of agencies such as the Canadian Red Cross, World Vision and Oxfam.

2.2 Improved customary dispute resolution

2.2.1 Community mediation and legal skills training

The Community Mediation and Legal Skills Training was a grassroots response to the numerous and complex legal issues created by the tsunami. With large tracts of land submerged, widespread destruction of boundary markers and loss of ownership records, the issues relating to land and property were overwhelming. Ensuring clarity of land ownership and protecting property rights was not only a precondition to the reconstruction process: it was essential to address the widespread uncertainty regarding ownership of assets brought about by the vast loss of life. Compounding this situation was the complex nature of Islamic inheritance distribution, and the difficulty in determining rightful heirs in cases where numerous family members had died. Finally, with an estimated 30,000 children orphaned by the tsunami,⁵² raising awareness about the responsibilities of guardians and the procedures related to guardianship formalization was necessary to protect the rights and welfare of orphans.

Evidence that the vast majority of tsunami-related disputes were being resolved through customary processes created concern as to (i) whether the rights of vulnerable groups were being adequately protected and (ii) whether decision-makers possessed the legal knowledge to make fair decisions grounded in law. In response, a training program was developed with a view to improving community leaders' mediation skills and their knowledge of land, inheritance and guardianship law. The rationale was that by raising awareness in these areas, decision-makers would be able resolve tsunami-related disputes within communities, hence reducing the caseload of the formal justice sector. Training participants were selected from a cross-section of community leaders, including *geuchik* (village chief), *imam meunasah* (religious scholar), *tuha peut* (elder) and women's, youth and religious leaders. IDLO established a list of criteria that included literacy, high-school education, 21+ years of age, experience in village-level organizations and a minimum target of 30 percent women. The objective was to reach a cross-section of community leaders rather than just the traditional male-dominated hierarchy, thereby providing broad-based capacity-building and empowerment for future leaders, including women.

Village position	No.	%
Village leader	327	47
Female leader	102	15
LOGICA cadre	87	12
Religious leader	63	9
Youth leader	45	6
<i>Tuha Peut</i> (elder)	35	5
Civil-society figure	23	3
Local government	18	3
TOTAL	700	100

The trainers comprised two judges of the *shari'a* courts, four lawyers and three legal academics. They first participated in a one-week training-of-trainers program in which, given their legal knowledge, the emphasis was on participatory and experiential learning techniques and community facilitation skills. This ensured that the training was technically accurate, interesting for village-level participants and culturally appropriate. The Indonesian Institute for Conflict Transformation facilitated a further one-week training-of-trainers on mediation.

The training was piloted in November 2006 to test modules, seek feedback from participants and enable trainers to fine-tune their facilitation skills. After significant redevelopment of the modules, the first phase was rolled out in December 2006. By April 2007, 34 four-day training workshops had been completed covering 95 tsunami-affected villages and reaching over 700 beneficiaries, of whom 24 percent were women.

The post-project evaluation confirmed that the legal knowledge of beneficiaries had improved. Of the 527 participants who had completed tests before and after training, 418 (79 percent) had improved their scores. The average improvement in scores was 20 percent:⁵³ Although this percentage may appear low, it equates (on average) as participants being correct on four additional questions. When test questions relate to important issues such as women's names being included on land certificates and the responsibilities of guardians, even a 20 percent improvement can have far-reaching results. There was also evidence that the skills acquired were being put into practice: interviews with 91 beneficiaries two months afterwards showed that 39 percent had used their new knowledge to resolve a legal issue involving land, inheritance or guardianship, or knew of a person who had done so.⁵⁴

BOX 2 – Training Participant Mediates Inheritance Dispute

RZ is 38 years old and lives in *Lambada Lhok* village. He survived the tsunami but lost his wife and two children. A number of his wife's relatives survived. When they married, RZ and his wife had purchased land that had the status of joint matrimonial property. RZ believes that he has full rights to this land. RZ's brother-in-law, however, claims that he should get part his deceased sister's estate.

The *geuchik* (village head) of *Lambada Lhok* was contacted to resolve the dispute. The *geuchik* had previously attended IDLO's Community Mediation and Legal Skills Training and had learned about inheritance law and mediation skills. The *geuchik* heard both sides of the matter, then called the parties together with the religious leader (*imam meunasah*) and the sub-village leader. The *geuchik* mediated the case and correctly informed the parties that the deceased wife's family had a lawful claim to a percentage of the land. The parties agreed that RZ would pay 7,000,000 Indonesian rupiah (approximately US\$610) to the family of his deceased wife. When the case was resolved, a letter of agreement was drafted and signed by both parties and those present at the mediation.

BOX 3 – Training Participant Requests Assistance from the *shari'a* courts

After attending IDLO training, village leader IK had a greater appreciation of the importance of legalized guardianship. He learned that guardianship can protect inheritance, assist in administrative processes and protect the interests of the child. Concerned about the large number of orphans in his village, IK contacted the *shari'a courts* and requested that judges from the mobile court come to his village, hold hearings and, where appropriate, provide legal certification of guardianship.

2.3 Enhanced access to justice for vulnerable groups

2.3.1 Project on Legal Representation, Counseling and Support for Women in Nanggroe Aceh Darussalam

As discussed in Part B, individuals who were unable to obtain a satisfactory resolution at the customary level needed to be able to access the formal justice system. Obstacles included a dearth of legal aid service providers and poor community awareness regarding court processes. Women were particularly vulnerable to discrimination under *adat* and faced increased difficulty in obtaining legal information and solutions. In response, IDLO partnered with local NGO *Kelompok Kerja Transformasi Gender Aceh* (KKTGA) to implement a program to make legal counseling and representation available to women through a Women's Crisis Centre staffed by two lawyers and six counselors/paralegals.

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To raise awareness of women's legal rights and the legal aid services available to protect them, KKTGA:

- broadcast 20 radio programs addressing land, inheritance and guardianship law and violence against women;
- advertised their legal aid services ten times a day on three radio stations;
- placed banners containing gender-friendly legal messages in strategic positions in Banda Aceh;
- distributed 2,000 brochures highlighting their legal aid services;
- distributed 3,000 stickers highlighting gender-friendly legal messages; and
- provided 84 days of on-site information dissemination and legal counseling for tsunami survivors and government departments in Banda Aceh and Aceh Besar, reaching 1,462 beneficiaries.

The post-project evaluation provided evidence that this awareness-raising led to increased utilization of KKTGA's legal counseling and representation services:

- between February and April 2007, 24 percent of clients reported that they had become aware of KKTGA's services through radio advertising;
- between February and April 2007, 18 percent of clients reported that they accessed KKTGA after participating in a community legal information session;
- in the months during and immediately after the radio advertisements, KKTGA experienced a surge in demand (see Table 1).

Table 1. Number of Clients Receiving Services from KKTGA (per month)

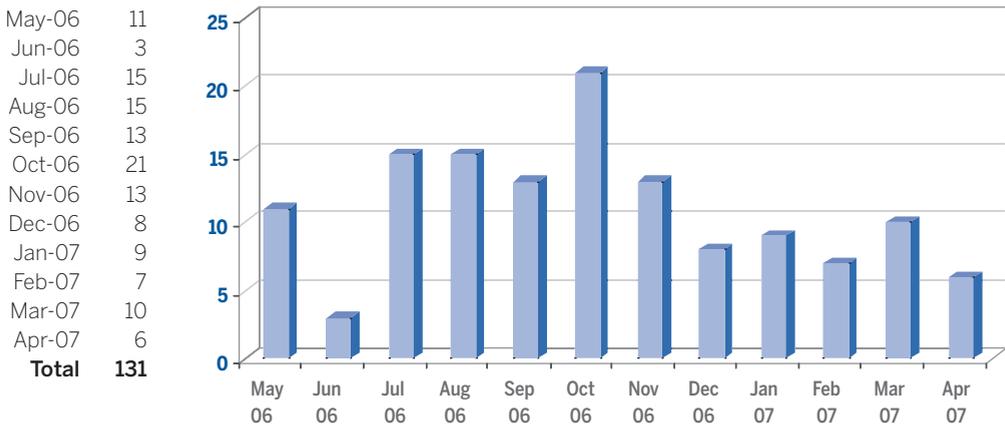


Table 2. Cases Disaggregated by Service

Service Type	No.	%
Litigation	28	21
Legal advice	88	68
Counseling	15	11
Total	131	100

Table 3. Types of Cases Processed by KKTGA

Service Type	No.	%
Domestic violence	62	47
Inheritance	22	17
Land	12	9
Guardianship	5	4

In 12 months, the KKTGA Women's Crisis Centre provided 28 clients with legal representation, 88 with legal advice and 15 with counseling;⁵⁵ 47 percent KKTGA's work with clients involved cases of domestic violence, a significant departure from the expectation that most cases would involve post-tsunami land, inheritance and guardianship disputes, which in fact accounted for 30 percent of the caseload. It was concluded that although there were many disputes involving land, inheritance and guardianship, they were being resolved through customary processes and women were either satisfied with the solutions or unable or unwilling to access the formal legal system. Domestic violence was generally not dealt with through customary processes, leaving resort to the formal justice system as the only option for affected women.⁵⁶

Of the 28 cases in which clients received legal representation, 21 had been fully resolved through the courts with decisions in the clients' favor. This number may be considered too low to justify the employment of two full-time lawyers. It must be taken into account, however, that the resolution of court cases in Indonesia takes a long time and is subject to bureaucratic constraints. The level of demand may also be indicative of the wider problems facing the justice sector in Aceh at that time. These included deficiencies in the law and patriarchal attitudes on the part of justice sector actors, widespread fear of involvement in formal legal processes and the costs associated with court cases. These factors would have reduced the demand for legal representation services focusing on women. This does not mean that making such services available in Aceh was unnecessary or unsuccessful: for the rule of law to be established, disputants must have opportunities to access the formal legal system when necessary. The Women's Crisis Centre was the only legal aid service of its kind in Banda Aceh and Aceh Besar that offered such access.⁵⁷

3. Additional experience, lessons learned and challenges for the future

The experience of IDLO and its partners in Aceh suggests that legal empowerment programs – that is, initiatives focusing attention and resources on using rights to benefit disadvantaged populations – can yield significant impacts, even with small budgets. This final section draws upon the evaluation data to review additional aspects of the post-tsunami response, identify lessons learned and highlight key challenges that need to be overcome in order to maximize such programs' effectiveness.

3.1 The importance of responding to current realities and the immediate needs of the disadvantaged

The legal empowerment discourse asserts that most international development agency efforts to build the rule of law have assumed a top-down approach that mainly focuses on judiciaries and other state institutions. This top-down paradigm holds that improvements to institutions and processes will benefit the poor and disadvantaged through economic growth, heightened trade and investment, job creation and secure private property rights.⁵⁸ Golub argues that this approach – the rule of law orthodoxy – is flawed in two respects. First, it incorrectly assumes that the formal court system is the preferred and primary means of dispute resolution for the poor and disadvantaged.⁵⁹ Making this assumption the basis of integrating law with development fails to respond to the principal legal needs of this group. Moreover, it exacts an opportunity cost in terms of foregoing alternative and potentially more impactful strategies, such as legal empowerment.⁶⁰ Second, under the orthodox approach reforms are centered around a partnership between foreign specialists and local elites, neither of which have particularly good insight into the legal needs and aspirations of the poor.⁶¹ The orthodoxy ignores the fact that such local elites may not be powerful or willing agents of change, and that international practitioners have a tendency to focus on the formal court system and to replicate processes that they are familiar with, perpetuating a cycle of institutional emphasis.⁶²

Partly through this discourse, the importance of bottom-up approaches centered on disadvantaged populations is gaining acceptance among some policy-makers and practitioners.⁶³ In practice, however, international development organizations still think principally in terms of state institutions and formal judicial actors, and to structure interventions around ideal scenarios of what a modern justice system should look like. IDLO was not immune to such leanings. During the planning stages of the Aceh program, there was an assumption that courts were the locus of dispute resolution, that there would be an influx of tsunami-related cases, and that *shari'a* courts would need support and strengthening. The original concept paper proposed a court-annexed mediation project and training for legal stakeholders on tsunami issues.

Importantly, IDLO also prioritized a strong dialogue with local stakeholders and giving such stakeholders a voice in program development. It came as somewhat of a surprise when the *shari'a* courts (the central beneficiaries under the original concept paper) counseled against a court-focused approach and lobbied instead for a strengthening of local dispute resolution mechanisms. They explained that the courts lacked the capacity, and the judges the knowledge, to process a large number of cases, even with a diversionary mechanism in place. Furthermore, consistent with Acehese norms disputes were being resolved at the village level, and it was unlikely that improvements to the formal sector would alter this. The courts advised that IDLO could most usefully assist by ensuring that disputes mediated through *adat* were resolved equitably and in accordance with due process standards. If this occurred, disputes were less likely to be appealed to the courts, and a flood of tsunami-related cases could be avoided. IDLO's field research supported this assessment. It became clear that, for the poor, community structures were the operative framework for protecting legal rights and adjudicating disputes. Empowerment had to occur at this level if it was to have a substantive and lasting impact. The program hence evolved from one that was focused on state institutions to a series of grassroots initiatives that sought to respond to the legal needs of the Acehese within a context that was relevant to them.

It was similarly clear that to have maximum effect, interventions needed to factor in the strong influence of Islam on Acehese life. At both the court and customary levels, the applicable law for resolving guardianship and inheritance disputes (the latter incorporating most land disputes) was *shari'a*. Village-level religious leaders and judges of the *shari'a* courts wielded immense social authority. These realities were fed into program development. All print materials (including training modules, community booklets and posters) used Koranic verses or *fiqh* to support or reinforce statements of law. Sermabi newspaper articles carried the logo of the *shari'a* court. And at the beginning of the educational film, the Chief Justice of the provincial *shari'a* court gave a two-minute endorsement noting the film's compatibility with both Islamic and Indonesian law and instructing the audience to listen carefully and share the messages with family members.

IDLO believes that these provisions added authority to activities and promoted popular acceptance. Couching messages about legal rights within the Islamic discourse also helped build relationships with key legal stakeholders, a move that proved advantageous when obstacles were encountered. For example, part-way through the film activity, the provincial *shari'a* court received a complaint from a man whose wife had attended a screening of the educational film. The complaint centered around the film highlighting the right of women to be appointed as guardians, something that the community member did not believe to be correct. The judge who received the complaint took it upon himself to give a presentation at the Grand Mosque (*Mesjid Raya*) in Banda Aceh the following week, explaining the issue and confirming the film's correctness under Indonesian law and Islam.

These experiences demonstrate that legal empowerment requires a pragmatic focus. Program designers, NGO leaders and government officials should focus on where justice is actually being meted out and identifying what are the meaningful and immediate legal issues for the poor. In many situations, access to customary institutions, actors and processes may be more relevant than the formal justice sector. This is particularly the case in the wake of conflict or disaster where state capacity is limited. As noted above, one complication is that the international community has traditionally concentrated its activities on the reform of formal justice sector institutions: the courts, legislature, police and correctional facilities.⁶⁴ Assistance to customary processes has been largely neglected by United Nations agencies as well as multi-lateral and bi-lateral programs.⁶⁵ Recent developments in international policy discourse may, however, signal a sea-change in the policies of international organizations and donors with respect to their level of involvement with the informal justice sector. Leading development agencies such as the World Bank⁶⁶ and policy institutes such as the Centre for Humanitarian Dialogue⁶⁷ have released strong statements regarding the importance of customary systems in promoting access to justice, sustainable judicial reform, and poverty alleviation. Such arguments are increasingly obtaining traction at the UN policy level:

Effective strategies for building domestic justice systems will give due attention to laws, processes (both formal and informal) and institutions (both official and non-official).⁶⁸

Perhaps a bigger question involves whether and in what ways the international humanitarian and development communities should engage with religious systems, particularly Islamic systems. In Aceh, IDLO was the only international organization working in partnership with the *shari'a* courts, and whose programs focused upon the implementation of *shari'a* at the community level. Other agencies cited mandatory restrictions that prevented them from undertaking such work. In addition, donors approached by IDLO for second-stage funding were reluctant to support processes that they regarded as lacking sufficient safeguards, promoting violent solutions and discriminating against women. These arguments mirror the views of critics of programs that engage with customary systems.

The counter-argument can also be drawn from the customary debate: religious legal systems, whether formalized or not, do exist. And for the poor, these systems can be the main and even the only option for dispute resolution. Ignoring these realities or (worse) using them as grounds for non-involvement, will not correct the injustices that occur through the operation of religious legal fora. Instead, it is the existence of those who have no choice but to rely upon such systems, that makes the case for active involvement compelling. As Thorne states, “the fact that these may not correspond to our concept of justice, or fully comply with international standards, is in reality only another reason why we should engage them.”⁶⁹ Programs like IDLO’s, where Islamic law and religious actors were used to promote, *inter alia*, the rights of women to own land, inherit and be appointed guardians of their own children, are positive examples of how engagement with religious systems can yield substantive impact.

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3.2 The role of legal culture in legal empowerment programming

In the aftermath of the tsunami, rebuilding houses to accommodate the displaced was a lead imperative. A major impediment was that the disaster inflicted significant damage upon the National Land Offices (*Badan Pertanahan Nasional*) and the majority of land records and boundary maps were either lost or no longer legible.⁷⁰ Compounding this was that approximately 75 percent of tsunami-affected land parcels were held under *adat* tenure; therefore, no official map or title even existed.⁷¹ Without state-recognized records of land ownership and boundaries, international agencies were reluctant to commence the rebuilding process. In response, a program of systematic land titling – the Reconstruction of Aceh Land and Administration System program (RALAS) – was developed. RALAS aimed to map and register up to 600,000 land parcels in tsunami-affected and adjacent communities.⁷²

The program also responded to what some development experts considered to be a prerequisite to the modern nation state – an efficient and comprehensive land administration system. According to such experts, individual titling would address the problem of land tenure security (particularly women’s tenure security), and contribute to economic growth as title holders would have greater access to credit.⁷³ These arguments drew heavily upon theories put forward by economist Hernando de Soto – theories that were subsequently adopted in the 2008 report of the Commission on Legal Empowerment for the Poor, which de Soto co-chaired.⁷⁴ Few questioned such a rationale at the time, perhaps because the logic sat nicely with the “build back better” mantra adopted by the Indonesian Government and members of the international community.

But was individual titling an effective vehicle for legal empowerment? While it may be too early to assess whether formalized land titling has had an impact on economic growth or poverty reduction, research data collected by IDLO does not support widespread improvements in perceptions of tenure security. Some communities surveyed felt that their land rights were even more vulnerable after their land boundary had been mapped and registered: they were concerned about the extension of government control over land and, in particular, the possibility that certification would facilitate appropriation of land by the state (a common occurrence during the conflict period). The evaluation suggested that land disputes were still being adjudicated through *adat* and that customary leaders based decisions on their knowledge of disputants’ land holdings and customary rules. Possession of a title certificate was not a particularly influential factor in such processes.

Moves to promote women’s tenure security through joint titling of matrimonially held property were similarly disappointing.⁷⁵ Survey data from several agencies showed that when left to communities, land was usually registered to male heads of household, not jointly with their wives. When such communities were provided with information on the legality of joint titling, and its benefits, rates increased but not significantly. Only when agencies became actively involved, or when joint titling was made mandatory, did rates improve.⁷⁶

There are at least two lessons to be learned from this. First, when identifying potential approaches for legal empowerment it is important to make realistic assessments about the state of the formal legal system, particularly as to whether it can support an empowered population. In Aceh, where legal institutions functioned only marginally and there were cultural disincentives to utilizing courts and police services, titling probably had less to offer than planners expected.⁷⁷

Second, it is necessary to factor in the challenges that may stem from a weak formal legal system and related norms. In the case of RALAS, the assumption that tenure security would flow naturally from the issuance of titles did not play true. Something was missing: to a large extent, this “something” was the absence of a shared sense of legal values such as equality before the law and the need for due process and judicial independence. The legal culture of Aceh was not one where individuals could go to court or an administrative agency to defend their rights, where state-issued title was regarded as indisputable evidence of a right, and where women owned and exercised control over land on an equal footing with men. In this environment, to expect that the issuance of titles would erase hundreds of years of complex customary rules regarding the management and passage of land, or that mandatory joint titling would automatically translate into increased security of tenure for women, was too simplistic.

Programmatically, this area of legal “culture” remains largely unexplored by the international community. There are several reasons for this. Sometimes it is assumed that a rule of law already exists; or (as in this example) that it will flow naturally from practical aspects of empowerment such as land titles. Sometimes the issue is avoided because practitioners fear

accusations of legal or cultural imperialism. Or it is placed in the “too hard” category because we really know very little about how, why and under what circumstances legal cultures change. It is argued, however, that as we look more closely at frameworks and mechanisms to legally empower the poor, we must be very aware of the determinative role that widely held rule of law values play. This is undoubtedly a difficult and complex area. How is a strong legal culture measured? What are its components? And should international actors be in this business at all? These questions, however, must be addressed if legal empowerment programming is to become effective.

A limited number of organizations have begun to explore these issues, including the impact that facilitated positive experience may have on promoting the rule of law and related norms. For example, in a subsequent phase of IDLO’s work in Aceh mobile courts were established to facilitate legal registration of guardianship; the aims were to educate community members with regard to the legal obligations of guardians with respect to their wards and to safeguard the rights of minors who had inherited property. The evaluation conducted some months afterwards concluded that although guardians appeared to have acquired and retained new knowledge, very little changed behavior could be observed. Although it was not directly evaluated, there was overwhelming anecdotal evidence that what participants remembered most about the experience was that court staff did not ask them to pay a bribe. Perhaps the most important impact of this program was not enhanced protection of minors’ land rights, but instead one that IDLO did not think to measure – the impact that this single positive interaction with the legal system had on guardians. Whether this type of experience may constitute the beginnings of legal cultural change needs to be further explored.

Finally, while there needs to be more research into how to help build legal cultures that respect and advance disadvantaged populations’ rights, it is also important to consider how programmatic interventions can have negative implications for normative change. A concern throughout the IDLO program was whether and to what extent activities should promote engagement with the formal legal system when it was apparent that this system was not fully functional. This was particularly pertinent to considerations of access to justice, impartial decision-making and protection of women’s rights. There was concern about the consequences if, for example, individuals approached a court expecting to receive certain services but found that there was still a large gap between what the formal justice sector should provide and what it actually did provide. Would such experiences exacerbate existing feelings of disenfranchisement and cynicism regarding the achievement of a just and effective formal legal system?

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Ultimately, it was concluded that the flaws in the formal legal system were also present in the informal system and that because the courts were sufficiently functional, engagement with the informal justice sector would be productive. A further consideration was that the transition to a society based on the rule of law required popular awareness of available options for resolving disputes: only by exploring such options would users gain sufficient awareness to demand improvements in state and non-state systems. An evaluation of these considerations needs to be integrated into project design and specifically risk analyses.

3.3 Challenges for the future: legal empowerment for all – the issue of scope

IDLO’s strategy was to provide a holistic response to inter-connected problems, focusing on a limited number of beneficiaries (100 villages). Legal awareness-raising activities allowed this group to gauge whether justice being dispensed by customary processes was acceptable, and where it was not, they were provided with the knowledge and the means to access the formal justice system. The evaluation indicated that interventions had been generally successful vis-à-vis their stated objectives: ⁷⁸ it confirmed that the legal knowledge of individuals and village decision-makers had improved; that decision-makers were putting their new skills into practice; and that some individuals were taking advantage of the legal counseling and

representation offered by KKTGA and receiving favorable decisions in court. It seems reasonable to conclude that within the 100 target villages, legal empowerment did improve. The difficulty is that the problems affecting these 100 villages were equally apparent in Aceh's other 654 tsunami-affected villages, and even throughout Aceh (approximately 5,200 villages).⁷⁹

A key challenge to making significant gains in legal empowerment thus relates to scope of intervention. In a situation such as Aceh – where there is a weak rule of law culture, widespread mistrust of state institutions and a formal legal system that is marginally functional – a comprehensive, integrated and long-term approach is required. The realities of modern rule of law programming, however, are such that initiatives can generally only be implemented on a small scale and/or within a limited timeframe. Timescale is a particular problem in emergency contexts such as following a natural disaster. Early recovery programming is usually short-term (6-12 months). Many argue, however, that in sectors such as legal development, such activities should be situated within a longer-term development framework.⁸⁰ Even then, program cycles (generally 3-5 years) are too short for substantive legal change to occur.

It is unlikely that funding modalities will change significantly in the near future, particularly in the current context of global economic recession. But if the issue of scale cannot be addressed, perhaps more can be done to promote complementarity in programming. In Aceh, IDLO, the World Bank, UNDP, UNICEF, Oxfam and several local NGOs implemented programs with legal empowerment components. These agencies adopted different approaches and target beneficiaries did not significantly or consistently overlap. It is not questioned that these interventions responded to key areas of deficiency. However, the fact that they did not reinforce one another, in addition to their small scale, meant that overall impact was limited. Had strategies been aligned and beneficiary groups coordinated, synergies could have produced wider benefits, making a greater contribution to justice sector development.⁸¹

Turning such an agenda into reality is more easily said than done. International development and humanitarian agencies, donors, governments, domestic NGOs and, crucially, the partner populations themselves may have different views and objectives. Gaining consensus on a common approach can be problematic. If cooperation is to be the way forward, prerequisites include enhanced inter-institutional dialogue on legal empowerment approaches, greater research into what works and what does not, and large-scale empirically-driven evaluations that are shared and used to come to some form of agreement on best practices. With such knowledge, practitioners, policy-makers and other stakeholders will be better equipped to move legal empowerment away from a discussion and into a framework for action and impact.⁸²

Endnotes

- 1 International Crisis Group, 2001, *Aceh: Can Autonomy Stem the Conflict?*, Asia Report No. 18, 27 June 2001, available online at <www.icg.org/home/index.cfm?id=1456&l=1> (last accessed 22 February 2004) 31; UNDP, 2003, *Aceh Regional Public Expenditure Review*, report on file with author, 1; T Lindsey and R Phillips "Inheritance, Guardianship and Women's Legal Rights in Post-Tsunami Aceh: The Interaction of Syariah, Adat and Secular Laws" IDLO (2005) 3-4.
- 2 ICG (n 1) 12; Lindsey (n 1) 4.
- 3 Arts 21-3 Law 18/2001 on *Special Autonomy for the Province of Nanggroe Aceh Darussalam*.
- 4 Ibid arts 25-26; see also "Access to Justice in Aceh: Making the Transition to Sustainable Peace and Development" UNDP (Draft Report, May 2006) 23.
- 5 Art 1(8), 9 Law 18/2001 on *Special Autonomy for the Province of Nanggroe Aceh Darussalam*; Lindsey (n 1) 4.
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- 8 "Aceh and Nias One Year After the Tsunami: The Recovery Effort and Way Forward" Agency of the Rehabilitation and Reconstruction for the Region and Community of Aceh and Nias (BRR), (December 2005) 14; Dr D Fitzpatrick "Restoring and Confirming Rights to Land in Tsunami-Affected Aceh" UNDP/Oxfam Report (July 2005) 4-5.
- 9 Consultative Group on Indonesia (CGI), "Indonesia: Preliminary Loss and Damage Assessment" (January 2005) 64.
- 10 *Mahkamah Syariah*, NAD (2005), *Laporan Tahunan Mahkamah Syariah Provinsi Nanggroe Aceh Darussalam Tahun 2004*, unpublished paper, on file with T Lindsey; see also Lindsey (n 1) 8.
- 11 Arts 1.1.1-1.1.2 *Memorandum of Understanding between the GOI and the Free Aceh Movement* (15 August 2005).
- 12 Ibid art 128.
- 13 Lindsey, above (n 1), 52.
- 14 See also Joint Decree of the Governor, Head of the Provincial Police Force, Head of the Provincial Prosecutors, Chairman of the *Mahkamah Syariah*, Chairman of the Aceh State Court and the Head of Provincial Office of the Department of Law and Human Rights of 9 August 2004; Lindsey (n 1) 52.
- 15 Drs H Soufyen Saleh, 2005, *Pembagian Hak Warisan (Pratek Mahkamah Syariah di Nanggroe Aceh Darussalam*, unpublished paper, copy on file with T Lindsey, 4; Lindsey (n 1) 53.
- 16 See Law 7/1989 *On Religious Judicature*.
- 17 In terms of legislation, the primary source of *shari'a* is the Islamic Law Compilation (*Kompilasi Hukum Islam*, or KHI). A secularized version of classical *fiqh* (understanding, comprehension, knowledge, and jurisprudence in Islam) KHI is a mix of different *madhhab*, or schools of Islamic thinking. It comprises three books – inheritance, marriage and charitable trusts. Although it is the primary authority on Islamic law throughout Indonesia, KHI is a non-binding guide and judges may refer to other sources of law including (in Aceh) *qanun* passed by the regional legislature or *fatawa*. See art 26(2) Law 18/2001 on *Special Autonomy for the Province of Nanggroe Aceh Darussalam*; Lindsey (n 1) 30, 35, 41-48; UNDP (n 4) 23-24.
- 18 Lindsey (n 1) 33-34.
- 19 Ibid 13.
- 20 Ibid 17.
- 21 Art 6 *Perda 7/2000* on the Establishment of *Adat* Life.
- 22 Ibid art 10.
- 23 Art 5 *Qanun 3/2003* on the Order, Position and Authority of the Government in the NAD Province.
- 24 *Qanun 5/2003* on the *Gampong* Governance Structures.
- 25 Ibid art 12(3).
- 26 Interview with Chief Justice of Banda Aceh *shariah* court (26 April 2006); interview with Chief Justice Jantho *shari'a* court (27 April 2006).
- 27 *Perda 7/2000* regulates the types of cases that *adat* leaders can deal with, but research conducted by UNDP suggested that beliefs varied among *adat* leaders regarding their jurisdiction: most incorrectly thought that they could adjudicate civil and family law cases, land disputes, and sometimes criminal cases. This misunderstanding was exacerbated by provisions in formal law: for example, Art 12(3) *Qanun 5/2003* provides that the *mukim's* decision is final and binding and Art 10 *Perda 7/2000* requires that disputants attempt to resolve their disputes through *adat* before approaching the formal justice system. This led many *adat* leaders and community members to believe that *adat* was the only forum for resolving disputes, that decisions based on *adat* could not be appealed, and that referring disputes directly to formal legal mechanisms was prohibited. See UNDP (n 4) 43, 77, 91, 65, 90.
- 28 To female children to make inheritance distributions equal.
- 29 UNDP, *Access to Justice in Aceh: Making the Transition to Sustainable Peace and Development in Aceh* (2006), 12.
- 30 The official language of the courts is Bahasa Indonesia, but most of the population speak Acehnese or other dialects.
- 31 There were several reasons for this: (i) the conflict prevented the national bar examination from being held regularly in Aceh; (ii) lack of employment opportunities encouraged registered lawyers to move away from Aceh; and (iii) a significant number of lawyers lost their lives in the tsunami, including several government-employed prosecutors and women lawyers.
- 32 UNDP (n 4) 50.
- 33 Ibid 66-67.
- 34 Ibid 67, see also 71, 79.
- 35 Ibid 51-52, 79, 97; interview with Geuchik Kajhu (7 May 2006). Imam Meunasah Lampaseh Kota (3 May 2006); and geuchik Cut Lamkuweuh (1 May 2006).
- 36 The evaluation was conducted in October 2007. General evaluation tools included: (i) interviews with legal stakeholders (5 people); (ii) post-project beneficiary interviews (75 men, 100 women); and (iii) a general legal awareness survey of residents of Banda Aceh and Aceh Besar (121 men and 119 women). Project-specific evaluation tools included: (i) quantitative data on information resources disseminated to various user groups; (ii) survey data to assess readership of IDLO's newspaper articles; (iii) pre-intervention and post-intervention knowledge testing of beneficiaries involved in training; and (iv) client data relating to beneficiaries who received legal aid services.
- 37 Organizations involved in peer review included BRR, the Indonesian Land Authority, IAIN University, *Dinas Syariat*, the *shari'a* court, local NGOs KKTGA and Flower Aceh, the World Bank, UNDP, Oxfam, UNIFEM, AIPRD-LOGICA and an expert from the University of Melbourne, Australia.
- 38 IDLO, *Post-Tsunami Legal Assistance Initiative for Indonesia Monitoring and Evaluation Report* (February 2006 – September 2007) 26 September 2007, 20. On file with author.
- 39 Ibid 21.
- 40 Response from survey participant 19 September 2007.
- 41 According to statistics provided by Serambi, 30,000 copies were circulated

- daily in 2006 and shared by about ten people. Total potential readership of IDLO's articles was therefore 300,000 per week: interview between Mr G Ellem (IDLO) and the Serambi Newspaper (25 January 2007).
- 42 Adult literacy in Aceh was 95.8 percent in 2002, compared with the national average of 89.5 percent. Female adult literacy was 94.1 percent compared with a national average of 85.7 percent. UNDP, *Aceh: Before the Tsunami* <http://undp.or.id/archives/aceh_update_report/Aceh_HDR-Summary.pdf> at 23 April 2009
- 43 The survey covered 415 persons (195 males and 220 females) in Banda Aceh and Aceh Besar.
- 44 It must be reiterated that this data is a guide only. The sample size was small (415 persons) relative to total potential audience (300,000 persons) and further, this sample was taken from Banda Aceh and Aceh Besar where readership is likely to be highest. Finally, that gratuitous concurrence among the respondent population might have positively skewed figures must also be taken into account.
- 45 IDLO (n 38) 43.
- 46 Id.
- 47 The themes of the film were: the right of women to be appointed as guardian to children under their care, the division of joint matrimonial property following the death of a spouse and the importance of joint land titling.
- 48 Peer review was conducted by local organizations (KKTGA, MISPI, BRR, Indonesian Land Authority, Dinas Syar'iat and the *shari'a* court) and international organizations (UNDP, the World Bank and UNIFEM).
- 49 IDLO, (n 38) 60.
- 50 Id. Action taken included women seeking further legal information, having a conflict resolved by village leaders, formalizing a guardianship arrangement, individually or jointly registering property, or approaching a legal aid organization for assistance.
- 51 Ibid 58.
- 52 Republic of Indonesia – Bappenas, 2005, *Master Plan for Rehabilitation and Reconstruction for the Regions and People of the Province of NAD and Nias Islands of the Province of North Sumatra – Main Book of Rehabilitation and Reconstruction*, I-1.
- 53 IDLO (n 39) 48-49.
- 54 Ibid 51. Action taken included seeking additional information, approaching individuals or organizations for assistance, or a case being mediated.
- 55 IDLO (n 38) 25.
- 56 Domestic violence was generally regarded as a personal matter for resolution within the family.
- 57 The Government-run legal aid service dedicated to women's legal issues (LBH-APIK) was based in North Aceh (approximately six hours from Banda Aceh) and its services attracted a fee.
- 58 Stephen Golub "Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative" *Carnegie Endowment for International Peace Rule of Law Series: Working Paper No. 41* (October 2003) 3, 7-8.
- 59 Ibid 14-15; C Alkon "The Cookie Cutter Syndrome: Legal Reform Assistance Under Post Communist Democratization Programs" (2002) *Journal of Dispute Resolution* 327, 339.
- 60 Golub (n 58) 15-16.
- 61 Ibid 8-9, 24; SN Carlson "Legal and Judicial Rule of Law Work in Multi-Dimensional Peacekeeping Operations: Lessons Learned Study" UNDPKO (March 2006) 16-17.
- 62 Golub (n 58) 13, 17-19, 22; Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (2002) 70.
- 63 See further Thomas F McInerney, "Law and Development as Democratic Practice", (2005) 38 *Vanderbilt Journal of Transnational Law*, 109.
- 64 Kristina Thorne, *Rule of Law Through Imperfect Bodies? The Informal Justice Systems of Burundi and Somalia*, Centre for Humanitarian Dialogue Policy Paper (November 2005) 1.
- 65 Ewa Wojkowska, *Doing Justice: How Informal Systems Can Contribute*, UNDP Policy Paper (December 2006) 5.
- 66 See generally <www.justiceforthepeople.org/?lang=en&act=showMorePublications> at 10 May 2007.
- 67 Thorne (n 64); see also United Kingdom Department for International Development (DFID) "*Non-State Justice and Security Systems*" (May 2004) 1.
- 68 Security Council UNSC "Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies" (2004) UN Doc S/2004/616 [35], see also [36].
- 69 Thorne (n 64) 7.
- 70 Fitzpatrick (n 8) 4-5; see also UNDP (n 4) 9.
- 71 Erica Harper, *Guidebook on Guardianship, Inheritance and Land Law in Post-Tsunami Aceh*, IDLO (2006) 84.
- 72 First, communities would reach agreement on land boundaries through a process of community land mapping or Community Driven Adjudication (CDA). Second, on the basis of the community land map officials from the national land office would survey boundaries and verify compliance with CDA procedures. Third, the resulting parcels of land would be registered and title certificates issued. BPN Decree No. 114-II.2005 *On the Land Registration Manual in Post Tsunami Areas*, 1, 5, 7.
- 73 See for example, World Bank, *Reconstruction of Aceh Land Administration System – Background* <<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/EASTASIAPACIFICEXT/INDONESIAEXTN/0,,contentMDK:20877372~pagePK:141137~piPK:14127~theSitePK:226309,00.html>> at 7 April 2009.
- 74 Hernando De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (2000); Commission on the Legal Empowerment of the Poor, *Making the Law Work for Everyone*, Vol. 1, (3 June 2008).
- 75 Joint titling was compulsory for all land purchased by BRR; BRR Policy Press Statement, Banda Aceh (19.09.06) on Joint Land-Titling - BRR/BPN Joint Agreement. On file with author. See also Harper (n 71) 98.
- 76 UNDP has estimated that joint registration has occurred in 3.9 percent of cases (10,137 land certificates have been signed); data on file with IDLO.
- 77 For further discussion on individualized titling as a vehicle for legal empowerment see G Payne, A Durand-Lasserve and C Rakodi, "Urban Land Titling Programmes" in M Brøther and J Solberg (eds) *Legal Empowerment - a Way out of Poverty*, Norwegian Ministry of Foreign Affairs (June 2007) 11-40; Juan M Otto "Rule of Law Promotion, Land Tenure and Poverty Alleviation: Questioning the Assumptions of Hernando de Soto" (2009) 1, *Hague Journal on the Rule of Law*, 173-195.
- 78 IDLO (n 38) 14-17.
- 79 Indonesian village potential census (PODES) <<http://ideas.repec.org/p/fre/wpaper/4.html>> at 26 April 2009.
- 80 UNDP, "Early Recovery and Rule of Law" (undated), report on file with author.
- 81 It is important to note that this paper is not predicated on the assumption that IDLO's interventions were ultimately the most effective ones. Provided each intervention is properly and impartially evaluated there is potential for everyone to learn from the successes and failures of the others. That having been said, questions of economies of scale inevitably arise. Would a comprehensive and integrated approach have been more effective in the immediate aftermath of the tsunami? The short answer is probably "no". Given the unprecedented nature of the tsunami it is reasonable to assume that no organization would

immediately have all of the answers. In the early months it was probably appropriate for different groups with different development philosophies to be trying different approaches. But once the immediate problems had been addressed – say one year out from the event – a coordinated approach incorporating the best aspects of each contribution would unquestionably have been more appropriate.

82 An additional way that international agencies can respond to the issue of scope is to invest more strategically in local capacity building. As part of its exit strategy, IDLO assisted national staff form a NGO specializing in legal training and mediation. Seed funding to register the NGO was taken from the program budget, and training was provided on donor relations and the preparation of project proposals and funding

applications. Although IDLO is yet to withdraw completely from Aceh, the intention is that the local NGO will carry on some or all of the activities undertaken between 2006 and 2009.

Legal empowerment of unwed mothers: Experiences of Moroccan NGOs

Stephanie Willman Bordat and Saida Kouzzi*

Executive Summary

This chapter examines Moroccan non-governmental organization (NGO) initiatives that promote the rights of unwed mothers with children born out of wedlock. Social stigmatization, criminal repression and legal discrimination marginalize these women and their children, and impact on their ability to obtain official identity papers. Without such legal identity, they cannot access a host of other fundamental rights, and legal empowerment can be impossible.

In focusing on child registration and Family Booklet¹ procedures as they affect unwed mothers, this chapter argues that law and development initiatives should take into account complex, intimidating legal realities that disadvantaged populations such as these women and children face, including: existing laws that may not be applied in reality, that are discriminatory on their face, that are unclear and open to disparities in their interpretation or that are silent on an issue and thereby create legal voids.

Four youth-led local women's rights NGOs created in the past five to eight years in diverse regions across Morocco, in collaboration with an international human rights capacity-building organization, currently implement grassroots-level human and legal rights education and launched a pilot Court Accompaniment Program in 2006 primarily for illiterate women in their respective communities. Initial indicators of impact of these two initiatives hint at shifts in attitudes and behavior among unwed mothers and local authorities charged with helping them access their legal rights.

The popular discourse in Morocco claims that the main obstacle to people making use of their rights is their ignorance of the laws and their rights; this could be remedied by legal education campaigns. The experience of these NGOs working with unwed mothers illustrates how knowledge of the laws alone is not sufficient. In order to access their rights, people need concrete help in navigating government services and bureaucracies that are often indifferent, intimidating or even hostile.

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In addition to providing legal information to unwed mothers, these and other NGOs play a critical intermediary role between women and local authorities, both in facilitating various processes for unwed mothers as well as serving as a watchdog over these authorities. In areas where the law is unclear, NGOs encourage the more advantageous interpretations of laws. Where there is a legal void, they apply strategies and encourage solutions that benefit women's rights. By accompanying and otherwise assisting unwed mothers, NGOs also help them avoid humiliation at public administration offices, navigate complex procedures, and help protect them from corruption and abuse of authority by civil servants.

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Drawing on these experiences, the chapter cautions that appropriate program objectives and desired results of any law and development initiative depend on establishing an accurate legal baseline from the outset. Voices of unwed mothers themselves also suggest that their desired outcomes sometimes differ from those of some NGOs. This has powerful implications for how one chooses to measure success and define legal empowerment for marginalized populations. In a long-term strategic process to respond to unwed mothers' priorities, future legal empowerment initiatives for them should focus on access to the justice system, broadly defined to include local government and administrative offices and the courts. Future work should build on the pilot experiences implemented at the local level and current, unofficial practices to support a legislative reform process to consolidate women's rights in law.

Introduction

This chapter² examines local NGO initiatives that protect the rights of unwed mothers in Morocco. Both the topic and country profiled raise interesting and timely questions about women's legal empowerment and NGO strategies for its promotion.³

The term “unwed mother” is used here to refer to women who have children outside the framework of legal marriage.⁴ They and their children – defined by law as “illegitimate” – are among the most legally and socially marginalized people in the Middle East and North Africa (MENA) region, not just in Morocco.

One must legally exist before being able to benefit from any rights contained in the law. Without such a legal identity, legal empowerment can be impossible. Unwed mothers and their children are not legally recognized because they lack the legal identity necessary to assert a host of other fundamental rights; at best, neither officially exists; at worst, unwed mothers can be and often are criminally prosecuted for having had sexual relations outside of marriage.

This legal invisibility combined with social taboos result in a complete absence of any reliable statistics on numbers of unwed mothers and their children in Morocco, with the few available sources conveying primarily sensationalist and anecdotal information. One article claims that in 2003 in Casablanca, there were 5,000 unwed mothers, although this is clearly underestimated given the current Moroccan administrative and social context.⁵

This chapter focuses on laws and NGO programs in the country. But the social status and legal framework surrounding unwed mothers is similar to those in other countries where women live under Muslim laws. Given recent legal improvements to women's status, such as the 2004 promulgation of the new Family Code, the international community, foreign governments, donors and NGOs often refer to Morocco as an example for reform efforts in other countries in the MENA region.

For these reasons, the Moroccan experience may be useful for initiatives to promote women's rights in other countries in the MENA region. This does not assume that what has been implemented and applied in Morocco will necessarily work elsewhere. Rather, the chapter shares examples of strategies used by local NGOs to obtain individual justice for single women in a complex legal environment with the aim to inform and inspire other NGOs creating their own strategies. Indeed, this chapter illustrates how some provisions presented publicly as positive reforms may be, in reality, be anything but, and encourages activists in other countries to consider this when advocating for legal reforms in their own domestic systems.

1. Legal context

It is important to analyse the Moroccan legal context surrounding unwed mothers and understand it accurately in order to establish a reality-based starting point from which to establish appropriate measures of progress and definitions of successful results. Many research studies, needs assessments and strategic plans only conduct a superficial analysis of laws, and give limited attention to ascertaining what legal texts actually state.

Not only can the actual language of laws be challenging to grasp for people from a different legal tradition or linguistic background, but vague and erroneous public descriptions of laws may be repeated so frequently that they become commonly accepted and cited as reality. Explanations of laws in Morocco often avoid accurate interpretation, intellectual debate, or plausible differences of opinion. Moral imperatives, political propaganda goals, and a desire to have one's own organization or institution receive credit for legal reforms are among many reasons that the state, Islamist groups or NGOs themselves may sometimes contribute to the

circulation of legal misinformation in the country. Widespread misconceptions and claims that do not reflect the actual language of the laws camouflage reality, encourage inaccurate conclusions, and mislead legal development efforts.

For example, numerous on-line articles about the status of unwed mothers in Morocco congratulate the country on its reforms. Many sources specifically claim that unwed mothers now have the legal right to obtain a Family Booklet and to request DNA testing to prove paternity of children conceived out of wedlock. As shown below, neither of these is actually provided for by law.

Even laws that currently exist on paper and that protect women's rights in theory are often not applied in reality. Local NGOs have documented the frequent non-application of laws by courts in practice.⁶ In addition, no mechanisms have been put into place to monitor and control the implementation by the relevant authorities of reforms related to women's rights, which accounts for the tenuousness of these legislative gains.

1.1 Relevant laws

Both criminal and civil laws in Morocco severely repress behavior associated with being an unwed mother and have gaps that prevent unwed mothers from accessing their rights, leading to their social invisibility and legal inexistence.

The religious exceptionalism created for issues related to women is one factor impacting on their status. The Moroccan Family Code governing marriage, divorce, child custody and guardianship, parentage, inheritance, and marital property is the only law in the country inspired by religious precepts and that provides for broad judicial discretion to interpret and apply Islamic jurisprudence and reasoning.⁷ All other legislation governing areas such as contracts, torts, administration and commerce is derived from secular, European-style civil codes.

For example, the Family Code does not recognize either adoption or "natural" paternity. Furthermore, the Penal Code bans sexual relations outside of marriage and outlaws abortion. These facets of the laws are often – whether correctly or incorrectly – attributed to religious precepts. As a result, the sacred nature of these laws makes them more difficult to contest and advocate for change.

1.1.1 Penal Code

Sexual relations outside of marriage are illegal in Morocco, with increased penalties where one or both parties are married to another person.⁸ In addition, rape is classified as a crime against morality.⁹ Non-consent is difficult for victims to prove in order to establish rape, often requiring actual physical injury. If rape is not proven, charges may be brought against the victim for having engaged in illicit sexual relations.

In addition to the fact that people – mainly women – are still actually imprisoned under these provisions, the mere threat of arrest and definition of sexual relations outside of marriage as illegal impacts on people's behavior, attitudes, health and access to their rights. This is particularly true for unwed mothers, as illustrated below.

The Moroccan Penal Codes also criminalizes abortion as a public morality offense.¹⁰ Abortion is illegal unless deemed necessary to protect the mother's health and conducted by a medical doctor.¹¹ It is not legally permitted in cases of rape or incest, fetal impairment, for economic or social reasons, or simply upon request. As a result, many single women may be forced to be mothers, whether the pregnancy resulted from illicit sexual relations between two consenting parties or rape, due to the lack of access to legal, safe and affordable means by which to end unwanted – and in this context, illegal – pregnancies.

1.1.2 The Family Code

The Family Code only recognizes legitimate paternal filiation, by which children are attributed to a father when he is legally married to the mother at the time of conception. “Illegitimate” or “natural” paternity does not exist in Moroccan law, and children born to unwed mothers have no rights from their biological fathers, such as the right to bear his name, receive financial support, or inherit. In contrast, mothers are legally affiliated to and responsible for their children merely by the fact of giving birth to them.¹²

The law provides for DNA testing to establish paternity, but only to prove or contest the parentage of a child conceived during a legal marriage.¹³ The 2004 reforms to the Family Code attribute legitimate paternity to a child conceived during the parents’ “engagement period”, taking steps to protect children’s rights and acknowledging that in reality couples may have sexual relations before marriage. However, the law does not provide for court-ordered paternity testing of a biological father against his will upon the unwed mother’s or her child’s request.

As a result, the only way for children to benefit from “legitimate” paternity if their parents are not legally married is to claim that they were engaged at the time of conception. Evidence of an engagement may be required, such as photos, videos, sworn statements by family and neighbors and, most importantly, the biological father’s consent to cooperate. In the case of unwed mothers, this is definitely not an assumed fact.

Finally, the fact that adoption is not legal in Morocco further limits options available to unmarried women who become pregnant.¹⁴

1.1.3 Civil Status Laws and Procedures

Another law of interest here is the Civil Status Law, which sets out all administrative procedures related to one’s legal identity and civil status, including birth, marriage, divorce, and death.¹⁵ Readers familiar with the French legal system will recognize the heavy bureaucracy and large amount of paperwork involved, where the smallest act in daily life requires obtaining copies of official documents on one’s identity and legal status from the local Civil Status Office.

The two main procedures impacting on unwed mothers and their children relevant to this discussion are: registering a child’s birth and obtaining a Family Booklet.¹⁶

First, for a child to legally exist, the birth must be registered at the Civil Status Office where s/he was born. While the previous Civil Status Law did not explicitly provide for registration of out-of-wedlock children, 2002 reforms introduced specific provisions allowing a unwed mother to register her child’s birth.

Registration requires a birth attestation written by a doctor or midwife and legalized by the local authorities, as well as a copy of the parents’ marriage certificate. Births must be registered within 30 days, after which time a court petition must be filed to obtain a judicial declaration of birth. Failure to register a birth within the legal limits is punishable by a 300-1,200 dirhams fine.¹⁷

Unwed mothers may register their child’s birth, but must choose a first name for the child’s fictional biological father that begins with *Abd*.¹⁸ In contrast, prior to the 2002 Civil Status Law reforms, the child of a unwed mother was registered as the child of “father unknown” or “xxx.”

Second, the Family Booklet is the main official document proving one’s legal identity and civil status, and is of utmost importance in one’s daily life. It is drafted upon marriage and contains all personal information about the Family Booklet’s owner (the husband), his wife/wives, and any children born of the marriage(s).¹⁹ Names, places and dates of marriage, eventual divorce, births, and deaths of each family member are recorded and, if necessary, modified later. Only

one original Family Booklet is issued – in the husband’s name, given to him, and deemed his property. A wife, divorced woman, widow or legal tutor may request a *legalized copy*.

The Family Booklet is the single most essential document in people’s lives – it is on this basis that other official papers attesting to one’s legal identity and civil status necessary to carrying out most daily acts may be obtained. The Family Booklet is required for, *inter alia*, obtaining a National Identity Card, a passport, a driver’s license, free medical care and other social services, legal aid assistance in courts, and a vaccination booklet. Also, to request an official birth, marriage or residence certificate, one needs to present the Family Booklet. A consultation of Moroccan Government websites reveals no fewer than 12 official documents related to civil status that are required for certain routine activities, and for which one needs to present a Family Booklet. It is also necessary as proof of identity to be able to obtain employment, register for government literacy classes, be admitted to the hospital, start a business, purchase a home or other property based on credit, get married, open a bank account, receive money transfers, and claim inheritance rights from one’s parents. Registration in a Family Booklet is generally required to enroll children in school. Without a Family Booklet, people simply do not legally exist.

Finally, it is actually illegal not to have official identity papers on one’s person. People can be stopped by the police, asked to produce identity papers, questioned and imprisoned if they are not carrying them.

A central question here is whether or not unwed mothers have the legal right to obtain a Family Booklet for themselves and their children. Unwed mothers are not addressed in the law’s provisions on the Family Booklet, although as mentioned above, the law does specifically allow them to register their children’s births. It is worth noting that under the pre-2002 Civil Status Law, any single person, man or woman, could obtain their own Family Booklet. In contrast, the current law restricts the drafting and granting of a Family Booklet to a married man only; there are a few exceptions where his wife may obtain a copy.

In May 2009, interviews conducted by the authors with several practicing lawyers in Morocco resulted in contradictory or “I don’t know” responses and thus do not help answer the question of whether or not the law actually allows unwed mothers to obtain a Family Booklet. The text of the law makes no specific provisions for unwed mothers to do so, and leads some to conclude that they do not legally have the right to obtain one. Others argue that there is a void that invites creative and active interpretation of the law,²⁰ reasoning that, since this provision in the previous law was not explicitly repealed, the legal possibility for single persons to get a Family Booklet still exists.

184 Previous interviews conducted by local NGOs representatives with Civil Status Officers directly charged with issuing Family Booklets had yielded similarly confusing results.²¹ When asked whether or not unwed mothers may obtain an individual Family Booklet in their own name in which to register their children, a Civil Status Officer from one major city answered, “Unmarried mothers...now have the legal right to have a Family Booklet.” In contrast, a Civil Status Officer from another town stated,

The mother of illegitimate children has no right to have a Family Booklet, because the pre-requisite for obtaining a Family Booklet is the marriage license. In the past, the mother of illegitimate children could obtain a Family Booklet so that she could have registration references and or for guardianship purposes. Now she cannot have a Family Booklet because, as I have just explained, the essential condition for obtaining one is the marriage license.²²

As recently as June 2009, yet a third Civil Status Officer in a small city replied that he did not know whether or not the law allowed unwed mothers to obtain a Family Booklet. In his opinion, they cannot, and at the Civil Status Office where he presides, they do not give Family Booklets to them.²³

1.2 Implications for setting baselines and assessing change

It is essential that practitioners, policymakers and donors give sufficient attention to obtaining a solid picture of the legal reality in any given country as a necessary first step to any legal rights-oriented development initiative. Appropriate program objectives, measures of progress and desired results depend on establishing an accurate legal baseline from the outset, and should take into account the following possible circumstances:

- existing laws that are clearly written but not applied in reality, whether beneficial or detrimental for women's rights;
- laws that are apparently discriminatory;
- laws that are poorly drafted and therefore unclear and open to disparities in their interpretation and divergences in their application;
- laws that are silent on an issue and create legal voids; and
- contradictions between laws that make their respective application impossible. In a context of recent legal reforms, changes to one code may be contradictory to dispositions in another, older law that has not yet been amended to reflect or be consistent with the new law. For example, while the Civil Status Law allows unwed mothers to register their children, the Penal Code still criminalizes sexual relations outside of marriage.

Project objectives, strategies and definitions of success will be determined according to the respective legal circumstances. This chapter discusses local NGO programs with unwed mothers, and reflects on their lessons learned that have implications on choices in measuring impact and defining success within any given legal and social context.

2. Social context

Women's status in Morocco, just as worldwide, is characterized by inequality, discrimination, economic dependence and marginalization. High illiteracy rates in particular among women, in particular in rural populations, as well as significant disparities between urban and rural areas in the availability and proximity of infrastructures, justice system personnel, education and transportation also affect women's ability to access their rights. Rural women are physically remote from public and private services, and illiteracy hinders women in general from knowing their legal rights and makes them vulnerable to misinformation and propaganda.

Of particular interest here are the policies and attitudes of control over women's bodies and sexual behavior by individual men, the family and the state. As one beneficiary of a local NGO's services stated:

Society belittles women and has the commonly held view that a woman's place is in her home, believing that a woman is born to live under the authority of her father, or her brother, and later on that of her husband. The result of this belief is that a woman remains dependent on her father's or her husband's legal documents.

The conservative legal, social and religious context surrounding women's rights and sexuality means that many issues have been considered too sensitive to address openly and directly. A major recent development in Morocco is that several topics and social phenomena previously considered taboo are increasingly debated openly, popularized through the press and cultural media, addressed by local NGO programs, and even integrated into official speeches.

2.1 The virginity discourse

The legal prohibition of sexual relations outside of marriage and the importance placed on female “intactness” before marriage combined with the increasing number of single people in their late 20s and 30s, and changing social norms can and do lead to inconsistent, even contradictory reporting on sexual behavior and attitudes about female virginity.²⁴

For example, a perusal of recent editions of national Moroccan magazines such as *TelQuel*, *Femmes du Maroc*, *Citadine* and *Ousra* reveals numerous articles describing the extent to which virginity is still important for women yet claiming that sexual relations prior to marriage are becoming increasingly frequent. Explanations for this include the increasing age of marriage, women’s decreasing financial dependence on their families or a prospective husband, and the possibility that one may never get married.²⁵ As one article describes it, although “arriving intact” at one’s marriage is still a strong social imperative in Morocco, an increasing number of couples make alternative mutual agreements.

The lack of statistics and people’s hesitation to speak openly about their own experiences make it difficult to draw an accurate picture of reality.²⁶ One survey reported that 62 percent of young Moroccans think that having a premarital sexual relationship would be complicated, the major obstacles being the reactions of their family (43 percent) and neighbors (23 percent). The same survey found that 67 percent of Moroccan men claimed to have had sexual relations before marriage, while the same percentage of Moroccan women claimed not to have.²⁷

People will rarely openly admit that they were not virgins upon marriage, although most people will talk about how they know someone who was not. Indeed, practices such as obtaining virginity certificates or operations by gynecologists to reconstruct the hymen illustrate the extent to which some women will go to preserve appearances.

The focus on technical virginity has implications for knowledge on sexuality and reproductive and sexual health. A recent survey found that 68 percent of Moroccans have never received any sexual education, and that 31.5 percent think that such education is harmful for children.²⁸ Typically, false stories and rumors circulate on sexuality in communities.

In addition, one article suggests that less than half of young couples in Morocco use some form of contraception²⁹ although the lack of comprehensive surveys and taboos surrounding the topic make it difficult to assess. Moreover, official government policy treats contraceptive use as a family planning method to space pregnancies within the context of marriage only, rather than as a form of birth control for unmarried couples. As a result, awareness-raising campaigns are not designed to target unmarried couples, who may lack sufficient knowledge about safe sex practices and may be hesitant to seek out advice and contraception from pharmacists, doctors or public health clinics.

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It is within these legal and social contexts that women in Morocco may be unwed mothers for a variety of reasons – from sexual relations with a boyfriend based on promises of marriage to rape of domestic workers by their employers. These contexts also have implications for how unwed mothers view themselves, and for how they are treated by their family, society and the state.

The next sections describe the behavior of different actors and their attitudes toward unwed mothers in Morocco, with a particular focus on establishing a baseline on which to assess changes in the communities assisted by the local NGOs of interest. Personal, familial, social and administrative obstacles identified below all have implications for programs designed to promote the empowerment of unwed mothers in Morocco.

2.2 Unwed mothers

2.2.1 Description

Unwed mothers frequently isolate themselves from friends and family out of shame and fear, or are actively ostracized and abandoned by them once their pregnancy is discovered. Also, many are unemployed, either because they have been fired or have resigned to avoid scandal at the workplace, or to give birth. Those who flee from their family homes may move far away where they are without connections or a social network, placed at risk of homelessness and turning to sex work. Considered by many as criminals who deserve their fate, unwed mothers are thus frequently without social or financial resources to support themselves and their children.

Unwed mothers who approach local NGOs usually request financial and material assistance in raising and supporting their children. They also ask for help officially registering a verbal marriage, obtaining housing and medical care, and enrolling their children in school. Many ask the NGO to facilitate employment for them, fearing that employers will refuse to hire them if they discover that they are unwed mothers.

Others who have abandoned their children at birth ask for the NGO's help in regaining custody. One result of society's marginalization of unwed mothers is that – with no support from the state, families, employers or the children's fathers – unwed mothers may abandon their children.

Finally, unwed mothers also ask NGOs to help them register their children's birth and obtain Family Booklets. They describe how persons who lack Family Status Booklets are considered non-existent and how they feel as though they are not full citizens. They see themselves as societal outcasts, deprived of their rights, often feeling inferior without an identity.

2.2.2 Obstacles to unwed mothers seeking out NGO services

Personal obstacles to soliciting assistance from local NGOs include the difficulty unwed mothers frequently have in breaking the silence surrounding their situations and speaking openly about their problems. An unwed mother may be reluctant to seek out the services of an NGO located in the neighborhood where she lives for fear of public knowledge of her situation. She may well prefer to solicit help from an NGO in a distant neighborhood where people do not know her.

At times, unwed mothers first come to ask for advice “on behalf of a friend” until they are convinced of the NGO's credibility and trustworthiness and only then admit that they are seeking assistance for themselves. Such hesitation is fueled by reports by unwed mothers who feel they are “interrogated” and “judged” when they have approached NGOs for help, as well as by a case widely reported in the newspapers in 2003 where local NGO staff were prosecuted for trafficking in children born to unwed mothers.

2.2.3 Family reactions and treatment

Typically, an unwed mother's family will reject her once it learns of her pregnancy. Several local NGOs even describe violent treatment of such women by their families. While individual family members may secretly help her, often she will be forced out of the household to live with another relative or friend, or in a brothel.

Anecdotal evidence from local NGOs suggests that in rare instances where the family accepts the situation, the unwed mother works to provide an income to support herself and her child. Acceptance is also reported to be more likely in families where there are no brothers pressured to defend the family honor who would force her to leave home or whose violent behavior causes her to flee.

Similarly, the biological father usually denies having had a sexual relationship with the unwed mother. He and his family may even deny knowing her, even when the relationship may be common knowledge in the community. Even in cases of *ourfi*³⁰ marriages, where the couple is considered married by their families and community, but does not have official paperwork to prove the marriage, sometimes the child's father and his family deny that the woman is his common law wife or that the child is his. They will accordingly refuse to acknowledge the child's existence and refuse to register the child's birth or obtain a Family Booklet.

2.3 Attitudes and behavior of relevant institutions towards unwed mothers

2.3.1 Hospitals and health personnel

Frequent reports from local NGOs as well as the few published studies on unwed mothers in Morocco describe verbal abuse, insults and humiliation inflicted on unwed mothers by hospital personnel and health professionals, as well as corruption practiced by these persons.^{31,32} Women who go to hospitals to give birth without a husband accompanying them or official proof of marriage are frequently interrogated by hospital staff to determine if they are legally married or not.

In addition, unwed mothers who do not request a birth attestation from the hospital where the child was born at the time of birth frequently encounter difficulties obtaining this attestation from the hospital later on.

2.3.2 Police

When hospital staff suspects that a pregnant woman who has come to give birth is unmarried, they often alert the police, who go to the hospital to question her. If they determine that she is in fact a unwed mother, police in rural areas particularly often then arrest her and launch a criminal prosecution of her for illicit sexual relations. In major cities, however, one study³³ and reports from local NGOs indicate that police interventions at hospitals are increasingly limited to preventing child abandonment, verifying the mother's identity, and ensuring registration of the child's birth.

One woman – the daughter of a unwed mother and without any identity papers – describes how whenever she travels to visit her family in another city, she is terrified when gendarmes stop the bus, for fear that they will ask her to present her identity papers.

Local NGOs in different cities also report that police tend to keep unwed mothers under close surveillance, monitoring and filing reports on their movements. It is not clear if this is with the aim of being able to arrest the unwed mothers should they break the law, or to harass, threaten or blackmail them should they “step out of line”.

2.3.3 Civil Status Authorities

188 This social and legal context also influences how unwed mothers are received and treated at the Civil Status Office, where local administrative authorities (Civil Status Officers and other public civil servant support staff) provide citizens with official civil status documents, such as birth registrations, Family Booklets, marriage certificates, and other identity papers. One unwed mother felt that women in general are marginalized and “treated like insects when they go to a public administration office.”

These four NGOs all describe how unwed mothers are humiliated at the Civil Status Office, and are the target of insults and inappropriate behavior by the civil servants working there.

In addition, unwed mothers are also frequently the targets of extortion for bribes by local civil status authorities. One woman explains her experience obtaining a Family Booklet:

I am an unmarried mother with two children. I wanted to register my children in a Family Booklet and I was confronted with a very disdainful attitude from civil servants who put all

sorts of obstacles in my way to discourage me. I kept on insisting on my desire to get this legal document and refused to bribe anyone. But after some months I came to the conclusion that there was no other way I could obtain a Family Booklet and that my children would suffer as a result. I therefore decided to give a very important sum of money to a civil servant, who then took care of all of the procedures, and now I have a Family Booklet.

A third reaction of local authorities to unwed mothers seeking official documentation is to launch criminal prosecutions against them, even when the mothers have approached the authorities to obtain assistance. One local NGO describes cases of unwed mothers who filed civil court cases to obtain their rights – for a paternity declaration or financial maintenance from the biological father – and instead were deemed to have confessed to sexual relations outside of marriage and were arrested.

In one town known for its brothels, the situation of unwed mothers is exacerbated by the fact that the authorities presume that all unwed mothers are sex workers and thus mistreat them. Similarly, a local NGO in this town describes how some residents do not support and even oppose its work because they consider that by working with unwed mothers, the NGO is encouraging prostitution.

In 2003, in a series of focus groups conducted by five local Moroccan NGOs with 93 different female heads of household³⁴ (not just unwed mothers but also married, divorced, widowed, abandoned, and separated women), not one was able to obtain a Family Booklet themselves without any assistance from a third party.³⁵ As this figure includes divorced, widowed and other women who, unlike unwed mothers, actually had the legal right to obtain a copy of the Family Booklet, one can only presume that unwed mothers faced even more resistance and difficulties than other women due to their illegal status and lack of legal provisions guaranteeing their right to obtain a Family Booklet.

2.4 Do unwed mothers use the law in their favor?

Most unwed mothers who seek out local NGO assistance are not aware of their legal rights under Moroccan law, and consequently do not take steps to access them.

One common assumption in law-and-development discourse is that “knowledge is power”. Even the unwed mothers who know their rights are frequently unwilling or unable to claim their rights, due to the above-described personal, familial, social and administrative obstacles. Although unwed mothers have had the clear legal right to register their children’s births since 2002, such obstacles dissuade them from using the law in their favor.

Unwed mothers cite numerous reasons for not registering their children or attempting to obtain a Family Booklet even when aware of their legal rights,

- In order to file a complete application to register a child’s birth or request a Family Booklet, a host of official identity documents including the parents’ birth certificates must be sought from the local administration at the person’s birthplace. If this is in a remote town or village, people must travel long distances to obtain the necessary documents.

Lack of local administrative offices in one’s place of residence, especially in remote rural areas and even in some medium-size towns also means that people frequently need to travel to another town to obtain official documents.

Unwed mothers often cannot travel to obtain such documents due to prohibitive transportation costs, time limitations and constraints on women traveling alone.

- Another deterrent to registering children and obtaining a Family Booklet is the high costs of gathering and obtaining all of the necessary administrative documents to

complete the application. In addition to travel expenses, application fees – 50 Moroccan dirhams (approximately US\$6) – are also prohibitive for many women without resources.

In addition to the intimidation and fear of criminal prosecution that characterize unwed mothers' interaction with administrative and police authorities, bribery and corruption dissuade many of them from attempting to exercise their rights. They describe how civil servants may take advantage of women's ignorance, blackmail unwed mothers, and exploit their vulnerability by asking them for large sums of money.³⁷

The procedures for registering children and obtaining a Family Booklet are also extremely complicated and difficult to understand, and require an inordinate amount of official paperwork that is frequently impossible to obtain. Many women simply lack the official paperwork necessary to register the child's birth or obtain a Family Booklet. The Civil Status Office requires a legalized birth certificate in order to register a birth in the State Birth Registry. In order to obtain this certificate, one must have a letter from a doctor or midwife attesting to the birth. However, unwed mothers frequently give birth privately and do not dare go to a hospital, clinic or a medical professional for fear of being reported to the police or out of shame. Without this letter from a medical professional attesting to the birth, they cannot get a legalized birth certificate from the local administrative authorities, and thus cannot register their child at the Civil Status Office.

In addition, parents need copies of their own birth certificates as part of the file to register their child. Unwed mothers often hide or are estranged from their own families, and thus may be unable to contact them in order to obtain the necessary documents (e.g. she may be registered in her father's Family Booklet, which she needs in order to get her own official identity and civil status papers).

- Furthermore, the vagueness of the laws and procedures opens them up to different interpretations and abuse of power by authorities.

The lengthy and time-consuming nature of the procedures also discourages many women from registering their children and attempting to obtain a Family Booklet. For example, seven unwed mothers from a major city in southern Morocco said they gave up after trying more than five times to obtain their Family Booklets.

- Finally, in ethnically Amazigh regions of Morocco, the Tamazight language is more frequently spoken within the family and women in particular will speak only the local Tamazight dialect, while Arabic is the official language for all administrative purposes. This language barrier often prevents women from seeking official documents or accessing the justice system.

While these obstacles to claiming one's rights can impact on all people generally, they affect women disproportionately and unwed mothers even more so. Many administrative procedures in Morocco are facilitated through social networks. While men have more personal connections in the public sphere and therefore have a wider network of people when interacting with the administration, women lack these types of connections; unwed mothers in particular are completely ostracized and excluded from their family and society, and therefore have no support network when dealing with the administration.

3. Indications of progress of local NGO programs on unwed mothers' rights

This section examines the initiatives of local NGOs to promote women's empowerment in Morocco. More specifically, it focuses on the four NGOs of interest located in different regions across the country – the northwest, Middle Atlas, southwest and south central – which are devoted to women's rights and empowerment. Linked nationally in partnership with Global

Rights, an international human rights capacity-building organization, the local NGOs implement grassroots-level human and legal rights education and court accompaniment programs primarily for illiterate women in their respective communities. In addition to these collaborative projects with Global Rights, the NGOs (all youth-led organizations created three to six years ago) also implement literacy, health awareness, professional training and income-generation programs for women.

While there are a handful of NGOs helping unwed mothers in several major cities in Morocco, none of the four NGOs specifically targets unwed mothers; rather, they are included in their women's rights programs together with other beneficiaries. These NGOs implement peer education programs and include unwed mothers in their governance structures and as legal rights education facilitators. They contrast their work with that of religious charitable institutions that allocate financial assistance.

Given the prevailing social and cultural contexts, these NGOs prioritize promoting equality and non-discrimination between unwed mothers and other women. They encourage experience sharing between them in order to create an atmosphere of solidarity and mutual assistance.

3.1 Grassroots-level human and legal rights education

Since the early to mid-2000s, these four local NGOs have been leading members of a group of local organizations from across the country, which, in collaboration with Global Rights, designed and currently implements a widespread grassroots-level program of human and legal rights education for primarily illiterate women from traditionally underserved and marginalized populations.

This broad-based, long-term initiative includes: participatory drafting of an Arabic language facilitator's manual with 74 two-hour program sessions on diverse human and legal rights topics; intensive training and ongoing peer evaluation of hundreds of local NGO members – primarily young women – as program facilitators; and implementation of the program by network member NGOs with tens of thousands of women participants in different areas across Morocco. Based on in-depth consultations with the participants, the program was expanded to contain additional themes identified by the women themselves. The program does not limit itself to providing mere information about the laws, but uses a participatory methodology appropriate for developing individual capacities to defend one's rights and building group skills for advocacy and social change.

3.1.1 Indications of progress on unwed mothers

This program also enables unwed mothers to break the silence and speak out about their lives. In 2002, unwed mothers participated actively with other women beneficiaries to revise the first draft of the program manual, suggesting modifications and additions related specifically to sessions on the rights of unwed mothers. They also proposed new topics of interest to them for the program. As a result, the second version of the Manual, published in 2004,³⁷ contains a session on procedures for obtaining a Family Booklet as well as field visits to Civil Status Offices, hospitals and the police, all of which also benefit other women.

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Unwed mothers also concretely profit from the legal information in the specific program session on their rights, which explains the procedures for registering a child's birth and applying for a Family Booklet. In one example in south-central Morocco, two rural, unwed mothers participated in an education session on the procedures for registering children out of wedlock. Afterwards, they approached the facilitator, who directed them to the NGO court accompaniment services. As a result, both women went on to file court cases and obtain judicial birth declarations for their previously unregistered children.

An integral part of the human and legal rights education program includes group field trips to local public institutions responsible for women's rights – such as the police station, Civil Status

Office and courthouse – during which women meet and hold question and answer sessions with relevant personnel.

In field visits to Civil Status Offices, women learn about services offered, papers necessary for different applications and files, and procedures to follow. They also become familiar with the offices, and make contact and form relationships with the staff that then allow them to return to the Civil Status Offices for assistance.

Unwed mothers actively ask questions during these field visits, including on procedures for registering children and obtaining a Family Booklet. Local NGOs also report how these field visits demystify the local public administrations and make them a less intimidating and threatening place for women.

In the four NGO experiences described here, unwed mothers also formed independent discussion, peer education and support groups among themselves to share their experiences and collectively analyze them. In one medium-sized town in particular, the unwed mothers who participated in the program decided to create their own NGO just for unwed mothers.

3.1.2 Indications of progress on other program participants

Similarly, NGOs describe the impact that participating in the legal and human rights education program has on other program participants, as a result of unwed mothers' presence in the groups as well as the specific program sessions on unwed mothers' rights. They mention how attitudes of rejection towards unwed mothers were replaced with sympathy and support. On a larger scale, as a result of the program, there was a shift from the consensus of silence around the issue of unwed mothers to a shared vision of participants that unwed motherhood is a social reality that must be addressed.

As one NGO described it, the other women "started behaving normally towards the unwed mothers and stopped marginalizing them".

3.1.3 Indications of progress on implementing NGOs' capacities

Implementing the group legal and human rights education program increases demand for the NGOs' other services. Education sessions not only provide a context where women learn about their legal rights, but also a safe space to encourage them to develop trust in the NGO and later seek out its direct services to address their individual legal problems.

NGOs also emphasize the advantages of implementing such a program from the creation of their organization, advantages that are not merely limited to providing a space where women learn about their rights. These sessions also create opportunities for implementing NGOs to learn more about women's perspectives and realities. By listening to women participants during program sessions, local NGOs can continually design and adapt their programming to effectively address women's concerns.

3.1.4 Indications of progress on local authorities

When the human and legal rights education program was first conceived, implementing organizations primarily focused on and looked for evidence of impact on the participants and NGO capacity building. However, one unanticipated positive result reported by local NGOs is the effect the program has on local public administrative staff and authorities, particularly due to the field visits organized in the program.

As specifically concerns unwed mothers, NGOs organize field trips to Civil Status Offices where program participants meet with the local authorities and public servants, mainly Civil Status Officers. After a presentation on the Civil Status Office structure, staff and procedures, the authorities then engage in a question and answer session with the women, who have prepared questions in advance. Since authorities address the entire group, positive, superficial answers to

questions posed will be witnessed by many. The authorities then become accountable for such statements when women later return to apply the laws and procedures in their specific cases.

3.2 The Court Accompaniment Program

In 2006, in collaboration with Global Rights, local NGOs in eight different regions in Morocco launched a one-year pilot initiative to set up structures for Court Accompaniment Programs within their organizations. In this program, local NGO staff accompanies women to courts and other relevant government offices and public services in order to orient them to the justice system and provide support during the process. The staff monitors the authorities' behavior in and decisions on these cases and conduct outreach activities for local authorities and civil servants, raising their awareness on women's rights. They also provide legal counseling for women and referrals to lawyers for pro bono or reduced fee services.

While the program was initially conceived as primarily accompanying women to courts and monitoring the judiciary, women also frequently approach NGOs for assistance with legal problems involving other public administrations, such as the police station, Civil Status Offices and hospitals.

Most of these services are provided on a volunteer basis by young women trained by the NGOs as counselors, who work with a small staff averaging five people to implement the entire range of NGO programs. In addition to the initial one-year training period by Global Rights in which the NGOs received a small monthly stipend for costs related to program set-up, the NGOs operate their programs on small budgets comprised mainly of individual contributions by its members.

The four local NGOs handle diverse family and criminal law matters concerning hundreds of women beneficiaries per year. Unwed mothers comprise approximately 10 percent of their total beneficiaries of court accompaniment activities. NGOs' support to unwed mothers includes legal orientation and accompaniment to court and government offices as well as assistance in registering their children's births and obtaining a Family Booklet. The NGOs also facilitate access to emergency shelters for homeless unwed mothers.

Moreover, one NGO working in a large southern city convinces local schools to enroll undocumented children even in the absence of the official identity paperwork normally required for school admission. According to this NGO, a ministerial circular stipulates that schools must admit children who do not have identity papers up to the end of primary school.³⁸

The NGOs' approach is to provide information, support and orientation so that women can complete much of the legwork and administrative steps themselves. For unwed mothers in particular, the NGO explains the procedures and list of documents necessary to register a child, and helps them prepare the necessary paperwork themselves. Once their file is complete, an NGO representative accompanies them to the administration to file the case.

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Local NGOs also intervene with local authorities to find solutions to the obstacles listed above to unwed mothers when registering their children. For example, local NGOs frequently accompany these mothers to the hospital if they have difficulties obtaining a birth attestation. When unwed mothers cannot obtain certain required documents, the NGOs work with local administrative authorities to find an alternative solution that will allow them to eventually register their children. In frequent cases where the 30-day deadline to register a child's birth has expired, volunteer lawyers help unwed mothers file a court case to obtain a judicial declaration of birth.

3.2.1 Indications of progress on local authorities

As with the human and legal rights education program, while the court accompaniment program was intended first and foremost to help women access their rights through

individualized legal orientation and assistance, the Court Accompaniment Program also impacted local authorities' attitudes, behavior and policies towards unwed mothers.

In all four towns and cities discussed above, local Civil Status Authorities requested that local NGO collaborate in awareness-raising campaigns to encourage unwed mothers to register their children's births. It is worth noting, however, that in at least one of the towns, the aim of the campaign was described by the local authorities organizing it as that of registering children born "in the absence of a marriage contract", deceptively presenting it as registering children born in *ourfi* marriages rather than to unwed mothers. This approach of camouflaging reality out of sensitivity or morality concerns is relatively frequent among Moroccan Government initiatives.

Moreover, local NGOs describe how now many of their unwed mother beneficiaries are referred to them by the local authorities themselves. One NGO in a large city describes how when police officers are informed by the hospital of a birth to an unmarried woman, they have become hesitant to arrest unwed mothers and instead refer them to the local NGO for information and assistance. Local Civil Status authorities will likewise send unwed mothers to local NGOs for help in preparing applications for official documents.

Furthermore, unwed mothers are reportedly treated with more dignity at the Civil Status Office if an NGO representative accompanies them. Anecdotal evidence from local NGOs describes how local Civil Status authorities are now friendly, polite, respectful and willing to provide unwed mothers with information, and try to simplify procedures for them. In one large city, local Civil Status Officers accommodate unwed mothers known to be beneficiaries of the local NGO and help them with their paperwork from other offices and administrations, facilitating all of the steps necessary to process the case with other civil servants.

Civil Status Officers in the communities where the four local NGOs work also reach informal working agreements whereby the Officers are more flexible in the paperwork required to register a child or get a Family Booklet for unwed mothers accompanied by local NGO members. NGO contacts among the local authorities in one city have also led to the authorities simplifying procedures for unwed mothers seeking access to diverse public services. For example, the Public Prosecutor there now systematically issues an order for homeless unwed mothers to go to a local shelter.

Local NGOs attribute this shift in attitude and behavior to two factors related to their Court Accompaniment programs: good working relationships and contacts with local authorities established by local NGOs during the above-mentioned campaigns and the watchdog role of the NGO representative that serves to monitor and guide the actions of the Civil Status Officer handling the file.

3.2.2 Indicators of impact on unwed mothers' lives

One indicator of social change highlighted by local NGOs is that unwed mothers actively seek out NGO services and assert their rights openly rather than hiding and accepting their plight. Second, local NGOs describe how the program led some unwed mothers to confront authorities directly and resolve problems themselves without the NGO accompanying them. Third, nearly all of the unwed mothers who contacted the four local NGOs to date have been able not only to register their children's births, but also to obtain Family Booklets in their name in which to record their children.

In the two years since the May 2007 completion of the initial one-year pilot period of training and setting up of the Court Accompaniment Program structures, the four local NGOs have each, on average, been able to obtain Family Booklets for 11 unwed mothers per year, a significant number in the context. If it were not for the NGO Court Accompaniment program, the number would likely be zero.

In addition to the limited NGO human and financial resources described earlier, the lengthy procedures mean that even with NGO assistance, it takes unwed mothers three to eight months to obtain a Family Booklet. Many unwed mothers still hesitate to address their situation openly because of the taboo and criminal nature of the issue. Since legal reforms impacting unwed mothers' status have only recently been enacted, the authorities are still grappling with their interpretation and application. Most importantly, unwed mothers do not actually have a clear legal right under law to obtain a Family Booklet. In many places such as the small city where there is no NGO Court Accompaniment Program, the Civil Status Office does not give unwed mothers Family Booklets.

Obtaining a Family Booklet enabled the unwed mothers to establish and enjoy all of the benefits of a legal identity for themselves and their children. They no longer encounter problems enrolling their children in school, applying for jobs, accessing health care in public hospitals, obtaining National Identity Cards, or traveling freely around the country. One unwed mother with a Family Booklet mentioned that she would now be able to get a passport to take her child abroad for much-needed medical care for a physical disability.

3.2.3 Indicators of impact on implementing NGO's capacity

Local NGOs describe the contribution of the Court Accompaniment program to their own institutional development. Through these hands-on, skills-building opportunities and mentoring by Global Rights, local NGOs have enhanced their ability to forge relationships with local authorities, to address risky and taboo topics with government officials and to put pressure on them to change their attitude towards and treatment of unwed mothers and have advocated for policy change at the local level. They have also put pressure on them to develop a support base of lawyers willing to provide pro bono legal assistance.

The program also improved NGO members' knowledge of laws and procedures, increased the number of NGO beneficiaries and contributed to women's trust in the NGO. It also enhanced the NGOs' overall reputation and credibility in the community as well as with national government representatives and international donors from whom to leverage support.

Finally, providing direct services at the grassroots level helps local NGOs engage with women in the community so that they continually assess and develop the next phases of their activities to be responsive to their priorities. In the case of unwed mothers, regularly listening to their needs has helped consolidate local NGO plans for future advocacy strategies concerning their realities.

When consulted by local NGOs, unwed mother beneficiaries expressed conflicting opinions about efforts to register their children's births and obtain their own Family Booklet. Many unwed mothers do not necessarily want this solution for themselves and their children, for several reasons. Some complain that registering a natural child's birth and obtaining an individual Family Booklet maintain their current stigmatization and that of their child. Since the law requires a symbolic father's name beginning with *Abd*, children are easily identifiable as being born to unwed mothers. Following the 2002 legal reforms, unwed mothers are the only unmarried persons now requesting exemptions to the law restricting Family Booklets to legally married couples.

Unwed mothers also point out that obtaining their own Family Booklet exonerates biological fathers of all obligations to their children and reinforces the idea that mothers alone are financially and morally responsible for their children, as if the father does not exist. Many would prefer an approach where the biological father's paternity is attributed and where he assumes his share of the child's upbringing.

Some unwed mothers believe that NGOs are facilitating the abandonment of their children by the biological father. While they agree that unwed mothers need official identity papers, they

argue that steps need to be taken to ensure that biological fathers assume responsibility for their children. They insist on sustainable measures, rather than the current solution of forcing the biological father to marry the mother only to divorce her immediately afterwards.

As one NGO member summarized the viewpoints of many unwed mothers, what is the point of being legally empowered as an individual if other actors – the state, biological fathers – are thus absolved of their legal responsibility? Local NGOs have now requested assistance from Global Rights to design and implement future activities to address this perspective voiced by unwed mothers.

Discussion and conclusions

Implications for the role of local NGOs

This chapter began by suggesting that practitioners, policymakers and donors give careful consideration to the details of any given legal context when designing, implementing and evaluating law-oriented development initiatives. Laws concerning unwed mothers have implications for the role of local NGOs, and highlight implications for the defining results and measuring success. Different circumstances can make it difficult to consider whether or not projects promote women's legal empowerment.

The popular discourse one frequently hears in Morocco – especially among the authorities, intellectuals and other members of the elite – is that the current problem is the population's ignorance of the laws and their rights. A recurring comment by both official and civil society actors is that legal education campaigns are the needed solution to many social ills. Under the above circumstances, in which laws are either not applied, are unclear, or have gaps, awareness of them is insufficient; knowledge alone is not power and does not effect change. The situation of unwed mothers in Morocco illustrates the need for concrete assistance in accessing the public administration and in navigating the system in order to obtain some measure of justice for themselves.

The question then becomes what the role of local NGOs is in this context. In addition to providing legal information and advice, they serve as intermediaries between women and the authorities. The knowledge of procedures of NGO staff and their personal contacts with staff at different administrations facilitate the process for unwed mothers as well as the civil servants' jobs. The NGO presence also serves as watchdog over local authorities.

Through such accompaniment, NGOs help unwed mothers avoid humiliation at public administrations and provide protection from corruption and abuse of authority by civil servants. In the absence of traditional family support networks and social connections that usually facilitate this for less ostracized people, NGOs step in to fill this role for unwed mothers.

In areas where the law is unclear or vague, NGOs complement the work of the local authorities and encourage advantageous interpretations of laws. This is the case with the local police, who now limit their hospital interventions at hospitals to determine the unwed mother's identity in order to avoid child abandonment. Without any orders or specific guidelines on how to deal with unwed mothers, the police frequently refer them to local NGOs for assistance instead of arresting them.

In areas where there is a legal gap, as with issuing a Family Booklet to unwed mothers, local NGOs work with local authorities to encourage alternative solutions that are more beneficial to women's rights, such as convincing the local Civil Status Office to give unwed mothers their own Family Booklet.

Under such circumstances, practitioners, policy-makers and donors must realize that support for NGOs that provide such direct assistance to marginalized populations will be necessary over the long term until the larger structural issues of social stigmatization, illiteracy, corruption, and legal and administrative reform are addressed.

Implications for measuring success and evaluating progress

How one views the role of local NGOs determines how indicators should be developed in order to assess progress and judge outcomes.

For example, the traditional solution of convincing biological fathers to marry unwed mothers is generally viewed by society as positive. In this instance, a report to donors might cite the number of marriages concluded between the biological parents of a child born out of wedlock as an indicator of success. However, many social workers acknowledge that a large majority of these marriages turn out badly – in violence and/or the father’s subsequent repudiation of the mother.³⁹ NGOs emphasizing family reconciliation may cite statistics on the percentage of unwed mothers who have returned home to their families, irrespective of possible abuse.

In the more recent approach focusing on official documents, NGOs may assess their work by citing the number of birth registrations of “natural” children and Family Booklets issued to unwed mothers that they assisted.

How would one describe or measure the non-application of a discriminatory law against women as a result of NGO efforts? Even though the penal code prohibits sexual relations outside of marriage, the police are increasingly reluctant to arrest unwed mothers. One wonders if local NGOs could be encouraged by donors, local authorities or other stakeholders to report reduced numbers of arrests of unwed mothers in hospital and prosecutions for sexual relations outside of marriage, and how this would even be feasible.

Similarly, if the impact of NGO work is circumventing the law to grant rights that do not legally exist, how and why would they openly report on this, given the risks? When probed by the authors for more explicit information, the four local NGOs resisted questioning local civil status authorities further to explain the legal basis on which they provide unwed mothers with Family Booklets. The NGOs feared that the authorities would conclude that there is actually no legal basis and consequently stop providing them with these booklets.⁴⁰

It is the authors’ view that practitioners, policy-makers and donors should be aware of how different results presented by NGOs working with unwed mothers demonstrate that, while in the guises of social science and empowerment, they may in reality reflect society’s morality imperatives. One should also be sensitive to political constraints to information and data gathering in a context that encourages a trade-off between immediate solutions to individual problems and speaking openly and publicly about larger institutional dysfunctions. Finally, steps towards progress should not be confused with longer-term empowerment.

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Implications for how we define empowerment

The legal and social contexts also affect one’s definition of empowerment, and hence how one assesses law and development initiatives designed to support marginalized populations. An examination of different approaches used by local NGOs in Morocco when working with unwed mothers helps reflect on how one’s conception of legal empowerment.

The initial approach used by some NGOs to address the issue of unwed mothers, in the words of one NGO President was, “we go find the biological father and corner him into marrying the mother!” In this traditional vision, the unwed mother is seen as needing a man to marry her in order to save her honor and put her in her proper place, married with legitimate children.

NGOs frequently contact the biological father to try and convince him to assume his responsibilities and recognize his child. It is worth emphasizing that this entails claiming that he and the mother were actually legally married – or at least engaged to be married – when the child was conceived, and not merely admitting biological paternity. Along the same lines, many NGOs include family reconciliation as part of their work, contacting the unwed mother’s family to convince them to allow her to return home.

More recently, local NGOs have instead begun using the strategies described above, providing assistance to unwed mothers and intervening with the administration in order to register her children and obtain a Family Booklet in her name. This strategy is frequently seen as promoting the empowerment of unwed mothers, who have begun to obtain legal identities for themselves and their children.

However, many unwed mothers consider obtaining individual identity papers as a band-aid solution to a larger problem of legal accountability of biological fathers for their children. This raises the question of how to understand legal empowerment – whether it is according to our definition as practitioners, policy-makers or donors of progress and positive laws or according to what the women themselves want, and how these should be reconciled.

Any definition of legal empowerment should take into account women’s own priorities, concerns, and recommendations when elaborating program goals, indicators of success and desired results. Definitions of legal empowerment for women are easily influenced by morality concerns and ideas that do not necessarily take into account unwed mother’s perspectives. The question becomes whether unwed mothers should adapt to society and the existing legal system; therefore, the extent to which they access it is evaluated and measured as success. Alternatively, should the legal system be adapted and become inclusive of and responsive to the needs of unwed mothers?

When asked⁴¹ what changes should be made concerning identity paper procedures, women listed the following:

- assistance from Civil Status Officers responsible for birth registrations and Family Booklets;
- simplification and acceleration of administrative procedures;
- elimination of corruption and punishment of bribery in public administrations;
- reduced fees for official documents;
- respectful treatment of unwed mothers by civil servants;
- awareness-raising and advice for women on their legal rights;
- responsibility of biological fathers for their children on an equal basis with biological mothers;
- guarantee of the legal right to all women – including unwed mothers – to obtain a Family Booklet.

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An assessment of local NGO efforts to date suggests that in the short three-year timeframe described here, current programs have succeeded in obtaining improvements related to all but the last two bullet points, at least on the local level. Even this claim comes with the caveat that these have been achieved on a case-by-case, unofficial basis through ongoing NGO interventions, and not yet made official law or policy that applies equally to all. The last two points require legal reforms and have not yet been addressed or made the focus of any advocacy campaigns. Based on input from unwed mothers, local NGOs identify legislative reform campaigns as a priority for future collaboration from Global Rights.

The current legal context in Morocco also raises questions about defining legal empowerment. As described above, legal empowerment for unwed mothers not only concerns ensuring that good laws are applied or that women have access to the rights contained therein, as is the case



with registering births, but also involves local NGO work with local authorities to not apply certain laws such as penal code provisions outlawing sexual relations outside of marriage, or overcoming legal gaps – in the case of the Family Booklet to obtain a right not provided for by the law.

Future legal empowerment initiatives concerning unwed mothers should therefore focus on access not only to the justice system, but also to the legislative reform process. In a long-term strategic process to respond to unwed mother's priorities and opinions, NGOs can build on the pilot experiences implemented at the local level and consolidate current unofficial practices to generate support and mobilize the state to integrate and recognize unwed mothers and their specific realities and concerns in the law.

Endnotes

- 1 The Family Booklet is the main and most important official document proving one's legal identity and civil status. Created upon marriage, it contains all personal information about the Family Booklet's owner, spouse(s) and descendants.
- 2 This chapter is based on the authors' nine years of working in Morocco with local NGOs designing and implementing programs to develop their capacities to promote women's legal and human rights. Information presented here is based on written quarterly progress reports submitted by local partner NGOs, regular site visits and assessment missions by the authors to the NGOs, monthly implementation assessments of telephone programs, and anecdotal evidence. Baseline information for this chapter was gathered during a United Nations Development Programme (UNDP) and Association for the Development and Enhancement of Women regional study on women, *Gender and Citizenship in the Arab World: To Be or Not to Be: Women's Legal Existence and their Compromised Citizenship* (2004), involving focus groups with women and structured interviews with decision-makers. Updated information, supplemental details and clarifications were gathered by the authors in May and June 2009 through a detailed six-page questionnaire sent to the four partner NGOs profiled here. Finally, the authors followed up on the questionnaire through telephone interviews with NGO staff and several local lawyers.
- 3 The authors depart from their usual practice of citing and thanking the partner NGOs by name for their program work and contributions to this chapter. As described below, the work of these NGOs with unwed mothers is based on maintaining good relationships with local authorities and could be compromised by too much public attention. In addition, the chapter describes how one aspect of NGO efforts involves convincing local authorities to provide unwed mothers rights not specifically allowed in the law. NGOs thus requested anonymity out of concern that local authorities might cease cooperating in this manner.
- 4 The term "unwed mothers" as used here does not therefore include divorced or widowed women who had children while legally married to the father.
- 5 Unnamed survey referred to in J Abbiateci, "Maroc: l'impossible combat des mères célibataires, Basta!" (18 February 2007) <<http://www.bastamag.net/spip.php?article154>> at 10 January 2010. As a point of reference, Casablanca represents approximately 10 percent of the total Moroccan population of 32 million (authors' note).
- 6 See, for example, the Ligue démocratique des droits des femmes, *Rapports Annuels sur la mise en place du Code de la famille* (2005, 2006, 2007, 2008).
- 7 *Code de la Famille* 2004 (La Moudawana) Dahir No.1-04-22 du 12 Hija 1424, full text available at <<http://www.justice.gov.ma/MOUDAWANA/Frame.htm>> at 10 January 2010. Please see the unofficial English language translation of the Family Code available at <http://www.globalrights.org/site/DocServer/Moudawana-English_Translation.pdf?docID=3106>.
- 8 *Code Pénal* 1962 Dahir No. 1-59-413 du 28 Joumada li 1382 (26 Novembre 1962) Portant Approbation du Texte du Code Penal, as modified by Dahir N° 1-03-207 du 16 Ramadan 1424 (11 Novembre 2003) Portant Promulgation de la Loi N° 24-03. Art. 490 punishes sexual relations between unmarried persons of the opposite sex with a prison sentence of one month to one year. Code Pénal 2003 Art. 491 punishes adultery with a with 1–2 year prison sentence.
- 9 *Code Pénal* 1962 Art. 486-488.
- 10 In Morocco, abortion is covered by Code Pénal 1962 Art. 449-458, in the section "Crimes and Misdemeanors against Family Order and Public Morality".
- 11 *Code Pénal* 1962 Art. 449-452 punish performing an abortion with 1-5 years' imprisonment (doubled if the person performing the abortion does so habitually), and medical professionals may also be barred from exercising their profession temporarily or permanently.
- 12 *Code de la famille* 2004, Art. 142-162.
- 13 *Code de la famille* 2004, Art. 153, 156.
- 14 *Code de la famille* 2004, Art. 149 provides that: "Adoption has no legal value and does not result in any of the effects of legitimate filiation."
- 15 Loi de Statut Civil 2002 Loi No 37-99 relative à l'état civil, Dahir 1-02-239 du 25 reheb 1423 (3 October 2002).
- 16 In French, the *livret de famille*, and in Arabic, the *dftar ailli*. It is worth noting that the previous law referred to a *carnet d'état civil* in French and *hala madania* in Arabic, which translates as Civil Status Book.
- 17 Approximately US\$40-150 as of January 2010. The legal, yet unenforced, monthly minimum wage in Morocco is approximately US\$250.
- 18 Examples include *Abdellah* or *Abdassalam*: *Abd* means "slave of" and is followed by one of the sacred names for God.
- 19 A person is registered in his or her own father's Family Booklet until and unless they get married, at which point they are registered in a new Family Booklet created for them and their spouse.
- 20 Taking into consideration, however, that Moroccan authorities, operating in a civil law country and not a common law country, are charged with merely applying the law, and there are major limitations in both law and its practice, as well as in interpreting them to expand rights or to disregard those they consider unpropitious.
- 21 UNDP and Association for the Development and Enhancement of Women, above n 3.
- 22 The Civil Status Officer interviewed objected to the term "unwed mother", preferring to use the term "mother of illegitimate children".
- 23 In following up on an interview conducted by a practicing lawyer and member of a local NGO, this Civil Status Officer sent a written request to the Ministry of the Interior posing the question and requesting official legal guidance. At the time this paper was submitted, he had not yet received a response.
- 24 There is no cultural or social imperative for men to remain virgins before marriage.
- 25 N Lamlii, "Virginité. Est-ce encore un tabou?", *Tel Quel* (28 July 2007) <http://www.telquel-online.com/284/couverture_284> at 10 January 2010.
- 26 J Mdidech, "Relations sexuelles avant le mariage, les jeunes en parlent", *La Vie Eco* (6 May 2007) <<http://www.bladi.net/12617-relations-sexuelles-mariage-jeunes.html>> at 10 January 2010.
- 27 Survey conducted by *L'Economiste* as reported in Lamlii, above n 26.
- 28 *Ibid.*
- 29 Mdidech, above n 26.
- 30 These marriages, concluded orally with the reading of the *Fatiha* and in the absence of a written marriage contract, are no longer recognized as valid after the 2004 Family Law reforms.
- 31 Haut Commissariat au Plan, Direction régionale du Grand Casablanca, *Etude sur les mères célibataires et les enfants nés hors mariage dans la Wilaya de Casablanca* (2002).
- 32 Some corruption practices include asking for bribes in order to provide

basic hospital services, minimal medical care, or even hospital admission. This is relatively widespread and standard, but unwed mothers are impacted more than other people by such practices, because their illegal status makes them particularly vulnerable to such extortion and their disadvantaged economic status means that they have fewer means to pay such bribes.

- 33** Haut Commissariat au Plan, above n 31.
- 34** UNDP and the Association for the Development and Enhancement of Women, above n 2.
- 35** Assistance in obtaining the Family Booklet was provided by local NGOs, high-ranking civil servants to whom the women paid bribes, relatives who were civil servants and worked in the relevant administration, or intermediaries

specialized in facilitating interactions with the administration who charged the women enormous fees for their services.

- 36** Seventy-six percent of acts of corruption in the Ministry of Interior services relate to obtaining an administrative document or an authorization; a right guaranteed to the citizen by law. The services under this Ministry were perceived as among the most corrupt and with the highest indicators of non-transparency: 41 percent of people having had contact with the *moquaddem* (civil status officers) in 2000 admitted to making an illicit payment to them either to have the law applied or circumvent it. Transparency Maroc, *La corruption au Maroc: Synthèse des résultats des enquêtes d'intégrité* (2002).
- 37** The *Arabic Language Manual and English Summary* can be downloaded in PDF format from <www.globalrights.org>.
- 38** The other three local NGOs and lawyers from other areas in Morocco consulted for this chapter were previously unaware of this ministerial circular.
- 39** Femme du Maroc, "Mères célibataires" <<http://www.femmesdumaroc.com/Magazine/Societe/meres-celibataires-le-happy-end-est-il-possible>> at 1 December 2009.
- 40** For this reason, the towns and cities where the NGOs described are located have not been named.
- 41** UNDP and the Association for the Development and Enhancement of Women, above n 2.

Women's inheritance and property rights: a vehicle to accelerate progress towards the achievement of the Millennium Development Goals

Nina Berg, Haley Horan and Deena Patel

Executive Summary

Women's inheritance and property rights constitute one of the main areas of focus of the women's movement in developing countries. Strengthening women's legal position in these areas is an important and effective means to decrease poverty and increase gender equality, and to accelerate progress towards the achievement of the Millennium Development Goals (MDGs). The importance of this issue is illustrated by the sharp rise in girl and women-headed household in regions such as sub-Saharan Africa, where the impact of armed conflict, HIV/AIDS, and poverty has resulted in a widowhood rate of 25 percent. Since 1995, the international community has dedicated increasing policy attention to women's inheritance and property rights, drawing on evolving human rights-based frameworks.

To illustrate the potential impact of legislative changes and their enforcement on the achievement of the MDGs in developing countries, this chapter presents two in-depth case studies from Rwanda and Ethiopia. The Rwanda case study focuses on examples of gender sensitive policy making and innovative electoral mechanisms, whereas the Ethiopia case study explores the impact of AIDS epidemic on these phenomena.

The law is a powerful instrument to improve the situation of women and to accelerate progress toward the achievement of the MDGs. While legal reform is rarely sufficient per se to bring about change, it can open the door to greater opportunities for women to individually and collectively assert their rights. Several steps must be taken in order that national justice systems effectively guarantee the internationally recognized rights of women, in line with a state's commitments under international agreements and conventions. These steps are diverse and challenging.

While there is no global blueprint for effectively guaranteeing women's inheritance and property rights, efforts must be focused on legislative reform, advocacy and enforcement. It is important to implement and enforce existing laws, as well as to build effective and efficient access to justice and awareness of these laws. Where protective laws do not yet exist, they must be drafted and adapted. Where conflicting laws are in place, their inconsistencies should be resolved and precedents established in ways that favour gender equality. Supporting civil society in its organizational, educational, advocacy, and legal services roles is an essential step toward ensuring that equality in the law on paper becomes equality in action.

Introduction

Women's inheritance and property rights constitute one of the main areas of focus for the women's movement in developing countries. Strengthening their legal position in these areas is an important and effective means to decrease poverty and increase gender equality, and a hence a crucial vehicle to accelerate progress toward the achievement of the Millennium Development Goals (MDGs). The consequences of this issue is illustrated by the sharp increase in girl and women-headed households in regions such as sub-Saharan Africa, where the impact of armed conflict, HIV/AIDS, and poverty has resulted in a widowhood rate of 25 percent.¹ In Rwanda, for example, nearly one third households are headed by women.²

Since 1995, the international community has dedicated increasing policy attention to women's inheritance and property rights drawing on evolving human rights-based frameworks.³ Relatively recent legal changes in for instance Northern Europe that recognize domestic work as equal to work outside the home in terms of its contribution toward the acquisition of movable and immovable property of a married couple – have proven an essential step toward strengthening women's individual decision-making power within the family and creating a basis for them to leave situations of dependency and gain full control of their lives and livelihoods. As observed by the United Nations Millennium Project Task Force on Gender Equality, ensuring women's inheritance and property rights helps to empower them both economically and socially. It rectifies a fundamental injustice that produces further positive outcomes, as women's lack of property has been increasingly linked to development-related problems, including poverty, HIV/AIDS and violence.⁴

To illustrate the potential impact of such legislative changes and their enforcement on the achievement of the MDGs in developing countries, this chapter presents two case studies from Rwanda and Ethiopia. The Rwanda case study focuses on examples of gender-sensitive policy making and innovative electoral mechanisms, whereas the Ethiopia case study explores the impact of the AIDS epidemic on these issues.

1. The current legal landscape and the Millennium Development Goals

Access to assets through various channels of transfer, one being inheritance, enhances women's livelihood options and is vital to their decision-making power and economic empowerment.⁵ Yet, women continue to be routinely denied land and property rights in much of the developing world. As a result, if their fathers, husbands, or, even in some cases, brothers or uncles die, they are often left destitute, making it difficult to care for themselves and their dependents. In turn, women find themselves with limited options and opportunities to improve their situations.

Many justice systems seek to protect women when their husbands die. However, their provisions and norms create or reinforce forms of dependency, rather than granting women decision-making power on their own terms. A widow is expected to be cared for by relatives of her deceased husband, or in some cases, the justice system may dictate that inheritance passes to the children only, effectively turning a widow into her child's dependent. Dependency and protection norms in informal or non-state legal systems are frequently further reinforced by formal legislation – oftentimes from the colonial past – stipulating that women are considered subordinates to their husbands.

Further, many developing countries are also experiencing changing social realities and the breakdown of customary norms and cultures. When combined with growing populations and increasing resource-scarcity driving up the value of land, norms that traditionally sought to protect women are turned into a pretext for abuse; the woman loses everything to “property

grabbing” and is often excluded from the family of her husband on whom she had been dependent. This situation is compounded by the stigma and discrimination faced by AIDS widows.

This state of affairs is incompatible with the international commitments to which most countries have agreed. Under the Convention on the Elimination of All Forms of Discrimination against Women 1979, for example, signatories commit to ensure “*the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property.*”⁶ The Global Platform for Action emanating from the World Conference on Women held in Beijing in 1995⁷ acknowledged that women’s right to inheritance and ownership of land and property should be recognized. Further, the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa states that “*a widow shall have the right to an equitable share in the inheritance of the property of her husband*”, including the right to continue to live in the matrimonial home, and that “*women and men shall have the right to inherit, in equitable shares, their parents’ properties.*”⁸ The Global Platform for Action emanating from the World Conference on Women held in Beijing in 1995 acknowledged that women’s right to inheritance and ownership of land and property should be recognized. The latest Security Council resolution on women, peace and security, Resolution 1889 (October 2009), recognizes the need to ensure women’s livelihood, land and property rights in the context of post-conflict peacebuilding.⁹ In addition, under *MGD 3: Promote gender equality and empower women*,¹⁰ the international community has committed itself to gender equity that includes inheritance and property rights.¹¹

The United Nations Millennium Declaration (2000)¹² identifies good governance and rule of law as the bases for the achievement of the MDGs. Although the MDGs do not include a specific justice-oriented goal, ensuring women’s inheritance and property rights provides an example of how a democratic governance intervention in the field of rule of law and justice can be a crucial instrument to enable and support the achievement of multiple MDGs. And although not an official MDG target, in 2005 the United Nations Millennium Taskforce identified the guarantee of women’s inheritance and property rights as a strategic priority toward the achievement of MDG 3. Its proposed indicators to monitor progress toward this priority¹³ relate to land ownership and housing title, disaggregated according to gender or jointly held. Moreover, women’s right to own and inherit property is also closely linked to MDGs 1, 6, and 7, as described below.

1.1 MDG 1: Eradicate extreme poverty and hunger

Women’s poverty is directly related to the absence of legal and economic independence and autonomy. Lack of opportunities and effective access to economic and natural resources, including rights over land, is compounded by normative and legislative frameworks that only provide women with subsidiary inheritance and property rights.¹⁴ This situation limits women’s options to enter into production on their own terms; it consequently limits their indirect opportunities to access credit, microfinance and employment. Women’s contribution to the household through farming, work in the informal sector, caretaking and other activities is indispensable to reduce extreme poverty and hunger, and to ensure the well-being of their dependents and families. But their legal and socio-economic dependency reinforces the status quo without tapping the potential for socio-economic development underlying women’s full participation in the human development process.

This untapped potential is further illustrated in the evidence that within their limited possibilities, women allocate their money more judiciously than men and spend more of their incomes on the health and nutrition of their family members and schooling of their children.¹⁵ This has a positive impact on human poverty¹⁶ and further contributes to the achievement of *MDG 2: Achieve universal primary education*, *MDG 4: Reduce child mortality* and *MDG 5: Improve maternal health*.

1.2 MDG 6: Combat HIV/AIDS, malaria and other diseases

There are strong links between the spread of HIV and women's right to own and inherit property. Women with secure property rights are better able to cope with and mitigate the impact of HIV and AIDS, such as illness or widowhood, on themselves and their children.¹⁷ With a legally secure resource base that can generate income, women are empowered to maintain their family's income and thus better able to bear the economic burden associated with AIDS. Upon widowhood, they are in a stronger position to retain their inheritance and property rights, and prevent having their property or land taken from them as a result of the stigma often associated with HIV and AIDS. Second, obtaining full inheritance and property rights also helps to prevent women from contracting the disease, by increasing their independence and bargaining power within the household, including their power to negotiate safe sex. Third, women who hold property in their own right are less likely to turn to transactional sex to support their families.¹⁸ The case study on Ethiopia will discuss the impact of women's inheritance and property rights in greater detail.

1.3 MDG 7: Ensure environmental sustainability

In their role as caretakers, women in much of the developing world have primary responsibility to obtain food, water, fuel wood and other basic necessities for their families. The environment has a direct impact on the subsistence economy and women's livelihoods. Consequences of climate change such as increased periods of drought, flooding and other environmental factors such as forest degradation make it increasingly difficult for women to obtain these necessities for their families.¹⁹ Women are also responsible for saving seeds for the planting season and seed management is of great significance to biodiversity.²⁰

Women thus have a special role and stake in ensuring environmental sustainability; hence, it is crucial to include them in environmental management and decision making, and to utilize their knowledge of the local environment. One way of doing this is to grant them full and equal inheritance and property rights with men. In turn, this will increase their vested interests and influence in ensuring the sustainable use of land that directly impacts on their possibilities to protect and govern their economic interest and livelihoods, and to provide for their families. Increasing this potential would likely have spin-off effects in terms of possibilities to increase women's income generation and accelerate their entry and participation in the cash economy.

The case studies below illustrate how the United Nations and the international community may support legislative reform in the area of women's inheritance and property rights as a tool for promoting women's empowerment and supporting the achievement of the MDGs.

2. Advancing Women's Inheritance Rights: Rwanda and Ethiopia

206 2.1 Rwanda

2.1.1 Background

In the immediate aftermath of the civil war of the early 1990s and the genocide of 1994, which claimed the lives of almost one million people, or 10 percent of the population, 70 percent of the remaining population was female.²¹ Many women were left as head of households to care for their own children and the orphans of other family members. In addition, according to a 1998 World Vision Study,²² there were some 60,000 child-headed households in Rwanda. However, under the patrilineal system of Rwandan customary law, women and girls were not allowed to inherit their parents' or their husbands' property: spouses were not considered part of the same lineage, and land passed from father to son. Thus, women returning from refugee camps were left with no legal channels to reclaim their property and girls heading households faced the risk that even if they worked hard to improve their house and land, these could be taken away from them in an unpredictable future. Despite a growing consensus that it was unacceptable that a distant relative of the deceased person could come to claim his or her

assets under the pretext that an orphan or a widow did not have the right to inherit merely because she was a girl or a woman,²³ there was no law on inheritance and marriage settlements to remedy the situation.

2.1.2 Advocating for women's rights and legislative change

In 1996, the Forum for Rwandan Women Parliamentarians was formed to champion women's issues, with particular reference to laws on inheritance and succession, as well as to strategize on how women could increase in numbers, have a critical mass in Parliament and make a significant contribution to nation and state-building. At that time, women held one-fifth of the seats in the Parliament of the transitional government.²⁴ Through the Forum, women Members of Parliament (MPs) united on issues of common concern. One Rwandan MP, Hon. Connie Bwiza Sekamana, explained, "When it comes to the Forum, we unite as women, irrespective of political parties. So we don't think of our parties, [we think of] the challenges that surround us as women."²⁵ The Forum had strong support in the government, and was backed by the Ministry of Gender, which was charged with coordinating the government's efforts regarding gender and women's issues. Furthermore, the Forum was linked to civil society by Profemme, an umbrella association of NGOs working to promote women's rights in Rwanda.

The UN system also worked to empower the Forum, including by supporting it to build international networks. In 1998 the Kigali Consultation on "Women's Land and Property Rights in Situations of Conflict and Reconstruction", hosted by the Rwandan Government, co-organized by the United Nations Development Programme (UNDP), the United Nations Human Settlements Programme (UN-HABITAT), the United Nations Development Fund for Women (UNIFEM) and United Nations High Commissioner for Refugees (UNHCR), enabled the Forum to forge ties with women parliamentarians from other countries, and reinforced its institutional and organizational capacity to lobby for the adoption of the legislative framework requisite to gender equality. This inter-regional consultation brought together over 100 women from Africa, Asia, Europe, and Latin America and the Caribbean to exchange experiences on problems faced by women in conflict and reconstruction phases, and on successful land reform and legislation initiatives that have empowered women and promoted gender equity in war-torn countries.²⁶

The Rwandan Women Parliamentarians were further bolstered by international instruments to which Rwanda was bound, including the Universal Declaration of Human Rights, as well as the constitutional principle of equality guaranteed under Article 16 of the country's Constitutions of 1962, 1978 and 1991. Women were also emboldened by their precarious situation at the end of the genocide – having witnessed and endured unspeakable cruelty, having lost livelihoods and property, and having seen their traditional social protection networks destroyed – and united by their shared desire to promote peace. Athanasie Gahondogo, Executive Secretary of the Forum for Rwandan Women Parliamentarians, said, "Had it not been for the genocide, Rwandan women would never have dared ask for succession rights."²⁷

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Also key to the success of Rwandan women in lobbying for the passage of the legislation was the persuasive political advocacy employed by the parliamentarians to engage men in the debate. Patricie Hajabakig, an MP in 1999 during the debate on inheritance, explains:

We had a long, long sensitization campaign ... this was a very big debate. We were asking [male parliamentarians], 'Ok, fine, you think only men can inherit, not girls. But as a man, you have a mother who might lose the property from your father because [your uncles] will take everything away from your mother. Would you like that?' Then we said, 'you are a man ... you have children, you have a daughter who owns property with her husband. Would you like to see that daughter of yours, [if] her husband dies, everything is taken away.' When [the issues] remain just in the abstract ... women and men become two distinct people, but the moment you personalize it, they do understand.²⁸

By 1999, the lobbying efforts of Rwandan women effectively resulted in the passage of the *Law on Matrimonial Regimes, Liberalities, and Successions*,²⁹ which legally guaranteed, for the first time, women's right to inherit land, giving equal rights to legitimate children, male or female, to inherit from their father, and allowing legally married women to inherit from their husbands.

In 2001, UNDP, together with the Inter-Parliamentary Union (IPU), sponsored a seminar to consider practical ways of ensuring that the new Rwandan Constitution would be gender-sensitive.³⁰ This brought together members of the Transitional National Assembly, senior government ministers, members of the Legal and Constitutional Committee, and Rwandan women's organizations, as well as women MPs from other countries and other partners of the Forum of Rwandan Women Parliamentarians. The workshop resulted in a set of preliminary recommendations and triggered a consultation process among various groups of women in Rwanda, from government and parliament to civil society.

Over a two-year period, these consultations produced a series of concrete recommendations aimed at entering principles of equality between men and women in the Constitution. The process ultimately produced what is now considered to be one of the most gender-sensitive constitutions in the world. Rwanda's new Constitution, formally adopted in 2003, reserves at least 30 percent of posts in all decision-making organs for women.³¹ As a next step, UNDP and the IPU organized leadership training for women candidates running in the electoral campaign.

In 2004, Rwanda became the world leader in gender parity in parliament, surpassing Sweden as the country with the highest proportion of women legislators.³² One of the first actions of the newly elected Women Parliamentarians was to advocate successfully for gender equality in the new Land Law adopted in 2005, which formalizes land rights through official titling.³³ Article 4 of the Land Law states: "Any discrimination either based on sex or origin in matters relating to ownership or possession of rights over the land is prohibited. The wife and husband have equal rights over land."³⁴ At a Women Parliamentarian International Conference under the theme "Gender, Nation Building and the Role of Parliaments," held in Kigali in February 2007, Ellen Johnson Sirleaf of Liberia, the first-ever African woman elected President, praised the Forum of Rwandan Women Parliamentarians for providing a forum for the exchange of ideas and opinions, research and the development of strategies aimed at prioritizing gender integration in all national policies, calling it a model and an example for Africa.³⁵ Under the resulting Kigali Declaration on Gender, Nation Building and the Role of Parliament,³⁶ delegates called on parliaments around the world to review and repeal existing discriminatory laws and, where laws do not exist, to pass laws for the protection of women's rights, particularly regarding inheritance, succession and gender-based violence.³⁷

208 Rwanda provides examples of gender-sensitive policy making and innovative electoral mechanisms that could be models for other parts of the world.³⁸ Nevertheless, significant challenges remain in ensuring statutory rights to inheritance for all Rwandan women and girls. In particular, women in customary marriages or unions, which represent the majority of Rwandan unions, are not protected under the present *Law on Matrimonial Regimes, Liberalities, and Successions*, which requires that marriages be registered with the local authority to be legally recognized, a process incurring a significant expense. Moreover, illegitimate children do not inherit under the statute. A further challenge is that, although Rwanda's Constitution and the new *Law on the Prevention, Protection and Punishment of Any Gender-Based Violence* (2006) prohibit polygamy, the practice continues in some regions, and "second wives" and their children are unable to inherit property.

2.1.3 How to implement and enforce the new legislation?

A challenge more daunting than legislative reform, however, is the implementation and enforcement of the law to ensure that women can in reality claim the rights they have on paper

in a resource-strapped country with a historical context that has put great pressure on the justice system. According to UNDP Human Development Indicators, Rwanda has the highest population density in sub-Saharan Africa, almost 9 million people live in an area of 26,338 square kilometers. Further, it has a large rural, semi-literate population; only two-thirds of rural men and women are considered literate. Moreover, half of the population (5.4 million people) live below the poverty line. Christine Umuntoni of UNDP Rwanda observes, "The greatest challenge now is to educate communities and women themselves about their rights to inheritance and how to claim them, and to further invest in legal aid services to help women claim their rights."³⁹ A 2005 study by Association 'HAGURUKA found that by 2005, knowledge of the existence of the law was relatively high, at three-quarters of respondents, evenly distributed between men and women;⁴⁰ their primary means of learning about the law was by radio. Understanding the basic content of the law was lower, however: only 70 percent understood that a widow has the right to inheritance as an independent proprietor, not merely as a guardian of the property on behalf of her children, and with an independent right to hold the property free from the interference of her in-laws.

Moreover, a review of cases found that judges often make decisions without reference to the law, or misapply it.⁴¹ In some instances, the law is interpreted to state that widows cannot inherit ancestral land from their husbands. In others, judges have paradoxically concluded that since the law automatically gives women the right to inherit, the courts no longer have competency to decide inheritance cases, when it is their duty to apply the law in deciding cases. UNDP's project to build judicial capacity in Rwanda seeks to address such challenges by ensuring functioning laws for the protection of child rights, family and succession laws, as well as laws against discrimination against women.

2.1.4 How to work with informal justice systems and support legal aid services?

UNDP's access to justice strategy in Rwanda also concentrates on the informal justice sector; only one-fifth of all disputes are settled by formally appointed judges, with the majority settled by local customary authorities (41 percent), followed by the family (25 percent).⁴² This finding reinforces the need for attention to the informal sector in awareness-raising and training. The main providers of legal aid services in the country are NGOs, members of the Bar Association, and university law clinics.⁴³ Legal aid initiatives include training community paralegals, village chiefs, and members of Land Boards and Tribunals on enforcing women's inheritance, property and legal rights, as well as training women on how to navigate legal processes. Initiatives include "widows' days" in court where legal aid providers are on call to offer targeted legal assistance, will-writing seminars, and assistance in obtaining, understanding, and protecting important legal documents, such as land titles and deeds. The University of Butare's Legal Aid Clinic trains law students to interact with clients and give legal advice under the supervision of lecturers and staff, referring appropriate cases to the formal court system. Nevertheless, many local leaders and indigent persons have limited knowledge of the availability of legal aid services, and moreover, legal aid services are not accessible to many would-be beneficiaries due to, *inter alia*, the lack of providers in rural districts and the high costs of transport to reach the courts and the offices of legal aid providers.⁴⁴

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2.1.5 Achieving the MDGs in Rwanda

The main impact of the legislation on women's inheritance and property rights will only be seen over time. To evaluate this process, indicators on the implementation of their rights (relating to land ownership and housing title, disaggregated according to gender or jointly held) will need to be monitored.

While there remains an enormous gap between legislation and its enforcement in Rwanda, with effective enforcement, the success of women parliamentarians in advocating for women's right to inherit has the potential to make a direct impact on food production and security, and the livelihoods of families and children left behind after the civil war and the 1994 genocide.⁴⁵

Encouraging signs for the country, attributable to a vast array of development efforts, include the significant progress Rwanda has made toward the achievement of the MDGs. In his address to the Rwandan Parliament on 29 January 2008, the United Nations Secretary-General commended Rwanda for its achievements towards the MDGs, particularly stressing *Goal 3: Promoting gender equality and empowering women*. In education, Rwanda has already achieved gender parity in primary school enrolment. In health, there has been a 30-percent drop in the maternal mortality rate between 2000 and 2005.⁴⁶ Further, the ratio of female-to-male earned income is estimated at 0.75 in Rwanda, rivaling that found in Norway.⁴⁷

In relation to *MDG 6: Combat AIDS, malaria and other diseases*, HIV/AIDS prevalence dropped from 13.9 percent in 2000 to 3.5 percent in 2006.⁴⁸ On the other hand, Rwanda's progress toward *MDG 1: Eradicate extreme poverty and hunger* is less certain. Despite high economic growth in the country, poverty rates have not fallen proportionately. However, the percentage of the Rwandan population that is undernourished fell from 41.3 percent in 2000 to 36 percent in 2006.⁴⁹ Rwandan women are the pillar of the economy as principal actors in the agricultural sector, and are becoming increasingly active in employment in other sectors. Further action to eliminate discrimination against women, especially in the strategic area of implementing rights to inheritance and property rights for all Rwandan women, will continue to have an important impact on eradicating hunger and improving the social and economic life of the country.

2.2 Ethiopia

2.2.1 Background

Ethiopia is a Federal Republic with a population of over 78 million people. A recent review of the legal system conducted by UNDP demonstrates a radical shift in the Ethiopian law initiated by the 1994 Constitution. The Constitution includes several provisions that promote the interests of women. Specifically, Article 34 provides for "*equality between men and women while entering into, during marriage and at the time of divorce*" and Article 35(7) provides for the right of "*women to acquire, administer, control, use and transfer property. Women shall also enjoy equal treatment in the inheritance of property.*"⁵⁰

Ethiopia is also party to many international conventions, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Elimination of all Forms of Discrimination against Women, all of which promote the equality of women. Finally, the Family Code of Ethiopia, which was recently revised, now includes terms that provide women individual rights on the same terms as men, such as equal marital and divorce rights. The law also sets out age, consent and registration requirements.⁵¹

- 210 An example of the positively changing nature of the Ethiopian law with regard to improved legal regimes for women is drawn from the country's Amhara region, which requires photographs of both the husband and wife on the land title.⁵² This provision restricts one spouse from selling the property without the knowledge of the other. These photos also help reduce confusion that may occur upon the death of one of the spouses. In comparison, in some neighboring countries, the husband is the sole property owner and inheritance is based on a patrilineal system; the land passes to the descendents of the husband regardless of whether his wife survives him.

2.2.2 The impact of the AIDS epidemic

Although Ethiopia is moderately advanced from a formal legal perspective, the issue of women's inheritance and property rights is still complex and problematic. This situation is accentuated in the context of HIV/AIDS. Since the start of the epidemic, AIDS has caused almost 28 million deaths. There are approximately 33 million people living with HIV in the world today, almost half of whom are women.⁵³ In certain regions, however, women account for more than half of the population living with HIV. For example, according to the UNAIDS Report of

2007, in sub-Saharan Africa, in 2007, almost 61 percent of the 22 million adults living with HIV were women. High numbers like this can be attributed to women's unequal legal, economic and social status. In Ethiopia, the prevalence rate is 2 percent.⁵⁴

The link between HIV and women's inheritance and property rights is growing stronger. A ten-country study on women's inheritance rights in sub-Saharan Africa suggests that unequal inheritance and property rights increase women's vulnerability to HIV, since many women remain in abusive marriages with little power to negotiate safe sex. Because they are often forced to remarry or co-habit with a brother-in-law or other close male relative after the death of the husband, they can face even greater risk of receiving or transmitting infection.⁵⁵ Furthermore, under some circumstances women are blamed for the deaths of their husbands and then forced from their households. They are therefore left destitute and much worse, left to live with HIV. If they remain in the household, they may be treated as servants or may be married off to the father, uncle, brother or another close male relative – this is a practice known as “wife inheritance”. Some villages also practice widow-cleansing, which is performed after a woman's husband dies, often from AIDS. In an effort to cleanse the widow, she is forced to have sex with a close male relative or community elder, rarely with protection, which can perpetuate the epidemic.

2.2.3 Joint Initiative on HIV/AIDS and Women's Inheritance and Property Rights

To address the issue of HIV and women's inheritance and property rights in Ethiopia and the broader goals of MDGs 3 and 6, UNDP and UNIFEM launched a Joint Initiative on HIV/AIDS and Women's Inheritance and Property Rights in 2005 to focus on these specific issues.⁵⁶ The aim was to build the capacity of the formal and informal justice systems, generate individual and collective action and empower women in gaining equal treatment in owning and inheriting property. Leadership Workshops were held in 2005 and 2006 to address HIV and women's inheritance and property rights, with participants from various sectors, including the Ethiopian Government and civil society.⁵⁷ Participating institutions included members of the federal and regional governments and justice bureaus, law enforcement agencies, National and Regional AIDS Councils, associations of people living with HIV, the media and civil society groups.

In tandem with the launch of the women's inheritance and property rights initiative, UNDP commissioned a comprehensive analysis of the legal framework in Ethiopia, which included a review of the statutory, civil and customary laws related to women's inheritance and property rights and the AIDS epidemic. This study provided a solid foundation for the initiative and underlined the strength of Ethiopian law.⁵⁸

As a result of the Leadership workshops together with the legal study, it was found that in reality, the protective laws meant to ensure equality are not being implemented or enforced, which is creating a major challenge. This is due to a number of factors, including strong biases against women, lack of awareness of the law, and ineffectiveness of the court system. More specific challenges include: a lengthy and costly legal process, which most Ethiopians cannot afford; the unavailability of free legal services leaving community members with little access to legal services; cultural barriers such as wife inheritance and widow-cleansing, which prevent women from exercising their rights; the fear of being shunned and stigmatized by both family and society; and conflicting laws, which cause confusion or discrimination against women.

The conflict between religious law and constitutional law originates from a clause in the Constitution that recognizes the adjudication of personal and family matters under religious or customary law, if both parties agree. Article 34(5) of the Constitution states (on Marital, Personal and Family Rights): “*This Constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute.*” The issue has arisen due to provisions in the Shari'a Law that contradict the terms set forth in the Constitution, leaving women with less than equal

rights to inheritance and property. With the dual legal structure in place, women are sometimes coerced into consenting to Shari'a rule by pressure from family or society. Although these challenges undoubtedly exist, the first step has been taken by having the legislative framework in place.

2.2.4 How to address the challenge of implementation and enforcement?

The joint initiative spawned positive activities within a matter of months. After participating in the Leadership Workshop, participants took initiative and ownership in addressing women's inheritance and property rights. Specific efforts include: the training of legal experts (judges, prosecutors and law enforcement officers) on the provisions available to women to inherit and own property, and measures they can adapt to uphold these laws; the use of public campaigns and radio programs to improve awareness and knowledge, specifically through interviews of women affected by this issues supplemented with basic legal information on women's inheritance and property rights; and translation and dissemination of legal provisions into the local language. In addition, an e-group was established, comprising participants from several government ministries, civil society organizations, the media and community groups, in order to communicate with each other and share best practices.

An additional achievement was a Joint Statement drafted by Workshop participants declaring their commitment to continue working on these issues. More specifically, following the leadership workshop, participants drafted and signed a Declaration of Commitment on HIV/AIDS and Women's Inheritance and Property Rights in Adama, Ethiopia in December 2005. The Declaration identified the lack of women's rights to inheritance and property as a key factor in the epidemic and highlighted the stakeholders' responsibility in addressing its spread.

2.2.5 Achieving the MDGs in Ethiopia

Ethiopia is progressing towards achieving the MDGs. In the *Synthesis Report on Ethiopia's Progress Towards Achieving the MDGs: Successes, Challenges and Prospects* (2008) developed by the Ministry of Finance and Economic Development,⁵⁹ Ethiopia is categorized as a country that has shown rapid progress in areas of poverty reduction, education, health care, gender equality, the environment, and food security. But in order to accelerate progress towards MDGs 3 and 6, which are of the utmost concern, issues relating to women's inheritance and property rights must be addressed. Initiatives such as the one described above must be replicated and scaled-up to achieve greater results.

Recommendations and conclusions

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As the previous cases demonstrate, the law constitutes a powerful tool to improve the situation of women and to accelerate progress toward the achievement of the MDGs. While legal reform is rarely sufficient in and of itself to bring about change, it can open the door to greater opportunities for women to individually and collectively assert their rights. Several steps must be taken in order for national justice systems to effectively guarantee the internationally recognized rights of women, in line with a state's commitments under international agreements; these steps are diverse and challenging. While there is no global blueprint for effectively guaranteeing women's inheritance and property rights, some of the key legal and social reforms that may be initiated in a context-specific manner are outlined below.

Legislative reform

Legislative frameworks must be put in place in order to incorporate international obligations into domestic law. Processes that provoke legislative reform normally involve the Executive as the agency that initiates the change by drafting the bill, tabling it before the Parliament for deliberation. It is particularly important that the Constitution of a given country includes provisions defining the principles of gender equality, non-discrimination and the empowerment of women. In order to do so the case-studies demonstrate that when women

take the lead in initiating change in the law and in attitudes and perceptions it is more likely that the legislator will get it right. Participatory and inclusive discussions help to ensure that all necessary issues are addressed such as for instance the complex interplay between a progressive Constitution that declares gender equality and customary law and traditional norms that are gender biased. Hence the translation of constitutional provisions and also international commitments of such principles into ordinary legislation regarding specific priorities that will promote women's empowerment such as non-discriminatory laws on property rights, inheritance and family law represent challenging processes that need to be facilitated with political wisdom and patience.

However, as illustrated in the case studies, legal reform in this area is far from straightforward. A complex legal universe governs the position of poor women in developing countries. This universe comprises a pluralistic legal landscape with various systems of informal, customary and faith-based normative framework and law, particularly in the area of family and inheritance law, derived from diverse traditions and religions. There may be several substantively different systems operating simultaneously within the borders of the same country and jurisdiction. Of particular interest with regard to property rights and family and inheritance law is whether the customary, faith-based or informal normative framework that regulates interfamily relations is based on a matrilineal or patrilineal system. This will determine the lineage to follow with regard to succession and will define women's position, rights and entitlements. Another challenge in this field is to ensure that women who are not formally married (based on a state definition of marriage) will also benefit from the opportunities granted to them by new legislation. The traditions of polygamy and bride-price further complicate the legal landscape with regard to inheritance and property rights. Ideally, legislation on inheritance should "provide for legal recognition of both spouses" rights to adequate land and housing", create "minimum disturbance for the family situation once the spouse has passed away", "treat female and male children equally" and "apply equally to all marriages, whether entered into under customary/religious rites or civil/common law."⁶⁰

Advocacy and enforcement

It is important to recognize that the adoption of legislative changes does not ensure the implementation of the law on paper, which may be particularly challenging when it requires the adoption of new social norms relating to gender equality. To facilitate the process of social change, legislation should stipulate that "all officials and authorities engaged in the inheritance process receive gender-sensitive and human rights training" and set forth a "plan for public awareness and education programs."⁶¹ The process by which legislation is designed is also essential to its effective implementation and broad consultation with all stakeholders, men and women, should be a priority. As the Rwanda example demonstrates, consultation that also targets men can enhance understanding of the new legislation and the advantages that it brings to both men and women. In addition, raising awareness of the judicial actors and involving the justice system early in the process increase the potential for active enforcement of the new legislation and decrease the likelihood of judicial misapplication or apathy.

Once legislation is in place, the judiciary and other actors must be trained to enforce and apply the new laws. Judges and other justice actors may find satisfaction in being enabled through legislative change to apply the international commitments of their states and governments accordingly. Familiarizing them with these commitments may encourage them to welcome new legislation that integrates them into domestic laws. It is equally essential to engage the informal system, be it customary or religious, which can be done through awareness raising campaigns, workshops and training. As a general rule, working with community leaders to reinterpret customary law and adapt customary laws in ways that favor women's rights – and respect national legislation and international principles – has greater legitimacy than attempts to impose reform from above.

The media is another important partner for the enforcement of gender-sensitive legislation. Legislative processes related to family matters and gender equality tend to gain significant public attention. The interest of the media and civil society, particularly women's organizations and faith-based associations, is raised because these are issues that concern everyone's private lives, and intense public debate often follows. It is important that these debates are well prepared and conducted not only in the urban areas, but also in the rural areas, in order to ensure that women do not remain ignorant of the potential for improvement of their legal and economic situation intrinsic to such reform. The United Nations and the international community can assist in supporting programs that promote public debate regarding such changes and ensure solid outreach.

To ensure that new legislation has an actual impact on women's lives, it is essential to make justice services financially accessible by poor women. This can be accomplished by, for example, waivers of court and other fees, and the establishment of legal clinics to provide representation and ensure appropriate, equitable and consistent application of laws – especially where secular and religious law is used interchangeably – to make women aware of their rights and to facilitate their ability to advocate for, access and claim their inheritance rights. Such clinics, which may be staffed by university students, can also help to settle disputes outside of court and refer appropriate cases to the formal court system.

Finally, as we have demonstrated in the case studies, the various important roles of civil society must be acknowledged. They can and do play important organizing, educational, advocacy and legal services roles. For example, the NGO umbrella organization Profemme has helped put ordinary women in touch with legislators and grassroots organizations such as GROOTS Kenya are working to help community-level women recognize and realize their rights. These and similar women's organizations that can help women make land claims should be further supported, including with funds to sustain and expand their operations.

In sum, there are a number of recommendations and actions that can be taken to address the issue of women's inheritance and property rights, and their impact on poverty alleviation. It is important to implement and enforce existing laws, as well as create access to and awareness of them. Where protective laws do not exist, these laws must be drafted and adapted. Where conflicting laws are in place, their inconsistencies should be resolved and precedents established in ways that favor gender equality. Only once these actions are realized will the MDGs be achieved.

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Land Rights and the Millennium Development Goals

How the legal empowerment approach can make a difference

Hamid Rashid*

This chapter explores the linkages between land rights and the Millennium Development Goals (MDGs) and explains how legal empowerment of the poor – understood as a process of systemic change and a bottom-up approach that seeks to strengthen the identity, voice, choice and participation the poor – can accelerate achievement of the MDGs. It argues that improving access to land and enhancing tenure security of the poor must define the fight against rural poverty, particularly given that close to half a billion people – almost half of the world's poor – are landless or near-landless. Three of the eight MDGs – reduction of poverty and hunger, gender equality and environmental sustainability – critically hinge on access to land and tenure security, which may also impact the achievement of two others – universal primary education and combating HIV and other diseases. As the deadline for reaching the MDGs is just around the corner and as many goals remain off-target, it is argued that a participatory approach to land governance can play a significant role in accelerating and sustaining their achievement.

Effective land governance and the realization of land rights can yield a multitude of benefits for the poor and can therefore be crucial in fighting poverty. Benefits can range from stimulating long-term investment, increasing agricultural productivity and employment, facilitating restorative and redistributive justice in access, use and ownership of land to improving food security, incentivizing sustainable land use and facilitating climate change adaptation.

Section 1 of this chapter presents evidences on the relationships between property and land rights, economic development and poverty reduction. It underscores the imperative of recognizing the right to land as a fundamental human right. Highlighting the importance of community-level deliberations, it argues that the poor require not just legal instruments – titles and records, but also community-level recognition to secure their land rights. Open and inclusive community-level discourses can play a key role in reducing the asymmetries in power relations that undermine their land rights.

Section 2 identifies some of the key challenges to the enjoyment of land rights, including disputes over inheritance, demarcation, registration and records, undervaluation of land, increased commercial pressures on land and how they affect realization of the MDGs Drawing on the experiences of effective community-level management of common pool resources, the final section presents a framework of equitable land governance and argues that community-based organizations, representing the land rights of the poor, must be an integral part of an effective land governance system. It further argues that from an empowerment perspective, the realization of land rights must be premised on the notion of justice, seeking to reduce, if not eliminate, unjust and unsustainable practices that hurt the poor. An equitable land governance system, the chapter concludes, must also ensure cost-effective dispute resolution mechanisms that will reduce transaction costs and deliver equitable remedies to the poor.

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Introduction

With the deadline for reaching the Millennium Development Goals (MDGs) just around the corner and many goals remaining off-target, the development community is looking for new impetus, strategies and approaches to accelerate MDG achievements. Given that three of the MDGs – reduction of hunger, gender equality and environmental sustainability – directly and critically hinge on effective use of land, it is not surprising that land is gaining prominence, albeit belatedly, in the discourse on MDGs. Equitable and efficient governance of land can also indirectly contribute to the achievement of the MDGs on universal primary education and reduction of HIV/AIDS.¹ The recent episodes of food and energy price volatility and the subsequent rise in commercial pressures on land also triggered renewed interest in land. The World Food Summit of 2008 unequivocally recognized that land management is critical to enhancing and sustaining global food security. With 75 percent of the world's poor living in rural communities² and depending on land and agriculture for their livelihoods, one can hardly overestimate the role that land rights can play in meeting the MDG targets.

Given that a quarter of the world's 1.1 billion poor people are landless, improving access to land and protection of land rights of the poor must define the fight against rural poverty. An additional 200 million – the near-landless – do not have access to sufficient land to earn a decent standard of living.³ Since a significant portion of the income of rural people, including the poor comes from farming, land rights must receive greater attention to achieve the goal related to full and productive employment and decent work for all, including women and young people (MDG, Target 1B). Protecting the land rights of the poor and democratizing access to and control over common pool resources,⁴ including land and water, will therefore be crucial for promoting productive employment and ending poverty.

Land provides the basis for livelihoods, a safety net from absolute impoverishment and destitution. Access to land and security of tenure is fundamental for ensuring material security and human dignity. Tenure insecurity and uncertainty undermine incentives for longer-term investments in land, which in turn, affects the income that people receive from their landholdings. Long-term investment in land is feasible only when clear land rights exist. Smallholders and poor farmers will only invest in their land if they know they will possess it long enough to benefit from such investments. Investment in land, leading to higher level of agricultural productivity, will increase their income and contribute to reducing poverty.

218 The global food crisis in 2008, on the other hand and quite expectedly, has led to a sharp increase in foreign direct investment (FDI) in agricultural land in a number of developing countries, leading to transfers of large tracts of land to foreign investors. FDI in agriculture can increase the overall production of crops, which may be beneficial for the local population if foreign investors are required to sell a certain amount of their output locally. Land-related FDI may also increase the productivity of local farmers through diffusion of new farming knowledge and technology.⁵ On the other hand, capital-intensive foreign investments in agriculture may decrease demand for local labor, increase rural unemployment and depress household incomes. On the balance, foreign investment in agriculture can improve food security of a recipient country provided its government can manage to prevent marginalization of small farmers and redistribute productivity gains.⁶ Given that food is scarce in many developing countries and that they are often net food importers or emergency food aid recipients,⁷ governments of these FDI receiving countries must also ensure that local populations have access to food produced by foreign investors, especially during the time of a food crisis.

Effective land management can be a critical factor in addressing the challenges of climate change mitigation and adaptation. According to the United Nations Framework on Climate Change, over 20 percent of global CO₂ emissions come from deforestation, forest degradation and land-use change, while the World Bank estimates that illegal logging has caused governments to lose US\$15 billion per year.⁸ A well-functioning and responsive land

governance system can ensure sustainable use of land and natural resources and facilitate an optimal climate change response for mitigation and adaptation. It is widely recognized that securing land rights can be a fundamental strategy for dealing with environmental and climate change concerns.⁹ For individuals and groups, effective and secure access to land resources can incentivize users to pursue sustainable land management practices.¹⁰ Secure access to land resources can also contribute to reducing abuse or over-harvesting common pool resources.

Effective land governance can ensure restorative and redistributive justice in ownership and use of land. Restorative justice – repairing the harm inflicted by illegal takeover and eviction – can help prevent mistrust, dissatisfaction and conflict. As noted by Elster, the state's failure to hold the wrongdoers accountable could lead to loss of legitimacy and increase in extremist movements. The redistribution of land, ensuring more equitable access, can address challenges regarding highly skewed distribution of wealth and income in many developing countries.¹¹ As argued by Stiglitz, high rates of economic growth are unsustainable without simultaneous processes to redistribute assets, with land being the primary asset in developing countries.¹² Equity in access to, and ownership of, land can play a significant role in improving incentives for the realization of many development goals, including the MDGs.

A competent, responsive and accountable land governance system, ensuring access to land and tenure security of the poor, will remain central to poverty reduction efforts (MDG 1).¹³ Higher household income in a more stable and predictable environment of tenure security – induced by the confidence that one's land or home is actually one's own and cannot be taken away on a whim – can contribute to the realization of MDGs related to poverty and hunger, employment, education, health, HIV/AIDS gender equality and environmental sustainability. As households begin to earn more, the demand for child labor to keep families afloat will diminish. This can lead to an increase in enrolment of boys and girls in primary schools (MDG 2, Target 1). Similarly, improved agricultural income can increase the likelihood that girls will be able to attend primary and secondary school, as they are usually the ones who are compelled to drop out (MDG 3, Target 1). With effective land governance in place, foreign investment in agriculture will contribute to boosting agricultural productivity and halving the proportion of people who suffer from hunger (MDG 1, Target 3). Clearly defined individual and communal land rights, ensuring ownership, incentives and responsibilities, will prevent illegal and harmful exploitation of land and enhance environmental sustainability (MDG 7, Target 1).

MDGs enjoy a universal appeal because they present measurable, reportable and verifiable targets. But for understandable reasons, they do not define processes that will make the targets incentive compatible at the local level and ensure their timely and bottom-up realization. They also do not define how goals and targets, if and when achieved, will be sustained in the post-2015 period. MDGs do not necessarily focus on community-level participation, empowerment, substantive freedom, and human capabilities, which can be critical for achieving and sustaining the development goals. Drawing extensively on Amartya Sen's¹⁴ seminal work on human capability and justice, and Elinor Ostrom's¹⁵ illuminating field research on common pool resources, the chapter argues that a community-based and community-driven, participatory approach to land governance – ensuring voice, choice and legal empowerment of the poor¹⁶ to realize their land rights – can play a significant role in accelerating the achievement of the MDGs.

Section 1 of this chapter will present theoretical and empirical evidence on the relationship between property rights, economic development and poverty reduction, define land rights as fundamental human rights and underscore the importance of tenure security. Section 2 will identify some of the key challenges to the enjoyment of land rights and how they affect the realization of the MDGs. The final section will present an empowerment framework for equitable land governance, drawing on the example of community-level management of

common pool resources, which will protect and promote land rights of the poor and create an enabling environment for MDG achievements.

1. Property rights, land rights and poverty reduction

For the majority of the world's population, secure property rights is not a reality.¹⁷ The right to property, however, is a fundamental right.¹⁸ It is fundamental to dignity, material security, social connection and citizenship. The right to property – ownership of tangible or intangible assets – fosters the quality of being worthy of respect. Furthermore, mutual recognition of rights and responsibilities established through property rights systems forms the basis for social cohesion and creates social capital.

The Commission on Legal Empowerment of the Poor recognizes that ownership of property, alone or in association with others, is a human right. Its final report¹⁹ underscores the following:

A fully functioning property system is composed of four building blocks: a system of rules that defines the bundle of rights and obligations between people and assets reflecting the multiplicity and diversity of property systems around the world; a system of governance; a functioning market for the exchange of assets; and an instrument of social policy. Each of these components can be dysfunctional, operating against the poor.

But what exactly is the right to property? For Kant and many others in the Contractarian tradition,²⁰ the right to property is not a natural right of isolated individuals, but a social creation depending on mutual acceptability of claims. The state, according to Kant, exists primarily to make claims to property rights both determinate and secure, and anyone claiming property rights thus has both the right and the obligation to join in a state with others. Since property exists only by mutual consent, and the state exists to secure that consent, the state necessarily has the power to permit only those distributions of property rights sufficiently equitable to gain general consent.²¹ Although the social contract approach to property rights supports a strong institutional focus, it also implicitly recognizes the role individuals and communities can play to ensure mutual recognition of, and respect for, property rights.

The right to property is, in fact, a “bundle of rights”. The law defines the specific features and rights that are included in this bundle. The right to property can be any right that positive law recognizes as such. For example, indigenous knowledge about a medicinal herb can be defined as property rights if the law says so. In practical terms, the term “property right” refers to a broad set of “use rights”, which allows the right holder to use an asset for consumption and/or to generate income. It can also include “transfer rights” – to sell, donate or bequeath. A property right also entitles the right holder to rent, mortgage or pledge the asset for use and enjoyment by others.

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Property rights generally signify private ownership of assets, which can exclude others from enjoying the property. By virtue of enforcing exclusion, property rights can align the incentives for protection and investment. Economists identify three transmission channels through which property rights can improve economic efficiency. Effective property rights can:²²

- eliminate or reduce “expropriation risk” and increase tenure security, allowing individuals to realize the fruits of their investment and efforts, and contributing to economic benefits;
- reduce “transaction costs” that individuals must incur to defend their property, which can be economically unproductive; and
- provide fungibility of assets, facilitating exchange, gains of trade and access to credit.

It is not surprising that poor and vulnerable populations generally face higher risks of expropriation and higher transaction costs in defending their property rights. A property rights system that can eliminate expropriation risk, enhance security of contracts and reduce transaction costs, which can be regressive for the poor, can have significant impact in accelerating economic growth and reducing poverty and hunger.

1.1 Property rights and poverty reduction: empirical evidence

The benefit of effective property rights is evident in land users' investment incentives. Feder (2002)²³ finds a doubling of investment, and a 30 to 80 percent increase in land values with more secure tenure. Enforceable property rights increase transferability of land, allowing transactions between less and more productive users of land due to increased development of the non-agricultural economy and rural-urban migration²⁴. Higher tenure security also helps reduce the need for resources, including time that individuals spend on securing their land rights, allowing them to invest these resources more productively. Also, numerous studies have found that where there is effective demand for credit, enforceable property rights can facilitate access to credit and improve the functioning of financial markets.²⁵ At the aggregate level, Besley and Ghatak find a strong negative correlation between property registration (the summary ranking of each country's performance across three indicators: cost of registration, number of procedures and time) and income per capita in a dataset covering 172 countries.²⁶

The "Property Rights and Rule-based Governance" indicator of the World Bank²⁷ assesses the extent – in a scale of 1 (very poor) to 6 (excellent) – to which private economic activity is facilitated by an effective legal system in which property and contract rights are reliably respected and enforced. Our analysis finds a strong positive correlation between net reduction in poverty²⁸ headcounts and the Property Right Index for 68²⁹ low and middle-income countries. The correlation coefficient (+.368) and the slope of the trend line confirm this strong correlation between property rights and poverty reduction. Without assuming any causality³⁰ between property rights and poverty reduction, the correlation signifies that property rights and poverty reduction can be conflated and mutually reinforcing.

Correlation between Property Rights and Poverty Head-count



Figure 1: Correlation between property rights and Poverty Headcount, estimated by the author, with data from the World Bank, World Development Indicators (2009).

1.2 Land rights as human rights

Land is the primary source of sustenance and a factor of production for the majority of the world's population.³¹ But its significance goes beyond being an economic input. Land accommodates and shelters individuals, communities and societies. Identity, a sense of belonging, inclusion and human dignity are fundamentally linked to ownership of land. Land also connects people and is the foundation for mutual interdependence and co-existence. Political citizenship is inextricably linked to land. In many countries, the right to vote and to participate in political processes can depend on having a physical address, which, in turn, is linked to ownership or possession of land. Land is an enormous political resource in defining power relations between and among individuals and groups under established governance systems.³²

The landless, near landless and those with insecure tenure rights often constitute the poorest and most marginalized groups in both rural and urban societies.³³ In many developing countries, most people lack legally recognized rights to the land they call home, from subsistence farms to shacks in urban slums. Without title deeds to their homes, families live under constant threat of eviction by public officials or invasion by violent gangs.³⁴ Rising demand for land and increased land values, on the other hand, are encouraging many developing country governments to implement mass eviction drives and remove informal settlements. Even though these families have no legal titles to those lands, they do have a fundamental claim to tenure security.

Although tenure security and equitable access to land are central to poverty reduction, they are generally neglected aspects of development³⁵. Land tenure creates security and stability, and facilitates the ability to invest, obtain services, and grow a business – all elements critical to poverty reduction. With limited and insecure land rights, it is difficult, if not impossible, for the poor to overcome poverty. Even when one holds legal title to land, this does not guarantee that the tenure is secure. Tenure security requires the law and practices to clearly identify the recognized interests in land. The rules of tenure determine who can use what resources of the land, for how long, and under what conditions³⁶. But even if strong legislation on land rights exists, actual enjoyment of land rights often depends on local conditions and the power relations at the local level.

Land rights are those property rights that pertain to land. Because land is a limited resource, and property rights generally include the right to exclude others, land rights are also exclusionary. Land rights can also be seen as a practice of social norms and conventions that regulate the distribution of the benefits accruing from specific uses of a certain piece of land.³⁷ From this perspective, land rights can go beyond individual property rights and ownership, and include common resource properties, which are essentially non-exclusionary but rival goods. Land rights are also considered in the context of the right to basic shelter, the right to tenure security, the right to decent housing, the right to a home etc. Each of these rights differs in the specific interests and protections they provide to the owner(s) of such rights.

United Nations documents – the Charter, human rights instruments and resolutions – contain almost no reference to land rights. Land rights, however, can be linked to the broader notion of property rights, as enshrined in Article 17 of the Universal Declaration on Human Rights. Since all aspects of land rights are not governed by specific legal instruments, land rights broadly fall under the purview of economic and social rights. The Preamble of the International Covenant on Economic, Social and Cultural Rights states that economic and social rights derive from the inherent dignity of human beings.³⁸ It is argued that economic and social rights – the so-called “second generation rights” or the livelihood rights – encompass the basic needs of life and survival, and are critical to preventing material insecurity. The critical focus on livelihood rights is justified on the ground that their protection and promotion can significantly enhance poor people's enjoyment of civil,

political and cultural rights. Tenure security of a home, the right to own and use tangible and intangible properties to pursue economic and social well-being, decent wages and job security, and the freedom and opportunity to choose a vocation, including self-employment and entrepreneurship are the basic livelihood rights that are *sine qua non* for the realization of all fundamental human rights.

To legal purists, rights that are not defined by a recognizable and enforceable legal deed or title are nothing but mere claims. For a claim to count as a right, it must have legal force. Land rights, therefore, may not necessarily qualify as legally defensible rights. In defending broader social and economic rights as fundamental human rights, Sen challenges the notion that a right must be institutionalized to count as a legal obligation. It is argued that, a right – such as land right – is still a legal right and a human right even if it does not correspond to precisely formulated duties and responsibilities. There are others who would tend to discount land rights as infeasible, arguing that even with the best of efforts, it may not be feasible to realize the land rights for all. Sen dismisses both these arguments:

The confusion in dismissing claims to human rights on grounds of incomplete feasibility is that a not fully realized right is still a right, for remedial action. Non realization does not, in itself, make a claimed right a non-right. Rather, it motivates further social action. The exclusion of all economic and social rights from the inner sanctum of human rights, keeping the space reserved only for liberty and other first generation rights, attempts to draw a line in the sand that is hard to sustain.³⁹

Acknowledgement of land rights as fundamental human rights will be critical to ensure their full and effective realization and to fight poverty, expand fundamental freedom and human capability. An effective land governance system – seeking to enhance access to and tenure security of land – must promote land rights as fundamental human rights. Moving beyond the narrow focus on legal instruments and institutionalization of land rights – which may be a necessary but not a sufficient condition for access and tenure security – land governance must ensure that land rights of the poor are also recognized and respected at community levels. The poor require not just legal recognition, but also social or community-level acceptance of, and respect for, their land rights. A strong role for communities, which are not necessarily legal institutions, will be an imperative to protect and promote land rights of the poor. Land governance must also ensure that the poor have the capacity to organize themselves, build political citizenship, secure participation in decision-making processes and influence new and existing land laws to realize their land rights.

Effective land governance must also take into account the complexities of land rights in local contexts, acknowledge the role and importance of customary practices and of collective rights of indigenous communities, and at the same time, improve the functioning of formal property rights systems to ensure mutual co-existence of different systems of property and land rights. Research findings show that land governance systems that implement successful property rights reform recognize the complexity and uniqueness of existing property environments and recommend discrete and context-specific interventions.⁴⁰ Successful reforms have also focused on creating flexible and resilient land rights systems that can adapt to changes in costs, technologies and social circumstances, rather than a static configuration of laws and social contracts.⁴¹

2. Challenges to full realization and enjoyment of land rights

In developed countries, property and land rights are often taken for granted. They are secure and inviolable, except in the interest of national security or eminent domain. But the situation is significantly different in many developing countries, where land rights are often ad hoc,

tentative and precarious. While equitable access to land can foster economic growth and improve collective well-being, inadequate land rights keep many in a permanent state of insecurity and uncertainty. In many developing countries, the key challenges to the full enjoyment of land rights involve disputes over inheritance, registration and titles, demarcation, undervaluation of land, and the rising commercial and investment pressures on land. Each of these factors contributes to undermining tenure security and affecting the livelihoods of the poor. As a result, they also impede, directly and indirectly, realization of many of the MDG targets.

2.1 Disputes over inheritance

Inconsistencies between customary and formal justice systems – the laws and their application – are most often the cause of disputes over inheritance. These disputes are generally rooted in the cultural and traditional practices of communities and in their interpretations by traditional leaders. Women suffer disproportionately from the discriminatory application of customs and traditions that involve ownership of land. Of the more than one billion people in the world who are inadequately housed, women constitute the majority. The *Centre on Housing Rights and Evictions* (COHRE) conducted surveys on the law and practices related to women's inheritance rights in ten sub-Saharan Africa countries⁴² and eight countries in the Middle East and North Africa (MENA) region, and found striking similarities in the reasons for denying – and methods used to deny – women their inheritance rights.

Disputes over, and often the denial of, inheritance rights have a particularly severe impact on women. When they are unable to own, control and inherit property, they fundamentally lack access to wealth.⁴³ Women and their dependents – children and elderly alike – can face homelessness, loss of livelihood and shelter, and deprivation at any time. This potential loss of integrity of the family unit detracts from the realization of many of the MDGs. Women without a husband or a male guardian often face discriminatorily treatment, which perpetuates gender inequality (MDG 3). Instability and displacement may inhibit their ability to access maternal and child health services (MDGs 4 and 5), and increased material insecurity may prevent children from attending school (MDG 2).

Lack of equal rights to land for women also contributes to the spread of HIV and weakens their ability to cope with the consequences of this deadly epidemic. Women's deep-rooted and pervasive tenure insecurity, often worsened by eviction and landlessness, can significantly limit their ability to produce and access food, consequently forcing them to resort to transactional sex for survival, which can trigger the spread of HIV.⁴⁴ Dependence on men due to unequal inheritance rights can also increase women's vulnerability to HIV, as they lack the power to negotiate safe sex with their male patrons.⁴⁵ Cost-effective measures for strengthening women's inheritance rights will contribute to the fight against the spread of HIV (MDG 6).

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Community-level dialogues on customary laws of inheritance and how they relate to formal laws can be a critical factor in ensuring that the poor and the marginalized can effectively voice their concerns and access cost-effective resolution of inheritance-related disputes at the local level. While such dialogues can be necessary and helpful, they will surely be insufficient to protect the inheritance rights of vulnerable women and the poor. Strengthening the capacity of community-based organizations to provide legal aid to the poor, engagement of non-traditional leaders – including village elders, teachers and healers – in mediation and alternative dispute resolution processes will ensure more equitable outcomes for the poor. Development efforts at the local level should support mechanisms for peer and partner review of decisions coming out of customary forums to discourage judgments that hurt the poor. There should also be provisions of cash and non-cash incentives and training of customary leaders to encourage judgments that protect the inheritance rights of the poor, including that of vulnerable women and children.

2.2 Disputes over land records and titles

Poor land records and complex titling processes often lead to disputes over land, which can significantly reduce the time that the poor need to spend on productive endeavors. Many countries have multiple laws on how to register properties, creating overlapping and conflicting interests in land. Widespread formal titling of land is often politically and economically infeasible in countries with a strong customary land rights system. Customary land rights often prevail in practice, while the formal justice system only recognizes formal titles, adding inconsistencies and complexities in dispute resolution.

Many factors discourage people from obtaining formal titles. Registration and titling of land are often procedurally and financially very costly, especially for the poor. Where domestic legal systems limit enforcement of titles only in formal courts, titling of land becomes unattractive to individuals who do not want to subject them to formal adjudication process. Land titling may also appear less attractive because of the possibility of future taxation, expropriation of land, and loss of ownership if used as collateral to access credit.

Accessible and acceptable land records that accurately reflect land interests are critical for enhancing tenure security. Absence of clear land records exacerbates uncertainties, because those seeking to purchase land are unable to determine who has existing interests and those seeking to transfer land may be inhibited by other land users with or without justifiable rights. To sustainably secure land rights, registration processes offering title-deeds are often not enough – land rights, conferred by a title, must be protected against competing claims. *Ex post* transaction costs and the poor's capacity to pay for such costs must be taken into account to effectively uphold their land rights.

Minimizing title-related disputes will offer a number of positive outcomes. Undisputed land titles will help to secure shelter and land use and encourage investment by providing security from seizure, transferability, extended collateral opportunities, and improved housing quality and agricultural productivity. It will also allow people to go to work and engage in productive enterprises, instead of staying home to protect their land and homes, or traveling to courts (MDG 1, Target 2). Titles, ensuring tenure security, can also promote sustainable use of the land (MDG 7). A reliable and updated land registry that is accessible, transparent, simple and affordable can also be used to track the identity of polluters and deter environmental pollution (MDG 7).

2.3 Disputes over demarcation

When land ownership is not secured by a title and survey records, disagreements over boundary and demarcation can occur and undermine the land rights of the parties concerned. The effectiveness and validity of formal title is also contingent on mutual and collective acceptance of land boundaries. Accurate land delimitation requires accurate survey as well as a depository of possession and ownership information at the land registry, which can be facilitated by community-level engagement. As asymmetries in power relations between disputing parties often determines the outcomes of boundary disputes, open discourse at the community-level can help to reduce the imbalances in bargaining power. The benefits of overcoming demarcation disputes are similar to those of disputes over land registration, because they lay the groundwork for tenure security, which is critical for goals of poverty reduction, employment generation, universal education and environmental sustainability (MDGs 1, 2, 7).

There is a strong need for supporting systematic demarcation and adjudication of land boundaries at the community level. This is likely to occur when the collective benefit for the community from systemic demarcation of all land boundaries and peaceful resolution of all competing claims outweighs the benefits that some community members, usually the powerful ones, may reap from maintaining the *status quo* of wrangles over land.

It is unlikely that an institutional approach, focusing on provision of formal titles and cadastre, will resolve all demarcation and titling disputes. While widespread formal titling of land remains costly and infeasible, customary certificates of ownership and other forms of semi-formal titles can reduce incidences of demarcation disputes and help enhance tenure security without imposing high costs on the poor. Given that the validity of a land title is contingent on mutual and collective acceptance of individual land boundaries, it is critical to ensure open and inclusive community-level discourse on boundary disputes. Such dialogues will, not only redress the asymmetries in power relations but also help to identify the costs and benefits of systematic demarcation and resolution of demarcation disputes. Effective land governance must also involve provision of cash and non-cash transfers and other forms of support to incentivize resolution of demarcation and titling disputes, especially when the perceived social benefit of peaceful demarcation is negative. There should also be strong support to enhance community level knowledge of land surveys and cartographic literacy to ensure that the poor can understand land records and appropriately defend their land rights.

2.4 Undervaluation of land

Whether land is transferred through a negotiated settlement or by forced eviction, displaced individuals and communities are entitled to compensation for loss of their land rights. Standards may vary from “full and fair compensation”⁴⁶ to “just and fair”⁴⁷ but the application of these standards can be subjective. The calculation of compensation undoubtedly incorporates the value of the land itself. However, given the varying ways land can be valued, disputes over valuation are prevalent. The most common approach is the willing-buyer, willing-seller model, where the market value is the amount the buyer would be willing to pay in an open market with multiple options. Other approaches used include the replacement cost model and tax valuations; in some countries, transaction data reported as part of the registration process serve as the basis for land value.⁴⁸ These valuation approaches tend to undervalue land from the seller’s perspective, failing to take into account subjective interests in land. Often sellers of the land, or those who encounter forced takeover, are poor and severely cash-constrained. They often agree to give up their claim to the land at a minimum price, when they are offered hard cash.

Net present value (NPV) – the difference between today’s value of the added returns and today’s value of the added costs – is rarely used for land valuation purposes. However, it provides a more accurate assessment of the value of the land because it can capture the value of social capital. Social networks create a web of relationships and cooperative action that can produce significant economic and social welfare gains for a geographically defined community.⁴⁹ Therefore, when the land of individuals or communities is transferred to another owner, be it voluntarily or involuntarily, the social capital is often lost. If this cost is not taken into account in the valuation of the land, the poor stand to lose out the most.

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Accurate land valuation, although costly, will reduce the number of disputes over valuation and ensure fair compensation for the poor (MDG 1). More accurate valuation of land will also facilitate access to credit and contribute to generating more farm and non-farm income. With more income, people may start businesses (MDG 1), send their children to school (MDG 2), or simply have enough material security to avoid risky behavior that could lead to the transmission of HIV (MDG 6).

2.5 Commercial and investment pressures on land

Communities are increasingly facing threats of encroachment and non-consensual takeover of their land by outside entities, often aided by local and central authorities. These takeover deals are characterized by a severe lack of transparency, low levels of community consultation, and increasing governmental involvement in negotiations.⁵⁰ The scale, terms, and speed of land acquisitions have provoked opposition in a number of countries.⁵¹ Investors seeking to acquire large tracts of land are increasingly coming into direct conflict with local populations, because

these deals often harm the interests and rights of poor and marginalized communities, and fail to bring the expected benefits. In this context, lack of tenure security has accelerated the displacement and vulnerability of poor land users, with many losing access to their homes and means of subsistence, which may also lead to their marginalization as land is often the foundation of their relationship to a community...

The enforcement of these investment agreements –ensuring that the land rights of the poor are protected– can increase food security, improve employment opportunities, decrease poverty and improve environmental sustainability (MDGs 1, 7). Effective community-level participation of all, including the poor, and open deliberations that can rank order the net benefit of various valuation approaches and investments can contribute to protecting the land rights of the poor. Effective land governance should seek to build the capacity of community-based organizations and non-governmental organizations that represent the interests of the poor so that they understand different valuation methods and can negotiate compensation and investment agreements. Broadening the informational base of the poor and strengthening their capability to negotiate better deals for themselves will remain keys to ensuring that large-scale investments in land actually make the poor better off.

3. Legal empowerment for promoting land rights

Legal empowerment, predicated on the concepts of fundamental freedom, seeks to enhance the poor's ability to secure their identity, participation and voice and realize their individual and social choices. It also wants to ensure that individuals – rich and poor – are capable of making choices in a discursive process. Legal empowerment seeks to avoid a narrow institutional focus and is aimed at ensuring that individuals and communities have greater control over the processes that affect their lives and that institutions effectively respond to their needs and evolve as necessary. Without seeking to establish a perfect set of institutions, legal empowerment focuses on the interactions between individuals and institutions that optimally advance the rights of the poor.

Legal empowerment of the poor does not support a property rights orthodoxy that ignores the importance of equity and assumes zero transaction costs. It also does not assume perfect information and perfect bargaining power among various economic actors, which also assumes efficient economic outcomes for all when property rights are effectively enforced.⁵² On the contrary, the legal empowerment approach recognizes that an efficient and equitable system of property rights cannot be realized without a functioning, responsive and accountable system of land governance, which can ensure effective participation of individuals and communities in various decision-making processes.

The ultimate objective of legal empowerment is enhancing human capability and the choices people have to realize their rights. By focusing on substantive freedom – identity, voice and participation, and freedom from fear and hunger – an empowerment approach can also ensure that people not only care about their own rights, but also those of others. It can help communities to recognize the inter-dependence of rights and that individuals must respect the rights of others if they are to protect and advance their own rights, going beyond the maxims of individual utility maximization.

Enhancing human capability is a must for protecting and promoting the land rights of the poor. Once the poor have identity, information and voice, they will be in a position to effectively engage in decision-making processes and choose the best possible alternatives available to them. In a deliberative process, the poor can express their preferences – between customary and formal tenure systems, between individual and community titles, and between various investment and compensation options – and rank different options, which reconcile their

individual and social preferences. A social choice approach that represents the collective preferences of all people involved can yield a socially equitable outcome and ensure full realization of the land rights of the poor. This is not to suggest that decisions concerning land rights should always be driven by a majority rule or by consensus. In fact, a majority rule approach can impose outcomes that can make the poor worse off. A legal empowerment approach can ensure that concerns of the poor are taken into account in the decision-making process and that a reasoned alternative is made available to them. As Sen would argue, open-minded engagement in public reasoning is central to the pursuit of justice for the poor,⁵³ which can ensure what he calls “reasoned progress”.

For the poor to effectively participate in a bargaining process, it is imperative that they have full information and understand the consequences of various alternatives. They must know who wins and who loses, and by how much, and the possible effects of various alternatives that are available to them. Without full information, it would be impossible for them to make a rational social choice. In any negotiation, it is not likely that everyone will expect the same costs and benefits from a proposed alternative. Some may perceive positive benefits after all costs have been taken into account, while others may perceive net losses. Consequently, the final social choice will be favored by some and opposed by others but there will be a collective ownership of the decision if the process is inclusive and transparent. A legal empowerment approach will ensure that the poor are part of the process that determines the optimal social decision that affects their land rights.

3.1 Common pool resources and the tragedy of the commons: an empowerment approach in practice

Garrett Hardin first used the term “the tragedy of the commons” to explain a coordination failure in the use of common pool resources that led to over-harvesting and ecological collapse. In his 1968 article, he describes a situation where individual herders kept adding animals to an open-access pasture and received an immediate individual benefit. They collectively suffered delayed costs from over-exploitation as the pasture soon became unsuitable for grazing. Hardin concludes:

Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit—in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons.⁵⁴

Ostrom’s theoretical work and extensive field research show that communities can develop effective arrangements to manage their common pool resources. Such an arrangement usually reflects a collective decision-making process and realization of social choices. She identifies the following factors for ensuring stable and equitable management of common pool resources:

- Common pool resources must have clearly defined boundaries and must effectively exclude external un-entitled users.
- Rules governing the use of common resources must be adapted to local conditions and must be generally acceptable to the resource users.
- Social choice rules must ensure that resource users are able to effectively participate in decision-making processes.
- Effective monitoring of the use of resources must be in place and the monitoring system must be part of, or accountable to, resource users.
- Mechanisms for conflict resolution must be easy and affordable.

Ostrom shows that communities will adopt new rules and procedures, and make optimal social choices for managing their resources if net benefits from adopting them are positive for at least

some users. Each resource user – whether he or she benefits from a new system or not – would need to estimate three types of costs:

- The up-front costs of time and effort to devise and agree on new rules;
- The short-term costs of adopting new resource appropriation strategies;
- The long-term costs of monitoring and maintaining a self-governed system.

If the sum of these expected costs for all users exceeds the benefits to be derived from a new arrangement, no user will invest the time and resources to create a new system of governance. For any social choice rule to work, such as unanimity or majority-rule, there must be a minimum coalition of users who would agree to adopt new rules. If a minimum winning coalition does not find net benefits greater than the sum of the costs, no new operational rules will be adopted.⁵⁵

Ostrom's work is extremely relevant to promote the land rights of the poor, not only in the context of using common pool resources, but also to ensure that they can fully enjoy their land rights and resolve disputes related to inheritance, demarcation, records, valuation and/or investment. The tragedy of the commons becomes inevitable where resource users are alienated from one another or cannot communicate with each other effectively. A different kind of tragedy of the commons can occur when poor people are unable to share information on the consequences of their actions and inactions, and are unable to participate in an inclusive decision-making process that addresses the issues of inheritance rights, disputes related to demarcation and land records, undervaluation of land, as well as challenges related to compensation and investments in land. Identity, voice and participation – leading to rational social choices – can be a key to avoiding the tragedy of the commons, where the poor are embroiled in costly land-related disputes and are unable to fully realize their land rights.

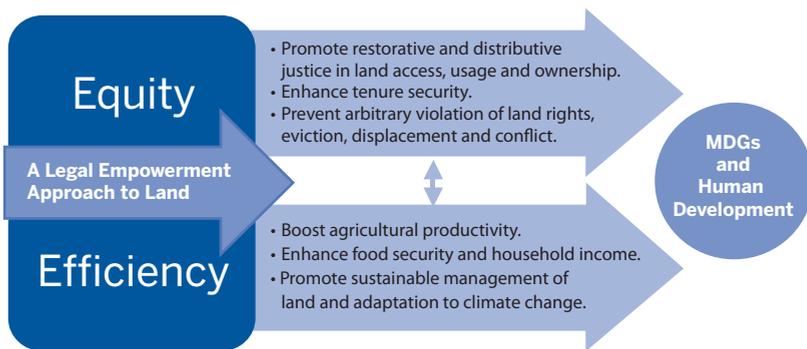
3.2 Land governance for securing the land rights of the poor

With limited or insecure land rights, the poor cannot reap the many rewards of holding interests in land, which contributes to perpetuate their vulnerability, hunger and poverty. Land governance must be bottom-up and demand-driven if it is to protect and promote the land rights of the poor, which can play a critical role in reducing poverty and hunger. Legal empowerment can ensure a systematic and participatory approach to land governance, taking into account constraints, both on the demand and the supply side, and understanding the motivations of various actors and the incentives they respond to. More specifically, a legal empowerment approach in land governance can ensure:

- The poor have an identity and a voice, and are organized to demand and realize their land rights;
- Legal and administrative institutions – court system, local government bodies, etc. – have both the capacity and the incentives to uphold the land rights of the poor and that they engage at the community level to ensure open and inclusive processes of deliberations;
- Land policies are products of an inclusive deliberative processes and geared towards the realization of the land rights of the poor.

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There are irrefutable equity and efficiency arguments for improved and effective land governance. A responsive land governance system can promote land access, ensure restorative and redistributive justice for the full realization of land rights and enhance tenure security, prevent arbitrary land takeover, eviction, displacement and conflict, and support sustainable land management. Ensuring access to land and enhancing tenure security must be the critical elements of a well-functioning land governance system.⁵⁶



In addition to equity objectives, effective land governance can increase agricultural productivity, enhance food security, improve household income, and promote environmental sustainability and climate change adaptation. Clear, recognizable, and enforceable interests in land within a functioning land governance system are critical for efficient and sustainable use of land.

In the absence of an accountable and responsive land governance system, people may be rendered landless without justifiable cause and without adequate compensation, and left impoverished with no means to improve their conditions. Forced evictions documented by COHRE are generally characterized by violence, lack of legal and judicial remedies and of compensation, and loss of livelihoods for the poorest and most marginalized.⁵⁷ Unless there is a land governance system that recognizes and protects land rights, and a state that is accountable to the people, arbitrary takeovers, evictions and displacement can make those who are already vulnerable homeless.⁵⁸

Poverty is in part due to a lack of usable capital, and land is arguably the most valuable asset of the poor. Without effective tenure security, their ability to use this asset to leverage access to other resources is often curtailed.⁵⁹ An accountable land governance system will also enable individuals to access credit and facilitate more substantial investments in land. Recognized and enforceable land rights will enable the poor to increase their incomes, becoming more self-reliant and better able to capitalize on new opportunities.

An equitable land governance system must create platforms for community-level and inclusive discourse to ensure effective participation and to strengthen the voice of the poor. It must also ensure that existing and new land policies take into account the equity, environmental, economic and conflict prevention dimensions as well as trade-offs and opportunity costs of various policy options. The land governance system must also ensure cost-effective arbitration, adjudication and dispute resolution mechanisms that will deliver equitable and income-sensitive remedies to the poor. For all these, community-based organizations and non-governmental organizations defending the land rights of the poor must become an integral part of the land governance system. Development support – from both within and outside – must strengthen the capacities of these organizations so that they can effectively represent and defend the land rights of the poor.

Realization of land rights must be fundamentally premised on the notion of justice, seeking to reduce, if not eliminate, unjust and unsustainable practices that hurt the poor. An equitable land governance system must seek to protect and promote the land rights of the poor by focusing on their perspectives and the incidences of chronic injustice that they encounter. Realization of their land rights cannot be contingent on the existence of perfect institutions and fully compliant behavior by all, which seldom exist in the real world. In the world of second-best,



protection and promotion of land rights of the poor must rely on community-level discourse and participation that will ensure inclusion, transparency and optimal social choices.

Given the critical role that land can play in combating hunger, averting conflict and preventing climate change, an effective land management system must empower the poor and ensure their participation, voice and choices. Land rights contribute to the realization of fundamental human rights and promote identity, social inclusion, and human dignity and capabilities. A land governance system that promotes a human rights-based approach to development and recognizes obligations to respect, protect, and fulfill land rights will create an enabling environment for accelerated achievement of the MDGs.

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Securing the land rights of the rural poor: experiences in legal empowerment

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Executive Summary

Secure land rights¹ contribute to the sustainable livelihoods of individuals, families and communities: a sense of personal security; the avoidance or mitigation of social conflicts; investment confidence; and sustainable development. This paper presents and analyzes some examples of legal empowerment initiatives to secure the land rights of the rural poor. Aiming to contribute to the larger debate on how to effectively secure the land and natural resource rights of the rural poor, it draws some lessons from these examples, their impacts and difficulties. It also highlights the role of external support in these processes.

The paper is based on a set of case studies coordinated by the Land Tenure and Management Unit (NRLA)² of the Food and Agriculture Organization of the United Nations (FAO), in collaboration with several development practitioners and organizations. These cases³ provide the basis for Section 3 of this chapter.

The paper is organized into four sections: Section 1 discusses the importance of the legal empowerment paradigm for approaching initiatives to secure land rights. Section 2 addresses what legal empowerment for securing land tenure rights means and how it works. Section 3 offers examples of externally supported initiatives to legally secure land tenure rights and provides an initial review of their impacts. Finally, the concluding Section 4 offers observations on lessons learned for future initiatives to secure the land and natural resources rights of the rural poor.

* The authors contributed to this paper in a personal capacity and the views expressed here do not necessarily reflect those of FAO.

Introduction

Access to and control over land and other natural resources such as forests and water are often key determinants of the livelihoods and socio-economic security of families and communities in rural societies.

This paper discusses a simple conceptual framework for understanding the importance and the components of legal empowerment for securing land rights. After presenting some examples and an analysis of legal empowerment initiatives to secure land rights in Africa, Asia and Latin America, some of the impacts and the difficulties are highlighted, as well as the role of external support. This paper is based on work first developed by the Land Tenure and Management Unit (NRLA) of the Food and Agriculture Organization of the United Nations (FAO). As part of its work program, this Unit has commissioned a number of studies from Africa, Asia and Latin America that document and analyze a variety of legal empowerment experiences and actions aiming at securing the land rights of the poor.

The paper is organized into four sections: Section 1 discusses the importance of the legal empowerment paradigm for approaching initiatives to secure land rights. Section 2 addresses what legal empowerment for securing land tenure rights means and how it works. Section 3 offers examples of externally supported initiatives to legally secure land tenure rights and provides an initial review of their impacts. Finally, the concluding Section 4 offers observations on lessons learned from these examples.

1. Why legal empowerment to secure the land rights of the poor is increasingly important

Growing populations and increasing commercial demands for agricultural land are making commercial land transactions and attempts to illegitimately take over the lands of the poor (colloquially called “land grabbing”) more frequent. Coupled with speculation and the changing climate, this trend could threaten the livelihoods of rural people in many regions of the world. To face these threats, the ability to legally document and defend one’s rights is increasingly urgent but still difficult for those who need such legal protection most. As global, national and local pressures for land alter rural dynamics, it is and will be increasingly difficult to protect land rights that are not clearly established and documented in writing in accordance with the law.

Different actors enjoy unequal levels of information on and awareness of land legislation and legally accorded rights. They also have very unequal capabilities to navigate the legal rules and procedures for securing their land rights or transactions. Legal empowerment of the socially and legally weaker rural populations is thus increasingly needed to reduce these imbalances and to strengthen their capacities to legally assert and defend their land rights.

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1.1 Land rights under new threats

The land rights of the poor are often challenged and under threat in many parts of the world as a result of several trends and factors. Growing populations and changing ecological conditions tend to make good land increasingly scarce and valuable. Arable lands become more coveted, more likely to be transferred through monetary transactions, and the object of growing competitions and conflict, often violent. In many regions, particularly in Africa, the customary mechanisms regulating land allocation are challenged by these growing tensions and by the changing attitudes of traditional authorities, who are often tempted to take advantage of the accelerated commoditization of land for their own profit.

1.2 New laws and new opportunities

There are also some positive opportunities and innovations to address the challenges mentioned above. Many countries have begun putting in place legal systems allowing for the legal registration of customary rights.⁴ These legal systems usually also increase the role of

decentralized administrative entities and local government to manage land rights. These new laws aim to promote the legal formalization of land rights for all citizens. To date, the implementation of this process remains difficult and limited.

1.3 Legal security of land rights as often inaccessible to those who need it most

Since most of the rural poor find it difficult to establish and document their rights, many are dispossessed of their land by powerful, richer or more astute actors. Therefore, relying on land laws and using legally defined procedures to secure land rights are important but also very difficult steps for many of the rural poor.

Several factors contribute to the rural poor's difficulty in using law and legal procedures to assert their land rights. Modern laws are complex and are often poorly disseminated by the state and unknown by the poor. Even when they have some knowledge of the laws, the rural poor are often illiterate and socially weak, and many are unaware of how to concretely deal with complex procedures, land administrations and bureaucrats. As a result, even progressive and well-meaning laws do not really protect land rights that are not legally documented in writing, nor do they make it easy to convert and formalize customary rights into legally documented rights that are more effectively protected by statutory law.

In many cases, land administrations and professionals who could facilitate the formalization of customary, non-written rights and who could make legal procedures user-friendly for all citizens tend to be rare, remote, expensive and not easily accessible. For all these reasons, many poor rural people do not even consider dealing with state institutions (typically land administrations in the situations addressed in this paper), feeling that the law is for the rich and not for them.

2. Legal empowerment to secure the land rights of the poor: what it is and how it works

2.1 A short definition

In the context of land tenure, legal empowerment of the poor could be defined as the multiple processes and actions by which people become more skilled, more powerful and eventually better able to use legal institutions and procedures to assert, document and defend their land rights. When regulations and procedures are so complex that they cannot be used by the poor, legal empowerment may also include legal and institutional changes that make procedures simpler and less costly, and the administrations in charge more accountable, user-friendly and accessible.

2.2 “The social working of law”: legal procedures and concrete interactions

Security of land tenure (as an individual legal entitlement and as a public good) can be seen as resulting from the interactions between land users and the suppliers of public services and administration, whose function is to legally document, protect and disseminate information about land rights.

What matters is how rights can be legally asserted, adjudicated and protected in practice. This depends on the actual functioning of procedures rather than the mere existence of laws, no matter how well worded or well intended. The real functioning of procedures involves the *social working of law*⁵ and the concrete interactions between individuals and groups: on one hand, the users (or potential users) of laws and public institutions, and on the other, the individuals in the public (state) institutions that implement legal procedures.

The concrete interactions between the citizens and the providers of public services (i.e. the public servants in land administrations) are an important component in the provision of legally

secure rights and legal empowerment processes. Improving these interactions is an important part of legal empowerment to secure land rights.

2.3 The continuum of legal empowerment: a set of interlinked actions

A sequence of steps is necessary to legally secure land rights where the poor are illiterate and far removed from the state and the law in many ways. Building on the typology adopted by John Bruce and his co-authors,⁶ the following continuum of actions and conditions may be defined as follows:

- **existence of legal rights:** rights enshrined in the national and sub-national legal framework;
- **availability of appropriate legal information:** support to understanding the law, its procedures and how they are used;
- **awareness of rights and willingness and confidence** to legally assert them through legal procedures;
- **capacities** (legal, social, financial) to activate procedures and to successfully interact with state agents in legal land institutions.

These components of legal empowerment for securing land rights are linked, and in reality function as a sequence of conditions and actions called the “continuum of legal empowerment to secure land rights”.

The fourth (procedural capacities) further includes three key factors: language, interactions and power balances:

1. Knowing how (and being able in practice) to use the *language* and meanings of complex words designating specific actions, things, rights and/or relationships.
2. Knowing *how to interact with state institutions* and the individuals within them, given that they often have specific social bias, habits, conceptions and ways of working (rent-seeking, political patronage, patron-client relationships, etc.).
3. Social assertiveness and *power balances*. Being daring and confident enough to assert rights in the context of “real life” social and administrative relations. This implies that the poor are and feel they are skilled and strong enough assert their rights effectively when facing competing claims and stronger actors. It is also important when they interact with state administrations that are not pro-actively delivering accessible and affordable public services to poor citizens.

238 3. Lessons learned from experience: methods and impacts of legal empowerment to secure the land rights of the poor

To understand how legal empowerment works and to improve the empirical knowledge base of such processes in rural areas, FAO has collaborated with various organizations and has commissioned a number of studies from Africa, Asia and Latin America that document and analyze a variety of legal empowerment experiences and actions aiming at securing the land rights of the poor. Together with the International Institute for Environment and Development (IIED) and the Law Faculty of the University of Ghana, FAO also organized an international workshop in Accra, Ghana, in March 2008. The workshop report, jointly published by FAO and IIED, presents the work experiences of legal services organizations from different parts of Africa.⁷ Drawing from the concrete experiences illuminated by these case studies, concrete examples are presented below of some core elements of the continuum of legal empowerment to secure land rights. The studies described below provide some insight into the problems faced by the rural poor and government

administrations, and some actions to respond to these problems. Where possible, the case studies also summarize the impacts of these activities.

3.1 The role of decentralized institutions in disseminating land tenure information in Niger

In 1993, Niger passed its Rural Law (*Code Rural*), which creates the conditions for securing the land rights of rural populations. The main objective of this law is to solve land problems through decentralized Land Committees (COFOs, *Commissions Foncières*). COFOs can be found at different administrative levels: the department (COFODEP), the municipality (COFOCOM) and the village (COFOB). They are designed to take into account the different needs of the population at the most appropriate administrative level. In addition, one of their main activities is to disseminate legal information to rural communities.

A 2007 study conducted by Avella and Younfa⁸ in the Departments of Mirriah and Gouré, in the region of Zinder, indicates that the COFODEPs have developed several strategies for disseminating land information to rural population, including awareness campaigns at the village level using tools such as radio programs, audio cassettes and visual banners. These awareness tools have started to address the lack of knowledge on formal land rights among rural population and are an important instrument for disseminating legal information to rural populations. However, their effectiveness is limited by: the fairly small number of villages reached by the awareness campaigns and the visual banners; the lack of radio coverage and absence of cassette players in many villages of the region; and the dependency on the funds provided by NGOs and other donors. One additional limitation is that very often the COFO members are not sufficiently informed and trained on how to implement the Rural Law.

Avella and Younfa therefore suggest designing capacity-building initiatives directed at COFO members in order to improve their ability to effectively communicate the rights contained within the Rural Law and the procedures that rural communities and individuals must follow to assert their rights. They also recommend strengthening COFOs' internal mechanisms through improved monitoring and by supporting them to gain the technical knowledge and professionalism required. Finally, they propose to improve the communication between the several levels of the COFOs so that users can receive the same information from the different institutions involved.⁹

3.2 Securing land rights through decentralized land authorities in Madagascar

The Department of Property and Land Services within the Malagasy Ministry of Agriculture, Livestock and Fisheries has promoted a comprehensive initiative, the National Land Programme (PNF, *Programme National Foncier*). Its main objective is to meet the massive demand from citizens to rapidly, cheaply and legally secure their land tenure rights. This is achieved through the formalization of customarily acquired but unwritten land rights, the safeguard and regulation of written land rights, and improved access of the rural poor to legal information. The decentralization process of land management underway in Madagascar aims at strengthening the capacities of local administrative institutions. This decentralization, together with the simplification of procedures and lowering costs, has the potential to make these institutions more accessible to most rural people. Towards this aim, communal and intercommunal *Guichets Fonciers* (local Land Desks) have been created to issue land certificates and register the transfer of customary held land rights.

The methods and the effectiveness by which the *Guichets Fonciers* communicate information are key to the effective implementation of Malagasy land reform. Goislard¹⁰ conducted a study in 2008 focusing on how these *Guichets Fonciers* perceived and communicated land law information and how they raised local awareness of legal rights and responsibilities related to land rights. According to this study, legal information appears to be well distributed across the region and the several municipalities; however, this does not seem to be always the case at the village level due to time constraints and budget restrictions. The radio was the most used communication tool, together with one-to-one conversations, but this communication tool has

not been applied consistently throughout the area concerned and most often has been left to the discretion of the regional government representatives.

Goislard recommends that a communication strategy be conducted at the regional, district and village levels. Officials should visit the villages at least twice a year to advise on the procedures for issuing and managing land certificates; media tools (radio, visual banners, comics, etc.) should be designed to complement these visits. Peasant organizations and NGOs with very strong expertise in communication techniques and methodologies must be completely integrated in this process. Goislard also points out that regional government and *Guichet* staff had not received specific training on land issues, and therefore recommends conducting ongoing training and encouraging working meetings.

3.3 Raising the awareness of judges on land law complements empowerment actions in Mozambique¹¹

Serra and Tanner note that few people in Mozambique are well informed about the country's Constitution and the rights it accords them, especially those related to land tenure. This opens the door to the more powerful in Mozambican society to claim and register land, as has been seen in the recent trend of foreign investors acquiring land for biofuels production.¹² The authors also note that rural citizens have serious problems accessing justice and very few are aware of the process to request support in resolving conflicts. Moreover, effective provision of state land administration services requires that the providers – local and provincial-level land administrators and local judiciaries – have an up-to-date understanding of land legislation and how it should be applied. Serra and Tanner report that in many parts of Mozambique, it is clear that judges and public prosecutors have little knowledge of the 1997 Land Law, which legally recognizes historically acquired land use rights. The judges also had little understanding of its underlying policy principles reflecting the day-to-day custom and practice of most rural Mozambicans. A project was launched by FAO in 2001 with the cooperation of senior judges within the national judiciary to train judges on the Land Law and other associated laws regulating natural resources rights and use.¹³

By bringing a small national-level institution like the Centre for Legal and Judicial Training (CFJJ) to the village level, the training project has begun to instill some sense of juridical awareness among its target groups, particularly the participating rural communities. It has largely succeeded in generating a new awareness among local people of the judiciary and what it does. Communities have benefited from direct interactions with legal professionals and judges to help them deal with problems with outside investors and the local administration.

Serra and Tanner summarize the qualitative impacts as follows:

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For both the paralegals and the communities, this experience has also helped people to review their image of the judiciary. From being distant figures in a far away town where their role is seen mainly as putting people in prison, the community meetings show that judges and prosecutors are also ordinary people. The communities then begin to understand how they can present problems to judicial institutions, and which ones are most appropriate in specific circumstances. And through the paralegals, they gain a supportive link to the professional support they need to make use of this framework. [...]

For the judges and prosecutors who take part in the program, this experience is also invaluable. It provides them with rare opportunities to see what is happening at local level, and to begin to see more clearly how they can act to bring together the vastly different world views of the peasant farmer or illegal hunter, and the formal world of the government, investors and their priorities. This does not necessarily make their work easier, and it is too early at this stage to say if and how they are achieving better results. But all the anecdotal evidence from follow up meetings and discussions with those who have taken part indicates that the courses and seminars have helped them greatly.¹⁴

3.4 Linking judicial institutions and civil society organizations to secure land rights in Rwanda and eastern Democratic Republic of the Congo (DRC)

In Rwanda, since 2005, a single comprehensive land law has substituted for a multitude of land-related laws, and the issuance of land titles has created a new land tenure framework, which is still not well known by the judicial actors and civil society. In order to fill this knowledge gap, the legal support NGO *Réseau de Citoyens Justice & Démocratie* (RCN, Citizens' Network for Justice and Democracy), created in 1994 to provide legal support in post-conflict Rwanda, has encouraged closer ties between the judicial system and civil society. According to a 2008 study by Vasseur,¹⁵ RCN's work focuses on structural communication bottlenecks, both at institutions and civil society levels, and contributes to improving the legal awareness of all the actors involved in land disputes. Its work involves three complementary approaches:

3.4.1 The institutional and judicial approach¹⁶

Judges face practical difficulties in managing land litigation, which represents about 80 percent of disputes they adjudicate. The experience of RCN in supporting the judicial institutions in Rwanda shows a common lack of communication between and within these institutions. Training sessions targeted 213 judges with the specific aim of providing them with the skills for a good understanding and control of land disputes in the context of the new Rwandan Land Law. "Problem-oriented training" was organized in five three-day sessions, which were decentralized to the provincial level. The assessment by the judges at the end of the training was that the topic of the Land Law came at the right time and allowed them to have a clear legal instrument to manage and solve land disputes.

3.4.2 The civil society approach¹⁷

The partnership agreement of January 2006 between RCN and the federation of farmers and livestock holders, IMBARAGA, promoted training sessions, workshops and roundtables to discuss problems related to the dissemination of the law and to strengthen people's ability to deal with land tenure issues. Extension workers have been trained to strengthen their knowledge on land tenure and their capacities to disseminate information on relevant laws to the population. The beneficiaries of the training were also members of IMBARAGA as well as representatives of the local administration, such as agronomists, civil servants and religious leaders.¹⁸ Training sessions with up to 50 people have been facilitated by a multidisciplinary team comprising one sociologist, one legal expert, one lawyer, one veterinary technician and one agronomist.

3.4.3 A 2008 study on land conflict management

The parties involved in litigation were interviewed and a comprehensive analysis was carried out of records and archives of local administrations, mediators and courts. Through these steps, RCN has been able to understand power relations in communities, evaluate the difficulties encountered by the comprehensive Land Law, and design legal empowerment strategies to address them.

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RCN also works in eastern DRC. A 2008 study by Mugangu¹⁹ shows that it bases its work there on the idea that strengthening the capacities of those involved in land management and land disputes will facilitate land rights security. It works with judges, district, municipal and cadastral authorities, chiefs, judicial police inspectors and officers. RCN's projects contribute to facilitate communication between the public users and the judicial system, laying the foundations of social control by citizens over the operating system.

3.5 Supporting San communities to secure territorial use and management rights in Namibia²⁰

Namibia's communal conservancies are an example of community-based natural resource management (CBNRM) initiatives. Members of conservancies are mainly indigenous people known as San. Namibia's 1996 Amendment Act allows for the creation of conservancies, but

does not give communities ownership of the conservancy land; however, it does give them the legal right to use the natural resources found on the land such as wildlife and plants.

The N'a Jaqna Conservancy was established in 2003 following years of planning. The conservancy covers 9,120 km² and is home to approximately 5,000 people. The gazetting of the Nyae-Nyae Conservancy²¹ for Ju/'hoansi San people in the neighboring Tsumkwe East Constituency in 1997 provided the inspiration for the San people in Tsumkwe West Constituency to start the conservancy establishment process. Observing the positive developments taking place in the Nyae-Nyae Conservancy, the San community appealed to the Working Group of Indigenous Minorities in Southern Africa (WIMSA), an NGO representing Southern Africa's indigenous peoples, for assistance in applying to the government for a conservancy of their own. This San initiative resulted in the recruitment of a WIMSA consultant to conduct discussions with several communities in the area, which in turn resulted in substantially increasing the communities' awareness of the value of the natural resources in their environment.

This increased understanding guided the San in applying for a conservancy that included the management of economically and culturally important forest resources. They expressed a wish to manage their entire environment for the benefit of the population. The San argued that the management of wildlife resources cannot take place in isolation from the environment on which they depend for food and habitat. In response, a Constitution reflecting the needs and aspirations of the San people under the policy of the Government of Namibia was drawn up with the assistance of WIMSA and submitted to the government in 1998. Today, the desire of the San to include the management of forest resources is reflected in the establishment of community managed forest areas within the Conservancy.

Despite the outside assistance, the establishment of community-managed areas took four years from the date of application in 1999 until the gazettelement of the N'a Jaqna Conservancy in 2003. During those years, the Conservancy management, representatives of the San people and WIMSA persistently negotiated for the official recognition of the Conservancy.

In addition to support from WIMSA, the San Human Rights Programme, which receives assistance from the NGO Legal Assistance Centre-Namibia (LAC), works to empower individuals within the overall San community by providing legal knowledge and skills training. It also works to: strengthen the capacity of communities to lobby for public services and to participate in the law reform and policy development affecting their areas; raise public awareness of new laws and outcomes of cases; bring public interest test cases to court, thereby enforcing and protecting the rights of San communities to access land and public resources; and establish San community legal advice centers where people can access information.

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In 2004 and 2005, the San Human Rights Programme trained and mobilized a number of San "paralegals" to work in areas of the country where San people reside. They have since assisted San people with matters related to the issuing of identification documents and birth certificates. One specific impact of the support was witnessed in 2005, when a legal case was brought to court and won by the LAC on behalf of affected San community members against a cattle farmer in Tsumkwe West Constituency, who had tried to force San people away from a water point so that his cattle could use it. However, the Programme depends on support from the LAC and WIMSA, and it is doubtful that it would become a truly independent, effective and sustainable San paralegal program without continuous long-term NGO support.

3.6 Bringing land management closer to rural people in Mali

In 2005, in order to secure rural land rights, bring land management closer to rural communities and reduce the costs and number of the legal procedures required for securing land rights, the Government of Mali passed the Agricultural Framework Law (*Loi d'Orientation*

Agricole). One of the main objectives of the law is to make legal procedures to secure land rights more accessible to the majority of the population through decentralized institutions. A 2007 study conducted by Goislard and Djiré²² in southern Mali indicates that there is widespread ignorance about these new laws at the institutional and community levels. Most of the farmers interviewed did not have access to concrete information about the current legal procedures to secure land rights; some of them knew of the existence of legal procedures but felt powerless because they thought that they were inaccessible and not suited for them. Farmers' unions and organizations were afraid of a progressive dispossession of farmers by the more powerful who had greater knowledge of the legal context as well as the financial and social means to access it. As described by the study, the institutional actors in charge of land management were aware that these legal procedures did not correspond to the needs of rural people. Furthermore, they acknowledged their own ignorance about these regulatory systems, which are complex and difficult to apply.

In order to protect their acquisitions, purchasers of land are beginning to obtain receipts or certificates of sale, or *petits papiers* (small papers). Moreover, a few better informed buyers are certifying these deeds at the administration level. Conversely, rural people face several problems in securing their land because they are not well informed and have difficulty accessing legal services and procedures. The institutions responsible for the formalization of land acts are all located in urban centers and at the communal level. Legal tools to secure land rights should normally be available to all citizens who wish to use them, but in reality the texts are overly legalistic and in a language foreign to many citizens, thus excluding most of the rural population from land ownership.

A 2008 study conducted by Djiré in the cotton (Koutiala) and peri-urban zone (Koutiala and Bamako) of Mali discusses the roles of intermediaries and informal facilitators in facilitating the access to legal language to secure land transactions.²³ The study focuses on the role of intermediaries and facilitators such as notaries and land brokers (*courtiers* in the text.). Most notaries are based in the capital and in some larger cities. In addition to geographical remoteness, there is also a knowledge gap distancing the notaries from the average citizen.

Other informal actors such as real estate companies, surveyors and land brokers actively provide information on the formalization of land transactions. Brokers are intermediaries in the truest sense, usually connecting people, facilitating or leading to the conclusion of an agreement or a land transaction. In theory, brokers should give the parties relevant and useful information regarding the transaction. But in the opinion of most institutional actors encountered during the Djiré study, they often play a negative role in securing land because they tend to encourage corruption in land administrations and exploit their clients taking advantage of their ignorance of the laws and procedures. Yet, in the absence of an efficient and accessible land administration system, informal brokers manage to play a consistent and important role in bringing buyers and sellers of land together and in allowing rural people to make use of the legal language.

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In order to encourage more transparent, accessible and pro-poor land transactions, the first measures provided for under the Agricultural Framework Law on rural land issues require a solid information campaign directed towards the actors within the decentralized services. Goislard suggests that this information campaign should involve all the administrative actors in the rural areas and disseminate simple and usable information on the content and tools of the Domain and Land Tenure Code as well as the Agricultural Framework Law.

3.7 Legal counseling, paralegal support and capacity development to enhance communities' land rights in Bolivia, Guatemala and Peru

In Central and South America, three civil society organizations (i.e. non-governmental and grass-root organizations) have supported rural communities to access and secure their land

rights under the complex legal framework of their countries. Studies prepared by the *Fundación Tierra* (Land Foundation) in Bolivia, the *Comité de Desarrollo Campesino* (CODECA, Committee for Peasants' Development) in Guatemala and the *Centro Peruano de Estudios Sociales* (CEPES, Peruvian Center of Social Studies) in Peru emphasize the importance of engaging existing legal frameworks and using laws that are applicable in rural areas.²⁴

3.7.1 *Fundación Tierra, Bolivia*

In the highlands of northern Bolivia, *Fundación Tierra* piloted a new approach to land regularization that takes communities' capacities and demands into account. From 2004 to 2006, in its work with San Vicente Collagua peasant community, it facilitated the training of paralegals to assist in the delimitation of the community boundaries and individual parcels within the community. The paralegals also acted as conflict mediators in case of disputes during the delimitation process. Paralegals were trained on three major issues: conflict mediation and customary laws; the national legal framework and related provincial laws; and in the conduct of field work using handheld global positioning system (GPS) devices to position and record landmarks. A strong component throughout the training was familiarizing trainees with legal procedures. The main result of these steps was the fulfillment of all the requirements of the new land law for legalizing the internal, community-led process of regularization, including a geo-referenced plan of internal and external community boundaries. A number of disputes were settled through customary conciliation mechanisms, thus avoiding resorting to the courts. The use of native languages together with the recognition of customary rules by the overall legal framework were fundamental in building a sense of ownership of the regularization process.

3.7.2 *Comité de Desarrollo Campesino, Guatemala*

Some lessons learned may be drawn from CODECA experiences related to the Monseñor Romero community in Guatemala. This community was formed in 1988 as an Associated Farmers Enterprise, legally known as *Empresa Campesina Asociativa* (ECA). This form of legal entity restricted the community's decision-making power and held the community collectively responsible for debts contracted by ECA's individual members. CODECA therefore provided the community with information related to their rights and responsibilities as an ECA and helped it find better legal alternatives. Supported by CODECA, community members drafted a constitution with the assistance of a legal assistant and registered the community as a local development committee (*comité local de desarrollo*). The results of the legal empowerment activities in the community are the dissolution of the ECA and the recognition of the new local development committee that allowed the community to access three development projects.

3.7.3 *Centro Peruano de Estudios Sociales, Peru*

The study examining the work carried out by CEPES since 1998 shows how the process of land reform in Peru has not been adequately supported by information campaigns in rural areas. CEPES started to support peasant communities through legal empowerment and advice. The study focuses on two cases on the communities of San Cristóbal and Choclococha. In the first case, CEPES supported the communities in engaging in public fora, demanding transparency and addressing the corruption of state institutions and the abuse of power by a mining company. In the second case, CEPES managed to create a space for peasants to negotiate their rights with a mining company in order to alter the agreement already signed with the same company. While there is no standard model for legal training, CEPES identified the following best practices:

- **capacity development** through intensive training workshops, panels for consultation and advice on the laws and rights of the community, as well as radio programs, flyers and newsletters;
- **legal advice** aimed to ensure that peasants, companies and state entities can interact as equals and that everyone can have the same opportunities to take autonomous decisions with the same negotiation skills;
- **promotion of leadership within the communities**, consisting in the training and

education of community members so that they can use their skills to involve other communities and gain their support to have an impact beyond their local area.

For CODECA, CEPES and Fundación Tierra, one of the most significant achievements in their legal counseling experience has been the strengthening of community organizations, thus allowing communities to more effectively defend their rights when their property was threatened. As part of a wider process of social empowerment, legal counseling, training of paralegals, farmers' advocate offices and legal workshops, the strengthening of communities and their awareness of their own land rights have been fostered in order for communities to defend their rights before state institutions.

3.8 Collective bargaining with legal support: empowering women and resolving land disputes in India²⁵

The high costs and drawn-out litigation process in India hampers the rural poor's ability to successfully engage the legal system to secure their customary land rights. Moreover, a lack of information on their rights and little legal support means that the rural poor start from a disadvantaged position.

The Indira Kranti Patham (IKP) Non-Purchase Programme²⁶ works to empower local women's groups to secure land rights in Andhra Pradesh State. It is implemented by the Society for Elimination of Rural Poverty (SERP)²⁷ through District Rural Development Agencies and trains young people from villages to act as paralegals.

The IKP Non-Purchase Programme limits its activities to land issues and has the following stated objectives: "(1) making poor people aware of their rights; (2) ensuring title and tenure security of lands to the poor by identifying and resolving issues relating to land; and (3) socially empowering the poor to assert their rights. The ultimate goal is to provide the community with the power to handle their own land issues capably. Thus, an overriding objective is to transfer land knowledge and information to the village communities."

The Programme addresses the task from several angles. Paralegals conduct training sessions with members of women's self-help groups (SHGs) to inform them of their legal rights, and help them identify and resolve land issues and disputes. In addition, it trains youth from the villages as community surveyors in partnership with the Department of Survey and Settlement, who work with the paralegals to resolve cases requiring survey work.

Beginning in 2003, one employee from each of the state's district land administration departments, was trained on land issues affecting the poor. The employee was then tasked with identifying land issues concerning the poor and bringing them to the attention of departmental officials. In many cases, the employees tried to persuade the officials to address the issues through their personal relationships with the administrations' decision-makers.

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After some initial success of providing legal assistance in 152 cases and securing 1,648 acres of land in a pilot area in the Cuddapah District, in late 2006, IKP NP expanded to more than 400 mandals²⁸ in 22 of 23 districts of Andhra Pradesh. The results from the first year of the scaled-up version of the IKP NP show activities in 19 districts in which the Programme identified land issues involving a total of 78,873 people, covering over 44,500 hectares of land. More than 27 percent of those issues have been resolved.

Vughen, Vakati and Giovarelli (207) explain some of the qualitative impact of empowerment programs in Andhra Pradesh as follows:

One major lesson learned from the experience in Andhra Pradesh is that poor women, when organized into strong groups, as a collective have much stronger bargaining power

and are better able to articulate their needs and demands. As a result, pro-poor project initiatives become easier to facilitate. Accordingly, institution-building of the poor women was a major area of emphasis in Phase I of IKP. There are now approximately 700,000 Self-Help Groups (SHGs) in Andhra Pradesh.²⁹

Observers at the village level report that after the first land issue has been resolved the SHG members invariably become convinced of the IKP functionary's commitment to resolving their issues. Moreover, the more vocal members (usually the leaders) are often the first to speak up and have their issues addressed. As a result, these influential women tend to speak positively of their experience to the other members. That factor, combined with the effect of regular attendance at SHG network meetings of paralegals and occasionally of the legal coordinator, results in the regular inclusion of land issues as agenda items at the VO [village organizations] and the MS [*mandal samakhya*s] meetings. This, in turn, raises even more awareness of land issues and how they can be resolved. All of the women interviewed during the study said that they previously would not even dream of taking up land issues as an SHG agenda item as they lacked awareness and sufficient information on which to do so. But with the encouragement of the IKP land functionaries they feel capable of discussing the issues and applying formally to the Revenue Department for redress. NP is proving to be a very empowering tool.³⁰

3.9 Women gaining awareness of equal land rights in Burkina Faso

Being capable of asserting one's own rights is particularly relevant for women, whose rights over land in many cases are more vulnerable than men's due to social and economic conditions that make the latter more powerful. In a study on women's access to land in Burkina Faso,³¹ Ki-Zerbo examines women's participation in social communication and civil society initiatives to improve women's access to natural resources, land and legal information.

According to Ki-Zerbo, exercising the right to speak out or taking action to secure equal land rights is an ongoing challenge. In some places, women's combined efforts have nevertheless had a positive impact and women's groups have been successful in winning collective land rights. In order to secure women's rights to land, however, the collective method should not be seen as the only solution, because individual rights to control and own land are also very important. Aware of their lack of legal information, the women of Burkina Faso are collaborating to call for their rights and to call on civil society organizations to help them with their social communication activities.

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Ki-Zerbo argues that legal information must be accompanied by administrative structures in charge of monitoring the application of laws. Simultaneously, Ki-Zerbo suggests the development of functional literacy initiatives, including specific training in land tenure matters, the translation of reference documents into local and national languages, and their distribution using appropriate media, such as cassette tapes, at an affordable price. In addition, Ki-Zerbo recommends summarizing and simplifying legal texts, training local extension workers, paralegals and administrative agents in education and communication techniques, strengthening the skills of community radio staff in the "gender and development" approach, and strengthening women's negotiating skills.³²

3.10 Advocacy and land rights campaigns influencing policy reforms in the Philippines

The experience of Task Force Mapalad, Inc. (TFM), as presented by Armando Jarilla, is an excellent example of the impact of legal empowerment activities in securing the land rights of the poor. TFM was created in September 1999 in the Negros Occidental Province in central Philippines, where land ownership has remained concentrated in a few powerful families. It is

a national federation of farmers, farm workers and individuals working for access to land and rural development in the Philippines. TFM works with government and non-government institutions to achieve policy reforms, but the farmers are at the forefront of local and national mobilizations for land rights and rural development. A successful land rights campaign in the Negros Occidental Province encouraged TFM to expand to ten provinces, and now more than 20,000 people are members of the TFM, reaching up to 512 agricultural estates.

TFM implements a training and legal education program for farmer-paralegals, TFM campaign specialists, peasant community organizers and local volunteers. Moreover, it consults with NGO lawyers and paralegals on land reform-related cases and supports paralegal clinics and community mobilization for policy reforms and dialogues with the Supreme Court and concerned government institutions to reform land laws. In addition, TFM files administrative complaints against government officials that do not fulfill their duties in land reform and social justice. Its activities are planned under a six-month campaign based on the current trends of land reform at the national as well as provincial levels.

TFM's experience-based advocacy led to several landmark policies and declarations such as the Supreme Court rule reiterating that only the agrarian reform department has jurisdiction over agrarian-related matters.³⁴ In this way noncompliant landowners cannot go to lower courts to obstruct the land reform program.

Conclusion

Efforts to secure the land rights of the rural poor are becoming increasingly important as global economic and climatic trends are putting new pressures on increasingly scarce natural resources. This paper has highlighted the relevance of legal empowerment strategies as a means to achieve this.

Strategies to legally empower the rural poor to secure their land rights come in a variety of forms; they can be directed at the poor themselves, bureaucrats, government officials and/or civil society organizations. To be effective, they must respond to the basic challenges underlying the rural poor's difficulty in understanding their legally recognized rights, accessing the necessary information and procedures for them to legally secure their land and ensuring that the legal and administrative systems work for the most marginalized. For example, programs can involve providing paralegal support, awareness-raising activities and legal training. Moreover, legal empowerment strategies can be more effective if they successfully address the underlying issues of power relations, information awareness and social marginalization that often preclude or thwart the poor's ability and willingness to access and use the legal or administrative system in place.

Generally, land tenure security is a function of both legal recognition and social legitimacy. The above cases hint at the intricate web of factors affecting tenure security, including barriers such as technical and administrative lacunae, which can be just as important as the sense of exclusion faced by many of the rural poor in the project areas. Moreover, it is clear that successful engagement of the rural poor in a given community in asserting and defending their land rights with external support can have a multiplier effect, as others in the area and in neighboring areas begin to sense that they too can successfully secure their land rights.

The cases also highlighted some of the common challenges in promoting legal empowerment strategies. The temporal and financial limits of external support are a major challenge to the implementation and success of legal empowerment strategies. Additionally, the lack of awareness on the part of government officials and bureaucrats of the poor's legal right to secure tenure rights and of the procedures to do so poses a significant challenge. Yet, these



cases also show that engaging public administrations and sowing the seeds for locally led legal empowerment activities is possible.

There is still much to understand about the provision of clear legal information and legal support, and its effects on the tenure security of the rural poor in the long term. It is still unclear whether such strategies can be effective at scales large enough to properly address the threats to rural land tenure security throughout the world today. Some of the cases presented above suggest that external support is essential for beginning legal empowerment strategies in rural areas. But they also show that with the right approaches and demand from the rural poor, such strategies can become part of larger and local social mobilization and civic engagement efforts, thus increasing the likelihood of their success.

Endnotes

- 1 Secure land rights, as used in this paper, involves having the confidence that one will not be arbitrarily dispossessed of land and related natural resources to which one is entitled by virtue of a pattern of use, ownership, occupation or other legitimate claims such as customary rights. Having legal proof and protection of one's land rights is an important element of secure land rights.
- 2 FAO uses NRLA as the short-hand term for this unit, which is derived from natural resources and land. Since the full name of the Unit would indicate otherwise, FAO uses the acronym to indicate its work concerning natural resources and land.
- 3 The case studies have been published by FAO's NRLA on a CD: *Legal Empowerment in Practice. Making Land Rights Legally Secure for All*, FAO Resource CD, Land Tenure Collection No. 3 (2009). See <www.fao.org/nr/tenure/lt-home/en/> for more information.
- 4 In Africa, these countries include Côte d'Ivoire, Ethiopia, Ghana, Madagascar, Mozambique, Namibia, Niger, the United Republic of Tanzania and Uganda, among others. In South America, Bolivia, Brazil, Ecuador, Peru and the Bolivarian Republic of Venezuela, among others, have introduced and begun implementing legislation to legally recognize customary land rights to varying degrees of effectiveness. In Asia, India, Nepal and the Philippines have also allowed for the legal recognition of use and management rights concerning forest resources.
- 5 Franz von Benda-Beckmann has introduced the concept of "social working of law". See, among others: F von Benda-Beckmann, "Uncertainty and land management" in H Savenje and A Huijsman (eds), *Making Haste Slowly: Strengthening Local Environmental Management in Agricultural Development* (1991) 75-88.
- 6 J W Bruce et al, *Legal empowerment of the poor from concepts to assessment*, report produced for USAID (2007). They have proposed the following typology of legal empowerment elements: (i) rights enhancement: reforming the law to the advantage of the poor and including them in the policy-making process; (ii) rights awareness: ensuring that the poor understand their rights and the processes to exercise and enforce them; (iii) rights enablement: assisting the poor to overcome bureaucratic and cost barriers; and (iv) rights enforcement: affordable, fair mechanisms for enforcement of rights and contracts.
- 7 L Cotula and P Mathieu (eds), *Legal Empowerment in Practice: Using Legal Tools to Secure Land Rights in Africa* (2008).
- 8 N Avella and A Younfa, *L'accès à l'information foncière et aux institutions décentralisées pour sécuriser les droits fonciers des ruraux pauvres. L'expérience des Commissions Foncières au Niger*, FAO Livelihood Support Programme Working Paper No.43 (2007) 47 (reproduced in FAO Resource CD, Land Tenure Collection No. 3, 2009).
- 9 Ibid 66.
- 10 This section draws substantially from C Goislard, "L'accès à l'information foncière pour sécuriser les droits fonciers des ruraux pauvres à Madagascar. Le cas des Guichets Fonciers" (2008) in *Legal Empowerment in Practice. Making Land Rights Legally Secure for All*, FAO Resource CD, Land Tenure Collection No. 3 (2009).
- 11 This section draws on C Serra Jr and C Tanner, "Legal Empowerment to Secure Land Rights in Mozambique. A Case Study" (2008) in *Legal Empowerment in Practice. Making Land Rights Legally Secure for All*, FAO Resource CD, Land Tenure Collection No. 3 (2009).
- 12 A Welz, *Ethanol's African Landgrab* (2009) Mother Jones, <<http://www.motherjones.com/environment/2009/03/ethanols-african-landgrab>> at 25 September 2009.
- 13 The 1997 Environment Law and the 1999 Forest and Wildlife Law.
- 14 Serra and Tanner, above n 11, 22.
- 15 This section draws substantially from A Vasseur, "Reforme foncière et sécurisation des droits sur la terre au Rwanda. Le projet de RCN Justice et Démocratie pour une justice de proximité" (2008) in *Legal Empowerment in Practice. Making Land Rights Legally Secure for All*, FAO Resource CD, Land Tenure Collection No. 3 (2009).
- 16 Ibid 11.
- 17 Ibid 14.
- 18 Participants were selected according to predefined criteria, including literacy, age, health and gender.
- 19 S Mugangu, "Vulgarisation de l'information légale et sécurisation des droits fonciers en République Démocratique du Congo. Le projet de RCN Justice & Démocratie en Ituri" (2008) in *Legal Empowerment in Practice. Making Land Rights Legally Secure for All*, FAO Resource CD, Land Tenure Collection No. 3 (2009).
- 20 The section on Namibia draws from B Fuller, "Conservancies in Western Namibia. A case study in legal empowerment" (2008) in *Legal Empowerment in Practice. Making Land Rights Legally Secure for All*, FAO Resource CD, Land Tenure Collection No. 3 (2009); W Odendaal, "Legal empowerment to secure land rights in North Eastern Namibia. The case of N'a Jaqna Conservancy" (2008) in *Legal Empowerment in Practice. Making Land Rights Legally Secure for All*, FAO Resource CD, Land Tenure Collection No. 3 (2009).
- 21 This was the first conservancy in Namibia to be gazetted under the Nature Conservation Amendment Act (Act 5 of 1996).
- 22 C Goislard and M Djiré, *Accès à l'information juridique, aux institutions et procédures légales: Quelle sécurisation foncière pour les ruraux pauvres au Mali? Etude de cas dans le sud malien*, FAO Livelihood Support Programme Working Paper 44 (2007).
- 23 M Djiré and K Traoré, "Assurer la sécurisation légale des transactions foncières au Mali. Quel rôle pour les intermédiaires et facilitateurs?" (2008) in *Legal Empowerment in Practice. Making Land Rights Legally Secure for All*, FAO Resource CD, Land Tenure Collection No. 3 (2009).
- 24 This section draws substantially from G Colque et al (coordination by L Del Castillo), "Legal empowerment to secure the land rights of peasant communities in Latin America. Study of three experiences in Bolivia, Guatemala and Peru and abstracts of original country case studies" (2008) in *Legal Empowerment in Practice. Making Land Rights Legally Secure for All*, FAO Resource CD, Land Tenure Collection No. 3 (2009). The original full text case studies in Spanish are available on the website of the International Land Coalition (ILC), which, together with FAO, provided financial and technical support to the conduct of these case studies, available at <http://www.landcoalition.org/doc_vid/eo_photo/coalition.htm> at 26 November 2009.
- 25 This section draws substantially from D Vughen, K Vakati and R Giovarelli, "Ensuring secure land rights for the rural poor in Andhra Pradesh" (2007) in *Legal Empowerment in Practice. Making Land Rights Legally Secure for All*, FAO Resource CD, Land Tenure Collection No. 3 (2009).
- 26 The program is called "non-purchase" because it works to secure land rights through means other than the purchase of land parcels.

- 27 SERP is an independent autonomous Society established under Indian Law.
- 28 A third-level administrative unit.
- 29 D Vughen, K Vakati and R Giovarelli, above n 25, 3.
- 30 Ibid 15.
- 31 F Ki-Zerbo, "Les femmes rurales et l'accès a l'information et aux institutions foncières pour la sécurisation des droits fonciers. Étude de cas au Burkina Faso" (2004) in *Legal Empowerment in Practice. Making Land Rights Legally Secure for All*, FAO Resource CD, Land Tenure Collection No. 3 (2009).
- 32 Ibid.
- 33 This section draws substantially from A Jarilla, "Securing the land rights of the rural poor through legal empowerment in the Philippines. The Task Force Mapalad Experience" (2008) in *Legal Empowerment in Practice. Making Land Rights Legally Secure for All*, FAO Resource CD, Land Tenure Collection No. 3 (2009).
- 34 *Department of Agrarian Reform v Roberto J Cuenca* (2004) GR No. 154112, Supreme Court of the Philippines.

Increasing local voice and benefit in natural resource investment: a legal empowerment approach

Lorenzo Cotula*

Executive summary

There have been sizeable increases in investment flows to several African countries in recent years, particularly in mining, petroleum and agriculture for food or fuel. While this may create livelihood opportunities, it also creates risks. Rural people may lose access to the resources they depend on, especially where their resource rights are weak, their capacity to enforce such rights is limited, and where major power asymmetries undermine their position in relation to governments and investors.

Legal Tools for Citizen Empowerment, an initiative involving the International Institute for Environment and Development in partnership with organizations in Ghana, Mali, Mozambique and Senegal, seeks to empower local people by increasing their influence on and benefits from natural resource investment projects. The program involves research, capacity-building, sharing of information and advocacy on policy. This paper draws on material and preliminary lessons from the Legal Tools for Citizen Empowerment program with a view to providing insights for international consideration of legal empowerment.

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Introduction

This paper discusses highlights and preliminary lessons from the Legal Tools for Citizen Empowerment program – Legal Tools for short – which aims to increase local influence over and benefits from natural resource investment in Africa. Legal Tools was launched in late 2006 and is currently in its pilot phase. It is coordinated by the International Institute for Environment and Development (IIED) and implemented in collaboration with the IIED-affiliated Foundation for International Environmental Law and Development (FIELD) and partners in Ghana, Mali, Mozambique and Senegal: the Centre for Public Interest Law (CEPIL), a public-interest law firm based in Ghana; the *Groupe d'Etude et de Recherche en Sociologie et Droit Appliqué* (GERSDA), which is attached to the Faculty of Law of the University of Bamako, Mali; *Centro Terra Viva* (CTV), a policy research and advocacy organization in Mozambique; and *Innovations Environnement et Développement Afrique* (IED), a Senegal-based non-governmental organization (NGO) engaged in action research, capacity-building and policy advocacy. Additional collaborations have been developed, for example with the Tanzania Natural Resources Forum (TNRF) and with organizations such as the Food and Agriculture Organization of the United Nations (FAO).

Legal Tools is principally funded by the United Kingdom Department for International Development (DFID) through its partnership agreement with IIED, that runs until 2011. Complementary funding has been provided by FAO and the Swedish International Development Agency (SIDA) through the Making Decentralization Work program.

Two and a half years into its pilot phase, Legal Tools is still too new to provide conclusive evidence regarding its impact on legal empowerment. But some of the ideas, approaches and lessons learned may provide useful insights for international consideration. Sections 2, 3 and 4 sketch the challenges to which Legal Tools responds, the role of legal empowerment as a strategy for change, and initial indicators that this strategy can be successful in dealing with natural resource issues. Sections 5 to 8 discuss highlights and lessons learned; section 9 outlines possible next steps.

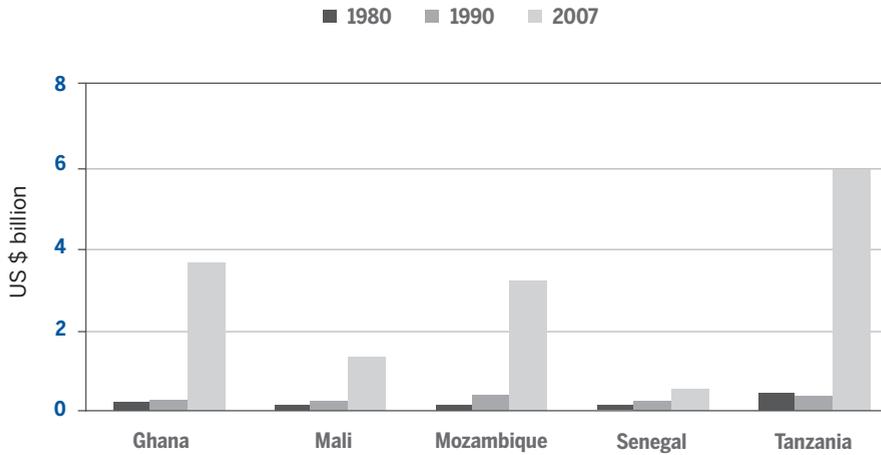
1. Context: increasing investment flows to Africa

In many parts of Africa private investment in natural resource projects is being fostered by economic liberalization, the globalization of transport and communications, and worldwide demand for food, energy and commodities. These projects include extractive industries such as mining and petroleum, and agriculture for food and fuel.

252 Over the past decade, foreign direct investment (FDI) in Africa has significantly increased. In 2007, FDI to sub-Saharan Africa amounted to over US\$30 billion, a new record, compared with US\$22 billion in 2006 and US\$17 billion in 2005.¹ The distribution of FDI flows and stocks is uneven, but countries such as Ghana, Mali, Mozambique, Senegal and Tanzania, which received limited foreign investment until the early 1990s, now hold more sizeable stocks of foreign investment (see Figure 1).

Natural resources are at the heart of these processes. Interest in Africa's petroleum and minerals, one of the main drivers of FDI to the continent,² has grown as a result of fluctuations in global commodity prices and efforts by developed countries to diversify supplies. This is exemplified by recent large-scale enterprises such as the US\$3.7 billion project to extract oil in Southern Chad and export it through a 1,070 km pipeline to the coast of Cameroon. Developed countries increasingly see fertile land in Africa as a means of securing their supplies of food or biofuels.

Figure 1. Foreign investment stock in selected countries. Data from United Nations Conference on Trade and Development (UNCTAD) website.



Increased investment can bring large-scale benefits such as economic growth, increased government revenues and improved living standards. However it also raises challenges. In much of rural Africa, people depend on natural resources for their livelihoods. As outside interest in previously marginal areas increases and as governments or markets make land and resources available to prospecting investors, disadvantaged groups are negatively affected:

- In the Massingir district of Mozambique a large-scale biofuel project has exacerbated land scarcity by taking land that the government had promised to communities that were being resettled to make room for a tourist nature reserve. These developments have had knock-on effects on neighboring communities.³
- On the coast of Senegal, booming tourism and related government projects such as a new international airport and a 150,000 ha “special economic zone” have swallowed up land previously allocated to the rural communities of Dias, Yenne and Sindia.⁴
- In Mali, villagers in the communes of Sanso and Gouaniaka have lost land to mining ventures and have documented their dissatisfaction with the land acquisition process and compensation standards.⁵

Local people are often offered vague promises of community projects and jobs as a trade-off. However, community projects do not always materialize, and loss of land is permanent, whereas job opportunities decrease as projects progress towards less labor-intensive phases. Environmental degradation and, in the worst cases, human rights violations have also been associated with large-scale investment projects.

2. Using the law: the need for legal empowerment

Effective use of legal levers can help people affected by development and investment projects to gain influence and increased benefits. Such legal levers include more secure land rights, tighter consultation and benefit-sharing requirements, decentralization, freedom of information legislation, and more structured investor/state contracts to maximize contributions to local livelihoods.

The ability of different people to make the most of these legal levers is determined by power asymmetries, which are in turn determined by differentiated access to assets, skills, expert advice and social relations. Legal levers that are appropriately designed and effectively used can, however, increase negotiating power as legal claims create bargaining endowments for use in negotiations “in the shadow of the law”.⁶ For example, negotiating power between a government and investors may be affected if a party knows it would lose its case should the matter be referred to arbitration.⁷ Similarly, negotiations between local landholders and investors might unfold in a very different manner if landholders could veto investors’ access to their land.

These considerations lie at the heart of the concept of legal empowerment. While the concept has been used by some with regard to specific policies (namely, the formalization of property rights, particularly through land titling and registration), the term “legal empowerment” is intended here as a means of helping disadvantaged groups to gain greater control over their lives.⁸ For the Legal Tools initiative, legal empowerment is primarily concerned with increasing the influence and livelihood opportunities of local people through the use of legal levers. It involves tackling power asymmetries, particularly between local people, governments and investors. Legal Tools is hence a context-specific and political process rather than a model technical solution, and it is likely to be resisted by vested interests.

The recent wave of law reform in several African countries has, in theory, increased opportunities for local participation in investment decisions and local benefits from investment programs. In many cases, however, such legislation is undermined by inadequate political will, and limited capacity in governments and courts restricts its implementation. Civil society can help to hold governments to account, but it often lacks resources and legal expertise. Communities tend to have little negotiating power: individuals are often not aware of their rights, do not know how to navigate legal procedures and lack the confidence, resources, information and social relations needed to exercise their legal rights. Co-option of local elites by outside interests can further undermine the position of local stakeholders. In addition, age, gender, wealth, status and other factors shape differences in local interests, negotiating power and impacts.

As a result, opportunities are being missed. In Mozambique, for example, there is a vague legal requirement that investors “consult” local people before obtaining natural resource rights. Such consultation often consists of a brief meeting between investors and local elites at which community lands are exchanged for one-off compensation and vague and therefore unenforceable promises of jobs or facilities.⁹

254 **3. Initial indications of the impact of legal empowerment on issues relating to African natural resources**

It is too soon to assess the impact of Legal Tools on natural resource issues. Nevertheless, papers produced for a March 2008 workshop organized by IIED, FAO and the University of Ghana law faculty are a basis for optimism about the approach the program is taking.¹⁰ Although the progress described was not made by Legal Tools, nor did it specifically involve natural resources investment, the approaches of other organizations concerned with natural resources are examples of the kinds of activity and impact sought by Legal Tools.

One paper documented benefits for transhumant pastoralists through a paralegal initiative in a district of Mali launched by the Malian NGOs Sahel Eco and Eveil.¹¹ This increased the standing of pastoralists with local authorities, helped to defuse conflicts with farmers and improved the status and leadership roles of women paralegals.

Another paper discussed the use of law by indigenous communities in southern Cameroon to secure land rights.¹² The customary land use rights of the communities were being ignored and access to natural resources was increasingly restricted, with negative effects on livelihoods as a result of the creation of national parks. In response, the Cameroonian NGO *Centre pour l'Environnement et le Développement* (CED) launched a program that included:

- distributing materials on the law and legal rights;
- training community-based paralegals;
- providing global positioning systems (GPS) and training community members in their use to enable them to demarcate boundaries; and
- engaging new law graduates to work with the communities.

The program has produced favorable outcomes on at least two levels. First, the communities used legal assistance (i) to persuade neighboring groups to recognize their land rights and (ii) to obtain written ratification from local authorities – the first official recognition of the land rights of indigenous peoples in the Congo Basin. Such agreements could be a model for replication elsewhere.

Second, the program used its GPS mapping and advocacy by CED lawyers to persuade the World Bank to use its influence when national park managers resisted community claims for access to natural resources in protected areas. The World Bank used approval of a loan for the Chad-Cameroon pipeline as leverage, with the result that communities were allowed to pursue their livelihoods up to 5 km inside protected areas.

4. The Legal Tools program – overview and approach

In the context outlined above, Legal Tools seeks to maximize local influence and benefits in natural resource investment.

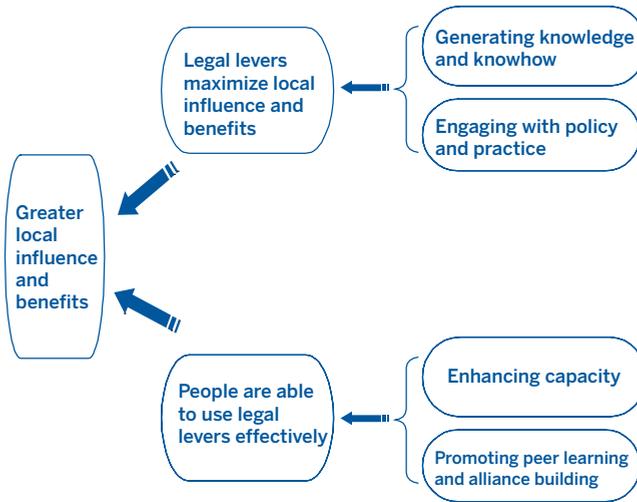
Its approach involves:

- “pushing the boundaries” of existing law and promoting reform of strategic levers;
- working at all levels to increase local influence and benefits;
- integrating law, politics, power relationships and capacity-building;
- finding ways to influence policy-making;
- using legal levers as the entry point and promoting cross-fertilization across sectors; and
- emphasizing innovation and learning rather than large-scale implementation.

The pilot phase of Legal Tools involves four activities:

- generating knowledge about trends and drivers in natural resource investment in Africa, and using legal levers to maximize local influence and benefits;
- enhancing capacity in the use of legal levers;
- sharing lessons from innovation; and
- engaging with policy and practice (see Figure 2).

Figure 2. Legal tools for citizen empowerment – change model



5. Generating knowledge and know-how

The research component of Legal Tools aims to provide a platform for more action-oriented work.

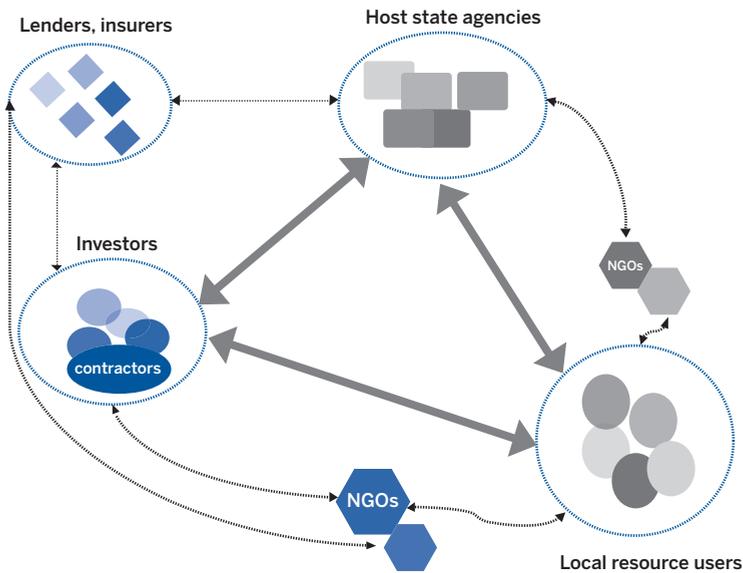
In terms of knowledge generation, research has focused on large-scale land acquisitions for agricultural investment for food or fuel in collaboration with FAO and the International Fund for Agricultural Development (IFAD). In 2008, FAO and IIED published a report documenting trends and drivers in land acquisitions for biofuels¹³ that was widely covered in the media and prompted follow-up research in Mozambique¹⁴ and Tanzania¹⁵. FAO, IFAD and IIED (through Legal Tools) have conducted research on large-scale land acquisitions in Africa and analyzed trends, drivers, contractual and land-tenure arrangements, and impacts on local people in terms of access to land.

Legal Tools has also identified legal levers that can be used to increase local influence and benefits. It has, in particular, documented ways to “push the boundaries” of these levers through innovative implementation and by developing options for law reform that are published in reports, briefing notes and peer-reviewed publications. Examples include studies of innovative local arrangements in the core Legal Tools countries and thematic cross-country studies on optimum ways to use international human rights law to secure local resource rights.

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Although the initial focus was on land rights, research revealed the importance of considering multiple levers and of engaging at the “upstream” levels where major decisions are taken. This work has generated insights into three key relationships between investors, governments and communities (see Figure 3).

Figure 3. Using legal levers to shape relationships



5.1 Relationships between governments and communities

Safeguards to protect local land rights from compulsory take-over can provide a legal defense or “lever” against arbitrary dispossession. In Mali, Mozambique and Senegal most if not all land is held by the state. Inaccessible registration procedures make it difficult for rural people to acquire land ownership, even where such ownership is at least, in theory, allowed.¹⁶ Further, most people possess only use rights, not ownership rights. The entitlements and negotiating positions of local rights-holders are undermined by: i) inadequate legal protection of land rights; ii) vaguely defined use requirements; iii) legislative gaps; iv) legal provisions based on the assumption that private investment is for public purposes; and v) compensation limited to loss of improvements such as crops and trees, but excluding loss of land.¹⁷

But there are legal approaches or “hooks” that are not used to their full potential. The internationally recognized human right to food requires that land expropriations be offset by alternative assets to ensure that levels of food security are maintained.¹⁸ Freedom of information legislation can increase local influence in decision-making.¹⁹ Legislation in Mali, Mozambique and Tanzania protects customary land rights and requires compensation and due process in cases of expropriation. In Senegal, where land management is devolved to local governments, the central Government can still allocate land to investors; clearly, more effective use could be made of local government powers. In these contexts the devil is in the detail, in that statements of principle must be backed by norms and processes, and in the implementation, without which the law exists only on paper.

5.2 Relationships between investors and communities

Effective partnerships between communities and investors may increase local influence and benefits, including financial transfers such as land lease schemes, community projects, and joint ventures involving collaboration in economic activities. Ghana’s Social Responsibility Agreements (SRAs) in forestry, for example, regulate the transfer of up to 5 percent of royalties to community development projects. Ghanaian law makes SRAs a condition for granting timber rights, which provides useful leverage in negotiations between communities and investors. But SRAs involve a relatively small share of project revenues and do not offer local

participation or capacity-building in forest-based business. Benefit capture by local elites, vague provisions and lack of monitoring capacity constrain implementation of SRAs.²⁰ In Mozambique, a legal requirement that investors consult local people before obtaining resource rights usually makes little difference; but support from legal service organizations is leading to joint ventures in tourism whereby communities provide land and investors provide capital, skills and marketing.²¹

The attitude of governments and investors is fundamental to developing effective partnerships; clear legal requirements are also needed. In Mali, some mining companies support community development projects near their sites, but the lack of legal requirements has undermined local negotiating power and created a breeding ground for mismanagement and benefit capture by community elites.²²

On the other hand, overly detailed regulation can reduce community benefits from FDI. In Ghana detailed rules cap benefits at 5 percent of royalties, whereas in Mozambique vague requirements for community consultation allow greater benefits for local people, for example by creating space for joint ventures with investors.

Power imbalances have a profound impact on negotiations. Legal service organizations can help communities to address such imbalances, for example by supporting collective action, facilitating access to information, and enhancing negotiating skills. Support is also needed to ensure that local leaders represent and are accountable to their communities; development agencies providing this support need business acumen and an understanding of private-sector concerns. Secure local land rights can also provide leverage in negotiations when there is a threat of uncompensated expropriation.

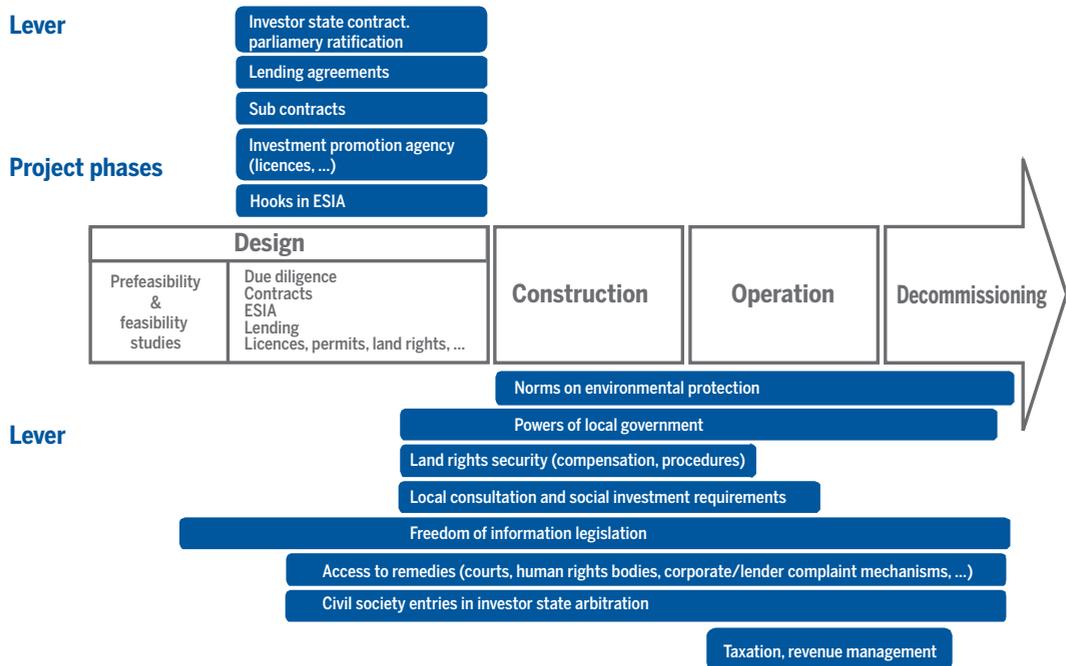
5.3 Contracts between governments and investors

These are usually negotiated behind closed doors. As a result, local input is limited and agreements may be made that are not in the public interest. Freedom of information legislation, as in Mali, and parliamentary approval of contracts, as in Ghana, are means of facilitating greater transparency, but impact to date has been limited. A fundamental rethinking of negotiation processes is needed.²³

A basic requirement is to ensure that the content of contracts between governments and investors is appropriate, because such contracts define social and environmental standards, determine the benefits for livelihoods and provide mechanisms for settling disputes; they may also regulate land acquisitions. Under so-called “stabilization clauses”, governments can contractually commit themselves to compensating investors for losses caused by regulatory change; these commitments are motivated by concerns that arbitrary government action could undermine the investment. But if they are not properly designed, they may also constrain action to raise social and environmental standards. This is a major concern in view of the long duration of most investment projects and the poor social and environmental standards at their inception. It is better practice to limit the scope of stabilization clauses to arbitrary state action and exclude public-interest regulation.²⁴ And civil society involvement in arbitration between states and investors can increase public scrutiny and consideration of non-commercial interests.²⁵

Figure 4 shows the legal levers that can be used to increase local influence and benefits in relation to a hypothetical oil pipeline.

Figure 4. Legal levers to increase local influence and benefits (hypothetical oil pipeline)



The knowledge and skills component is where Legal Tools has made most progress: it has generated a body of knowledge, and some publications have attracted interest in the media and among practitioners and researchers. The work of Legal Tools on legal levers has shown the inadequacy of approaches to empowerment that rely on a single type of intervention. The conclusion is that legal empowerment in transnational contexts, like those characterizing investment projects, requires concerted action at different levels, from improving the security of local land rights to influencing the negotiation of international investment contracts.

6. Strengthening capacity

The other activities of the Legal Tools program are less advanced than the knowledge and knowhow component, partly because they were initiated at a later stage with a view to benefiting from the results of Legal Tools research.

Lack of capacity at the local and national levels means that legal levers are not used to their full potential. To address this challenge, Legal Tools is developing replicable capacity-building tools to help communities, civil society and governments to make better use of legal levers to increase local influence and benefits in large-scale investment projects.

Capacity-building has centered on legal literacy training for communities affected by investment projects in Ghana (one session to date), Mali (four) and Senegal (two). Training ranges from legal literacy camps in Mali to short sessions on specific subjects for forest communities in Ghana. Topics include land rights, decentralization, benefit-sharing opportunities and other country-specific levers, and practical skills such as negotiating tactics. Although the program is in its infancy, anecdotal evidence suggests that trained community members have acquired the skills and confidence to make their voices heard. A training

participant from Mali said: “We now know that we are also sons of this country, and that we have rights to claim.” Legal literacy training materials have been produced in Senegal, almost entirely in the form of comic-style books,²⁶ and are being finalized in Ghana²⁷ and tested in Mali.

Developing capacity-building tools and methodology is time-consuming. A particular challenge has been to repackage complex legal information in a format that can be understood in communities with high illiteracy rates. The use of visuals, comic-style books, photographs and participatory tools has proved effective, as has promoting debate among participants about fundamental questions such as “what is law?”

Effective monitoring and evaluation (M&E) is needed to document effects on: i) local capacity and legal awareness; ii) actual use of rights; and iii) impacts on local livelihoods, for example through better deals with investors. M&E makes it possible to reorient program activities when necessary and generates lessons for wider dissemination. A rigorous M&E system developed in collaboration with the London School of Economics will be implemented as Legal Tools is scaled up.

Investment in legal literacy training can be linked to short-term outcomes such as greater legal awareness, but a longer-term approach is required for the complex process of measuring impacts on people's lives. Change will require a critical mass of trained people and follow-up support, for example in negotiations with governments or investors. In Mozambique, for instance, Legal Tools has supported the emergence of representative community-based organizations in Zavala district and is producing a guide on ways in which external supporters can assist local people in the implementation of community consultation processes.²⁸

Because social differentiation shapes relationships in communities and between communities and outside players, handling differences regarding issues such as who participates and how is a major challenge in terms of training, broader support and M&E.

Beyond building capacity, other conditions are needed to increase local influence and benefits in large-scale investment projects: governments must be able to negotiate contracts with investors that maximize local benefit, and parliaments, civil society and the media must be able to scrutinize them.

To enhance capacity at these levels, Legal Tools has developed a training program on investment contracts, treaties and arbitration.²⁹ In Ghana, CEPIL and IIED organized training on oil and gas contracts for the Government, parliamentarians, the media and civil society. Participants valued the knowledge acquired and appreciated the opportunity to come together, often for the first time, in a multi-stakeholder forum.

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Generating impact requires work with the commercial lawyers advising governments and investors. Legal Tools is feeding insights from its work on investment contracts into specialist publications³⁰ and into academic law courses such as that at the Dundee University Centre for Energy, Petroleum and Mining Law and Policy.

The capacity-building component has broken new ground, for example by working at multiple levels from local legal literacy to national and international specialist training. Teaching law through participatory approaches is also promising. But much remains to be done, and major challenges need to be tackled. For example, all Legal Tools partners are based in capital cities which makes it difficult to follow up training with regular support, especially where long distances and poor roads are constraints. Alliances with community-based organizations, local government bodies or agencies with local offices can help to address this issue, but they cannot provide continued engagement at the field level.

As a result, the enthusiasm generated in training has not yet translated into an organized critical mass of people who are able to use their rights in practice. Placing greater emphasis on community-level paralegals is emerging as a response to this challenge: there is significant convergence on this in the Legal Tools core countries despite the diversity of contexts and partners. But it must be borne in mind that even well trained paralegals need regular support and supervision.³¹

This highlights the long timeframes and sustained levels of investment that are needed to develop sound training, tools and materials, build a critical mass of rights-bearers and hence improve livelihoods and governance. The capacity-building by Legal Tools must therefore be regarded as a first step in terms of timeframes and available resources.

7. Promoting learning and alliances; engaging with policy and practice

Legal Tools is not alone in developing ways to help disadvantaged groups to make better use of their legal rights. In many parts of Africa, legal service organizations – predominantly NGOs – are working innovatively with community-based paralegal programs, providing legal assistance in negotiations with governments or the private sector, and promoting strategic use of public-interest litigation.

Legal Tools facilitates exchanges of experience among these innovators. In March 2008, IIED, FAO and the University of Ghana law faculty conducted a workshop in Accra on securing local land rights that brought together 25 practitioners from 13 African countries. IIED, the Ford Foundation and CTV held a sub-regional meeting on environmental justice in Maputo with practitioners from southern and eastern Africa that covered issues such as securing land rights and establishing community/investor partnerships.

These events facilitated information sharing and bonding among the participants, many of whom felt energized by the exchanges and learned new ideas and methods. A participant in the Accra workshop observed: "...the experiences we shared gave me a new vision of working." Follow-up to these events has had mixed results, however.

The Accra workshop resulted in the publication of capacity-building tools and methods,³² but maintaining momentum after the meetings has proved more difficult. A community of practice among workshop participants based on e-mail has not yet become operational: people are busy and it has been difficult to start exchanges. A step currently being explored involves extending the list of participants to junior staff: at the meetings, organizations were usually represented by their directors, who have little time to devote to project work and electronic fora. Workshop participants suggested more targeted exchange visits between legal services and community-based organizations from different countries as follow-up. Legal Tools will in future pay greater attention to communication channels such as these.

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The fourth area of activity concerns promoting change in legal levers at the national and international levels. In 2008, IIED presented findings from work on investment contracts at international events such as the Organization of Economic Co-operation and Development (OECD) Investment Forum and a multi-stakeholder consultation on stabilization clauses and human rights convened by the International Finance Corporation (IFC) and the Special Representative of the United Nations Secretary-General on Business and Human Rights. Policy advocacy is also under way in the core countries: examples include a national workshop on community/investor partnerships and follow-up engagement in Ghana and a multi-stakeholder event on mining in Mali. Some of this capacity-building work also aims to change policy and practice, for example with regard to international training and specialist publications on investment contracts.

Of the four components of Legal Tools work, policy engagement is at the earliest stage, partly because effective advocacy requires the development of knowledge, capacity and partnerships to draw on. Early experience indicates that it is crucial to work at different levels from the local to the international; that alliances and concerted action create opportunities and increase leverage; and that commercial operators are prepared to listen if approached with balanced, evidence-based and commercially sound proposals for change.

8. Next steps

The issues addressed by Legal Tools are complex, and its goals are ambitious. In moving beyond the pilot stage, Legal Tools will continue to focus on legal levers such as land rights, community/investor partnerships and investor/state contracts, but it expects to shift emphasis progressively to enhancement of capacity, partnership building and engagement with policy. It must always be borne in mind that these issues cannot be tackled by isolated initiatives, and that alliances and dialogue are paramount. Work to develop such partnerships must be intensified if Legal Tools is to achieve its goals.

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No rights without accountability: promoting access to justice for children

Anne Grandjean*

Executive Summary

The year 2009 marks the 20th anniversary of the adoption of the Convention on the Rights of the Child (CRC) by the General Assembly of the United Nations. The adoption and near universal acceptance of the CRC implies a profound change in the way the world sees and treats children. Recognizing that children have human rights, the CRC creates obligations for governments and duties for communities. The child is no longer the object of the charity of adults, but rather, a full-fledged subject of rights. As a result, every child – or a party on his or her behalf – must be able to make claims and demand accountability when rights are not respected. Children's rights imply the establishment of legal frameworks and enforcement mechanisms.

In reality, all over the world, children face extraordinary obstacles in accessing justice due to various factors, including: their dependent status; a lack of information on their rights and on how to demand redress; and the complexity and remoteness of justice systems. The particular issue of child participation in administrative and legal processes, or lack thereof, also reflects the many challenges children face. Certainly, they do face difficulty in participating as full-fledged members in their communities despite that CRC provides for the right to express their views and be heard in all matters affecting them, in accordance with their age and maturity. Children often lack a voice in issues that concern them. Ultimately, in overloaded justice systems, children's cases are unlikely to be treated as a priority.

The 20th anniversary of the CRC is a good opportunity to reflect on what can be done to improve children's access to justice. Overcoming these extraordinary obstacles and ensuring adequate access to justice for children requires effort on at least two levels: building a child-sensitive justice system on the one hand (the *supply side*), and providing information and support to children in claiming for their rights and obtaining redress on the other (the *demand side*). At both levels, the focus must be on the most excluded and the most difficult to reach.

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This chapter mainly focuses on the latter – the demand side – and describes a few promising initiatives supported by the United Nations Children’s Fund (UNICEF): the Paralegal Committees in Nepal, the Village Courts Child Protection Program in Papua New Guinea and Socio-legal Defense Centers in the occupied Palestinian territory. These initiatives have several features in common that are particularly instrumental in contributing to an improved access to justice for children; if confirmed through formal evaluations, they could constitute a basis for the identification of successful interventions promoting children’s access to justice:

- They are decentralized and located in areas where the poorest, most excluded live;
- They are owned and run by communities;
- They are multi-disciplinary and involve a large number of partners, including civil society organizations;
- They respond to a particular need and fill a gap in a weak or failing formal justice system;
- They inform upstream policies and advocacy; and
- They are part of a systematic approach.

Introduction

The year 2009 marks the 20th anniversary of the United Nations Convention on the Rights of the Child (CRC), adopted by the General Assembly of the United Nations in November 1989. As a binding treaty of international law, the CRC codifies principles that Member States of the United Nations agreed to be universal for all children,¹ in all countries, at all times and without exception. The Convention is the first legally binding international instrument to incorporate the full range of human rights – civil, political, cultural, economic and social. The Convention has achieved near-universal acceptance, having been ratified by 193 States Parties.²

The CRC has transformed the way we see children. Its adoption and near universal acceptance imply a profound change in the way the world treats children. First, by recognizing that they have human rights, the CRC creates obligations on its States Parties. With the CRC, the child is no longer the object of the charity of adults, but rather, is a full-fledged subject of rights. As a result, every child – or party on his or her behalf – must be able to make claims and demand accountability when these rights are not respected.

Second, the responsibility of States Parties to realize the rights of all children under their jurisdiction requires structural and proactive interventions. As every child is entitled to the same rights, reactive and individual responses are no longer sufficient; these must be replaced to systemic approaches requiring attention to, *inter alia*, policy and law reform, institutional capacity development, planning, budgeting and monitoring processes.

Third, a child rights-based approach requires the full participation of children in issues that concern them. Article 12 of the CRC,³ together with the child's right to freedom of expression (Article 13, CRC), and other civil rights to freedom of thought, conscience and religion (Article 14, CRC) and freedom of association (Article 15, CRC) underline children's status as individuals with fundamental human rights, and views and feelings of their own.

This chapter looks at some examples of how UNICEF supports children in demanding their rights. In doing so, it focuses on children's access to justice systems specifically and does not cover more general, independent complaint procedures, such as ombudsman offices, nor alternative dispute resolution mechanisms.

The chapter starts by contrasting the wide array of child rights with the obstacles that most children face in claiming them. It then looks at what can be done to improve children's access to justice, with a specific focus on the demand for justice, using examples of UNICEF's interventions in different regions. It concludes with highlights of common features that these examples demonstrate, suggesting that, if confirmed through formal evaluations of the interventions in question, they could constitute a basis for the identification of successful interventions promoting children's access to justice.

1. Child rights: a comprehensive legal framework

As mentioned, the CRC provides a comprehensive list of rights to which all children are entitled and creates a solid international legal framework for the protection and promotion of the human rights and fundamental freedoms of all persons under the age of 18. These rights relate to all aspects of children's lives, from health, education and leisure to preservation of identity, freedom of thought, conscience and religion, protection of privacy or freedom of association, and protection against abuse, violence and exploitation. All rights are deeply interconnected and interdependent. The violation of one right usually leads to the violation of others.

Implementation of the CRC must be guided by four general principles, in the light of which all articles are to be read:

- Non-discrimination: child rights apply to all children irrespective of the child's or his or her parent's or legal guardian's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
- The best interests of the child shall be a primary consideration in all actions concerning children.
- The right to life, survival and development: every child has the inherent right to life, and to survival and development to the maximum extent possible.
- The right to be heard: every child has the right to express his or her views freely in all matters affecting him or her and these views have to be given due weight in accordance with the age and maturity of the child.

The implementation of the CRC by its States Parties is monitored by the Committee on the Rights of the Child (the Committee), a United Nations body of 18 independent experts appointed by States Parties to the CRC.⁴ All States Parties are obliged to submit regular reports to the Committee on how the rights are being realized. The Committee examines each report and addresses its concerns and recommendations to the State Party in the form of "concluding observations" that governments are expected to implement. Concluding observations are meant to be widely publicized in the State Party and to serve as the basis for a national debate on how to improve the enforcement of the provisions of the CRC. The reporting procedure is constructive and oriented towards international cooperation, with the aim to define problems and discuss what corrective measures should be taken.

The CRC is complemented by two Optional Protocols – on the involvement of children in armed conflict (2000) and on the sale of children, child prostitution and child pornography (2000).

Although it is the most comprehensive international instrument providing legal protection to children, the CRC is not the only one. It has provided the impetus for further standards to advance their rights, and a wealth of additional international and regional standards and norms applicable to children are now binding on States ratifying them. These include, for example, the International Labour Organization (ILO) Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, also known as Convention 182 (1999); the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2000); the Rome Statute of the International Criminal Court (1998) that defines the crime of genocide, crimes against humanity and war crimes; the Convention on the Rights of Persons with Disabilities (2007); and the African Charter on the Rights and Welfare of the Child (1990).

2. No rights without accountability

As seen from this wealth of international standards, the field of child rights is relatively well regulated and provides comprehensive legal protection to children. However, if not enforced, these standards do not mean much and remain only virtual; in particular, they would remain empty words without access to justice⁵ and the possibility to obtain just and timely remedy for violations of these rights.

As is the case for all human beings, children whose rights have been violated shall have an effective remedy, "determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State" (Article 2, International Covenant on Civil and Political Rights).

The United Nations Committee on the Rights of the Child stated in its General Comment 5 that “for rights to have meaning, effective remedies must be available to redress violations. This requirement is implicit in the Convention and consistently referred to in the other six major international human rights treaties.”⁶ The International Covenant on Civil and Political Rights, Article 2, for example, states that States Parties are “to ensure that any person whose rights or freedoms [...] are violated shall have an effective remedy [...] and to ensure that any person claiming such a remedy shall have his [or her] right determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy.” The Committee emphasizes that “economic, social and cultural rights [of children], as well as civil and political rights, must be regarded as justifiable. It is essential that domestic law sets out entitlements in sufficient detail to enable remedies for non-compliance to be effective.”⁷

The UNICEF Innocenti Research Centre has recently conducted research on the rights of children to participate in legal and administrative proceedings that provides some information on the right of children to take legal action or invoke an administrative procedure to protect their rights.⁸ The research provides examples from laws and practices of 52 countries around the world. The examples of national provisions below come from this research.

The research has shown that, in some jurisdictions, children have the right to bring a matter to a court, and to receive support in doing so. In Paraguay, for example:

specialized children’s courts have competence over cases concerning paternity, guardianship, maintenance, custody, foster care, adoption, child abuse, child labor, issues concerning health and education, and the protection of child rights in general. Children have the right to bring matters before this court, and the presiding judge has an obligation to listen to the child concerned, in accordance with the age and maturity of the child, before resolving any matter before the court.⁹

In Romania, the law on the protection and promotion of the rights of the child “recognizes the child’s right to personally make complaints regarding violations of his or her fundamental rights”.¹⁰ The Children’s Act of South Africa recognizes in general terms the child’s rights to access the courts, to receive assistance in bringing matters before a competent court and to seek judicial remedy for violations or threatened violations of rights recognized in the Constitution or in the Children’s Act itself.¹¹ Similar types of provisions can also be found in several children’s codes adopted in Latin America (e.g. Bolivia, Costa Rica, Ecuador and Guatemala).

In other countries, children can only take legal action through their parents or other legal representatives, or can lodge a complaint on their own but then need an adult (e.g. litigation guardian) to act on their behalf throughout the subsequent phases of the process. In Libyan Arab Jamahiriya, for example, “persons under the age of 18 can make complaints to administrative or criminal authorities, but they lack standing in legal proceedings and must be represented by a parent or adult guardian.”¹² In some countries, “older children have the right to seek judicial remedies, while younger children have the right to turn to administrative bodies, which may initiate legal proceedings if they consider it appropriate.”¹³

In any of these cases – i.e. whether the child’s right to take legal action is provided by law or not, and whatever the limitations (e.g. in terms of age) to this right might be – it is always difficult for children to initiate and pursue legal action. Some of the main obstacles to children’s access to justice are summarized in the next section.

3. Extraordinary obstacles to children's access to justice

In spite of the Committee's view that the availability of effective remedies to redress violations of child rights is an implicit requirement in the CRC, and in spite of the fact that such remedies are foreseen by law in many countries, access to justice remains in reality a tremendous challenge for children, especially the poorest. There are several reasons for this difficulty.

First, children's access to justice very often depends on the support provided by adults and their good will. As mentioned by the Committee, "children's special and dependent status creates real difficulties for them in pursuing remedies for breaches of their rights":¹⁴ They depend on adults for information about their rights, about the availability of redress and about ways to access it. In the vast majority of cases (and with the exception of some older adolescents), they need support from adults to lodge complaints and stand by their side through legal or administrative proceedings. In many cases, such as where literacy rates are low, parents and families themselves do not necessarily know how to best support their children.

Justice systems are particularly intimidating for children (and for many adults) and their complex procedures, difficult to understand. This is particularly true for certain groups of children, such as those with disabilities who need additional support to understand the process around them or those from ethnic minorities who might speak another language. Legal and judicial professionals are often not trained in children's issues and may not be aware of their particular rights and needs. Children also generally need financial support to cover court and/or lawyers' fees, as well as transportation to courts because they often do not exist in the most remote areas of a country. Evidently, the younger the child, the more difficult it will become for him or her to claim his or her rights without support.

The situation becomes even more complex since the perpetrator of a crime, human rights violation or other injustice is often an adult from the child's immediate environment, e.g. the child's parent(s), legal guardian or another family member. This obviously makes it extremely difficult for a child to oppose the adult(s), thereby risking retaliation and/or jeopardizing the family's honor and reputation. Other family members might be unwilling to support the child in fear of reprisal, social ostracism, stigmatization or exclusion. Speaking up bears risks for one's security and continued acceptance within the community. In many societies, lodging complaints and seeking redress before the court or other relevant authority without parental consent is not culturally acceptable.

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Second, despite the almost universal ratification of the CRC, in many instances, there is still no full acceptance of children as rights holders. Too often, children are still considered subject to adults' good will; violations of their rights are not considered crimes by local justice systems despite the international legal framework. In many societies, for example, child abuse and gender-based violence are largely seen as private matters, sometimes conflated with disciplining children as a normal child rearing practice that should not be brought to justice. The particular issue of child participation in administrative and legal processes, or lack thereof, also reflects the general difficulties for children to participate as full-fledged members in their communities in spite of the CRC requirement that they be able to express their views and be heard in all matters affecting them, in accordance with their age and maturity¹⁵. Children often do not have a voice in issues of concern to them. In overloaded justice systems, children's cases are unlikely to be treated as a priority.

Considering these structural and logistical obstacles, is access to justice for children really possible? The story of Nojoud Ali – widely reported by the media since 2008¹⁶ – shows it is. In April 2008, a ten-year old Yemeni girl escaped her home where she was living with her 30-year

old husband in order to go to court on her own and ask for a divorce.¹⁷ Although, according to Yemeni law, she was under the legal age to do so, the judge heard her complaint and ordered the arrest of both her father and husband. Nojoud was subsequently accompanied and supported in this process by her uncle and a lawyer, and obtained an annulment of her marriage. According to the BBC,¹⁸ the former husband told the court that the marriage was consummated, but he denied Nojoud's claims that he beat her. In Yemen, Nojoud's story has spurred a movement against child marriage and for legislative change, led by women's rights groups. As of September 2009, the Yemeni Parliament is discussing a bill mandating that girls cannot be married until the age of 18.

Nojoud's story is certainly an exceptional one, for thousands of girls in Yemen and elsewhere suffer forced marriage in silence. But the story certainly shows that accessing justice can be possible, even for a ten-year old girl living in a country where women and girls in particular have limited access to justice.

4. What can be done to ensure better access to justice for children?

Overcoming these extraordinary obstacles and ensuring adequate access to justice for children require interventions at a minimum of two complementary levels: building a child-sensitive¹⁹ justice system – including the police and courts, on the one hand (the “*supply side*”), and providing information and support to children in claiming for their rights and obtaining redress, on the other, with a focus on the most excluded and the most difficult to reach (the “*demand side*”).

Using the terminology associated with a “human rights-based approach to programming”, the supply aspect aims at enabling duty-bearers (mainly the justice, social and law enforcement institutions) to fulfill their obligations towards rights-holders; and the demand aspect enables rights-holders to claim for their rights and hold duty-bearers accountable.

The “supply side” of justice for children also includes access to informal justice systems (e.g. traditional, customary systems) and alternative dispute resolution mechanisms, as well as non-judicial, independent complaint procedures (e.g. ombudsman offices). However, in keeping with this chapter's overall emphasis on the demand aspect, these systems and mechanisms are not covered here.



4.1 A child-sensitive justice system

A child-sensitive justice system applies child-sensitive procedures, operates in a child-friendly environment and through professionals who are trained and able to deal with children according to their rights and specific needs. Useful provisions in this respect are put forth in the *United Nations Guidelines for Justice in Matters Involving Child Victims and Witnesses of Crime*. Interviews, examinations and other forms of investigation should be conducted by trained professionals – the police, prosecutor, judges, lawyers, support person, social workers, health staff – who proceed in a sensitive and respectful manner. Every intervention by the justice system needs to fully take into account the age, level of maturity and unique needs of each particular child in order to prevent further hardship and distress that may result from the child's participation in the criminal justice process – the detection of the crime, making the complaint, investigation, prosecution and trial and post-trial procedures.

Child-sensitive procedures need to reflect children's right to be treated with dignity and compassion, the right to be informed (e.g. of the availability of support services, of the process and progress, of the mechanisms for review of decisions or of opportunities to obtain reparation) and the right to privacy. Children also have a right to be heard and to express views and concerns. Hence, professionals should make every effort to enable child victims and witnesses to express their views and concerns related to their involvement in the justice process, their concerns regarding safety in relation to the accused, the manner in which they prefer to provide testimony and their feelings about the conclusion of the process. This requirement often implies changing adults' attitudes and adapting the police station or court environment. Children and, where appropriate, family members should have access to assistance provided by professionals who have received relevant training. This may include assistance and support services, i.e. financial, legal, counseling, health, social and educational, physical and psychological recovery services, and other services necessary for the child's reintegration. In particular, children should receive assistance from support persons, commencing at the initial reporting stage and continuing until such services are no longer required. Professionals should coordinate support so that the child is not subjected to excessive interventions.

The *United Nations Guidelines* also put forth the right of child victims and witnesses to be protected from hardship during the justice process. Professionals should take measures to prevent hardship during the detection, investigation and prosecution process in order to ensure that the best interests and dignity of the child are respected. This includes: providing the child with clear indications of what to expect in the process; ensuring that trials take place as soon as practical; using interview rooms designed for children and modified court environments; providing recesses during the child's testimony; providing interdisciplinary services integrated in the same location; limiting the number of interviews (for example using video recording); and using testimonial aids or appointing psychological experts. In order to ensure the child's security, safeguards should be put in place: direct contact should be avoided between the child and the alleged perpetrator; court-ordered restraining orders should be enforced to give police protection to the child; and his/her whereabouts should be safeguarded from disclosure.

Finally, child victims have a right to receive reparation for full redress, reintegration and recovery. Reparation may include restitution from the offender, aid from victims' compensation programs and damages ordered to be paid in civil proceedings. Where possible, costs of social and education reintegration, medical treatment, mental health care and legal services should be addressed.

In support of governmental and civil society efforts to implement these rights, UNICEF has been increasingly investing in the establishment of child-sensitive justice systems in all regions of the world. For example, UNICEF has supported governmental and non-governmental

partners in establishing child-friendly police stations with trained multi-disciplinary teams and services (e.g. Sudan, Jordan, Azerbaijan, Timor Leste, the Philippines). Police officers working in these stations – including women officers – have received special training to carefully assess a child’s situation and conduct investigation without further distressing the child. Testimony is usually recorded on video to prevent the child from having to repeat his or her story. These stations typically provide: psychological and social support; medical care; separate rooms for children in order to prevent their contact with the persons accused of harming them; and play and sleeping areas. In some instances, staff of the police station also conduct outreach work to raise awareness of communities on child protection issues and on where to seek support in cases of abuse, violence or exploitation. In Khartoum, Sudan, for instance, the presence and professionalism of trained medical experts, forensic investigators and skilled police officers are believed to be among the reasons – together with the acceptance of children’s evidence in court – for a high conviction rate (approximately 60 percent) for cases of sexual crimes referred to courts by the Family and Child Protection Unit.²⁰

UNICEF has also supported judicial authorities in a number of countries in setting up child and gender-sensitive processes in courts (e.g. Cambodia, Malawi, Mozambique, Zimbabwe, Nigeria, the Lao People’s Democratic Republic, Myanmar, the Bolivarian Republic of Venezuela, El Salvador, Papua New Guinea, Albania) by supporting the development of necessary laws, regulations and policies, or building professionals’ capacities. In addition, practical assistance has consisted of, *inter alia*: the set up of one-way mirror interviewing rooms; set up of separate rooms connected to the court via a closed circuit TV system; and facilitating intermediaries appointed by the court to act as a bridge between that separate room and the court room. The intermediary (a psychologist or social worker) transmits the questions forwarded from the courtroom to the child in a child-friendly language. Special units for victims, including legal assistance and counseling, have also been established in the courts in several countries.

As a result of these actions, in selected instances, justice systems have been made less intimidating and safer for children. The programs have also made such systems easier to understand and have therefore enabled children to contribute meaningfully to the legal process, as is their right.

4.2 Information and support to children in claiming for their rights

If not complemented by initiatives to reach out to the most vulnerable children, inform them about their rights and support them in claiming these rights, the aforementioned efforts to create child-sensitive justice systems would only benefit a small number of children: those – usually among the most privileged – who easily access the justice system and are not necessarily the most affected by violations of their rights.

Creating a demand for justice among vulnerable children and ensuring that it materializes in obtaining remedies requires at least two main complementary interventions:

1. **Information:** providing adapted information to children about their rights, the possibility to claim these rights and the avenues to do so. Child rights education should normally be integrated into the regular school curriculum, but alternatives channels should be designed for children who are out of school, for example, through youth clubs, health centers or similar community-based programs. Child participation and peer education programs could also be used for this purpose.
2. **Support:** providing children with legal, paralegal, social and other types of support throughout the process. Socio-legal (or paralegal) support in claiming rights are often provided through decentralized, community-based, multi-disciplinary centers such as socio-legal defense centers, legal clinics or child rights promotion centers, where children and their families can obtain information on the avenues for redress, receive

legal and social advice from professionals, be referred to appropriate services (e.g. a lawyer, doctor or psychologist) or, in certain cases, receive direct legal assistance to initiate a judicial process.

Examples of such programs supported by UNICEF and how they work with children and their families are further elaborated in the following section.

5. UNICEF's support to children's demand for redress: some examples

Throughout the last 20 years (since the adoption of the CRC), UNICEF has been building expertise in supporting governments in the establishment of juvenile justice systems in line with children's rights with, in most cases, a focus on legal reform and capacity building of professionals. To a lesser extent, but increasingly so, UNICEF has also been supporting the creation of child-friendly justice systems for child victims and witnesses of crime, especially since production of the United Nations Guidelines for Justice in Matters Involving Child Victims and Witnesses of Crime in 2005.

Support to access to justice for children has been both less systematic and less widespread. But interventions do exist, and promising results have been shown, laying the ground for further expansion of similar action. Three of these interventions are described below, which were particularly selected to present different facets of this work, in different regions. A subsequent section reviews some of their common features.

5.1 Paralegal Committees in Nepal²¹

In Nepal, an extensive network of 482 Paralegal Committees (PLCs) in 23 districts across the country, supported by UNICEF, facilitates access to justice and mediation services for children and women whose rights have been violated. PLCs comprise women from diverse ethnic, socio-economic, caste and religious backgrounds. These women are volunteers who come from the communities they serve. Each PLC includes approximately 13-15 volunteer members, totalling over 6,500 women participating across the 23 districts. PLCs deal with a broad range of criminal and civil cases, especially those involving domestic violence, trafficking, early marriage, alleged witchcraft, property disputes and polygamy.

PLCs were originally established in 1999 as part of an intervention against sex trafficking. Since 2002, their scope has expanded to include all forms of violence, exploitation and abuse of women and children. They were initially established as community groups without any formal legal identity and are currently exploring options for formal registration – for example, as an NGO or as a community-based organization under the auspices of the Ministry of Cooperatives – in order to reinforce their authority and legitimacy, especially in the eyes of the alleged perpetrators.

UNICEF has worked in partnership with civil society – such as the Forum for Women, Law and Development, or FWLD, a national NGO that designed the training manuals and is conducting the program training – to ensure that members receive training on: women's and children's rights and protection; documentation, evaluation and follow-up of cases; and mediation and awareness-raising skills. PLCs are supported by District Resource Groups, which are district-based groups of 10-12 lawyers and social activists who provide training, technical support and monitoring to the PLCs in their district.

The Committees mediate cases or refer them as needed to a range of service providers, including local authorities, law enforcement, health services, NGOs, District Resource Groups and the judicial system. They then continue to follow up cases in order to ensure a proper outcome. According to a 2009 evaluation of this program, in 2008 they "provided

approximately 13,500 individuals with access to justice and local mediation services and were able to resolve a wide range of disputes and violations”.²² Approximately 80 percent of cases were resolved by the PLCs through mediation, while 20 percent were referred to local- and district-level stakeholders and service providers (including 5 percent to police and courts).

A particularly interesting feature of this program is that it both provides for a dispute resolution mechanism (mediation) and builds the demand for it. In parallel to mediation and referral, PLCs promote gender equality and women’s rights through social mobilization and awareness-raising in their communities. Domestic violence, child labor and child marriage have been the most common targets for these initiatives to date. This program operates as “pressure from within” to challenge traditions and norms that have harmful impacts on women and children. The 2009 evaluation of the program notes that although “it is difficult to measure the impact of these activities objectively, [...] there is strong anecdotal evidence that they have had a positive impact.”²³ Building the demand for justice from within is a particularly important element of the program, and considered a necessary step towards changing attitudes and behaviors in the long run. This is especially true of crimes considered shameful or private, such as domestic and gender-based violence. Through constant advocacy, PLCs have created space for women to share information about such private abuses, as well as gradually changing the social context that allows such abuses to occur.

According to the 2009 evaluation, the most significant factor behind its success “has been the motivation and commitment of the PLC members themselves and the emphasis on collaborative working that has helped provide the solidarity and mutual support needed to overcome the challenges they have faced”.²⁴ Other important factors of success identified in the evaluation are the “quality and depth of the training provided and the availability and willingness of lawyers and social activists at the district level to support the program”.²⁵

PLC members who have been interviewed in the context of the evaluation mentioned their own empowerment as an important outcome. They now feel able to “put their views forward in a wide range of public arenas and to challenge others when required.”²⁶ According to the evaluator, these women in turn provided role models for other women in their communities and helped “challenge the entrenched prejudices of their male counterparts”.²⁷ In his opinion, “the resulting benefits in terms of changing attitudes and deterring or preventing violations against both women and children are likely to be at least as important, in the long term, as the detailed casework carried out by the PLCs.”²⁸

5.2 The Village Courts Child Protection Program in Papua New Guinea²⁹

Since 2007, UNICEF has supported the Village Courts Secretariat in Papua New Guinea (PNG) in the implementation of the Village Courts Child Protection Program, which aims at, on the one hand, equipping Village Court magistrates (duty-bearers) to meet their obligations in terms of women’s and children’s rights, and, on the other hand, building a demand for respect of these rights among women and children (rights-holders).

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In a country with over 800 different tribes and languages, and a high prominence of customs over state law, Village Courts are PNG’s most numerous and accessible courts. They are hybrid institutions that draw on the authority of both state justice and traditional justice. They are created by the State, have jurisdictional powers established under statute and, in theory, are subject to review by formal State courts. At the same time, they are presided over by village leaders and are aimed to resolve disputes in accordance with local custom. Their primary task is to “ensure peace and harmony”; most disputes are resolved or managed through mediation.

Women and children in PNG are heavily affected by violence in their homes and communities. According to UNICEF PNG, widespread and pervasive discriminatory attitudes and practices give rise to some of the highest rates of violence and abuse against both women and children

in the world; 75 percent of children report physical abuse.³⁰ In spite of this reality, cases involving children that are dealt with by Village Courts seem to mainly involve them as alleged offenders – as opposed to victims. Other cases of relevance to children include mainly customary adoption and maintenance in case of parents' separation. Abuse or "child discipline" is largely seen as a private family issue and generally not considered a problem to be brought to the attention of the village courts, either formally or informally.

Initially, communities request that the program nominate their own women participants and identify how they can contribute to it financially or in-kind. This is followed by a two-week child protection training course for women's and youth groups, together with their Village Court magistrates. The course first requires participants to identify the problems affecting children in their communities in terms of abuse, exploitation and violence, and to come up with a plan to address these problems. The next step is a follow-up and mentoring phase, where trained technical advisors observe court processes and provide magistrates with mentoring support to apply knowledge and skills acquired during the course. The advisors also meet women leaders and youth who attended the training course in order to assist them to overcome the obstacles to implementing the agreed plan and, importantly, to advise them on how to best mobilize their communities in this respect.

Similarly to the Nepal program described earlier, this training course builds the capacity of women, children and young people to understand and claim their rights and to make a meaningful contribution to their realization. It also results in encouraging and enabling village court magistrates and community leaders to recognize their own obligations and undertake concrete actions to meet them. Some examples of such action include: "placing signs at village courts advising the public that serious cases of violence and abuse will be referred to the formal courts; awareness campaigns in local gathering places such as markets; acceptance of women village court officials; assigning of women as support people for women and child victims."³¹

In addition to improving the capacity of the village courts to make rights-based decisions and recognize the limits of their jurisdiction, the program enables the justice system to take a more proactive role in the protection of children. The program gives women and young people a new opportunity to learn about and articulate, as well as share information on their rights. Together, women, young people and their Village Court magistrates are using their collective power to demand justice for vulnerable children. In one district, women participants and one of the magistrates approached a local school to demand the re-enrolment of 16 girls who were denied access to education following their teenage pregnancies. As a direct result of this intervention, the school opened its doors to these girls and waived their school fees. In another district, two parents became concerned about the upcoming marriage of their 16-year old daughter to a local policeman. After speaking to the girl and seeking her views, a trained Village Court magistrate ordered that the policeman apologize for attempting to marry the girl, provide some compensation and cease any further advances.³² Many trained women leaders now attend Village Court hearings to monitor the decisions made by village court magistrates. They report that the partnerships developed during the training (both with each other, and with the village court magistrates) have empowered them to raise their concerns with trained magistrates directly.

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This program design is more successful than standard training for a number of reasons:

- The training includes both duty-bearers and rights-holders, and facilitates joint planning. This enables the women and youth to develop partnerships with male leaders and generates a sense of joint accountability for the delivery of rights-based decisions.
- It draws on multiple and diverse partnerships, enabling the program to remain flexible and responsive to differences between communities and unexpected challenges.
- The generation of community ownership at the outset and the ongoing mentoring

support to both rights-holders and duty-bearers is seen as equally important as the training itself.

As in the case of Nepal, this PNG program provides both for a dispute resolution mechanism (mediation) and builds the demand for it. The difference in PNG, however, is that the women's and youth leader groups focus mainly on legal empowerment, whereas the PLCs in Nepal also carry out mediation.

5.3 Socio-Legal Defense Centers in the occupied Palestinian territory³³

Children in the occupied Palestinian territory (oPt) are confronted with violence in all settings in which they live.

In the oPt, UNICEF supports the running of five socio-legal defense centers that provide free legal, psychological and social advice to children affected by violence and their families. The centers are operated by two Palestinian NGOs: Defense for Children International in the West Bank and the Palestinian Center for Democracy and Conflict Resolution (PCDCR) Gaza.

Children and their families come to the centers to seek advice and assistance from trained professionals (lawyers, psychologists and social workers). These professionals provide immediate advice and assistance on the spot or refer children and their families to other services (medical, legal, judicial, etc.) as necessary. They have been trained in child protection and multi-disciplinary work. In both the West Bank and Gaza, the NGOs in charge of the centers have established a network that includes various governmental and non-governmental actors, and constitute a second protective layer around children. Authorities and organizations member of the networks have received training on children's rights and a multi-disciplinary approach to child protection. This approach involves bringing all stakeholders together and provides a sense of working towards the same objectives. Referral lines have been jointly agreed on and ratified by all concerned parties.

Information about the centers is widely disseminated, including through the media, together with awareness-raising messages concerning children's rights and adults' responsibilities. A toll-free telephone line also operates in Gaza. It partly focuses on cases of sexual abuse, which can be very sensitive to divulge in person. Lawyers monitor the court cases, including for children in detention facilities. In Gaza, the socio-legal defense centers also refer some cases to the community for mediation by traditional leaders who have been trained in this matter.

Empowering children through the provision of information and education on their rights is an important component of the program. Workshops are organized for them to learn about their rights with a special focus on their rights to protection from violence, abuse and exploitation. Children are also informed of the services provided by the socio-legal defense centers and how to access them. In parallel, activities with parents and the communities are organized to raise their awareness on the legal rights of children and their responsibility to protect them from abuse.

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6. Some common features of promising legal empowerment interventions

The three legal empowerment interventions described in the previous section have several features in common that are particularly instrumental in contributing to improved access to justice for children. They could therefore serve as examples and inspiration for other efforts down the line. Below is an initial attempt to summarize key features of these interventions. It is important, however, to mention that these common features have been identified on the basis of observation and are not the result of formal evaluations.³⁴ They should be considered initial ideas to be further confirmed and refined, if and when evidence of success becomes more substantial.

6.1 They are de-centralized and located in areas where the poorest, most excluded live

As discussed above, there are many obstacles for children – poor and excluded children in particular – to seek redress for violations of their rights. Special efforts are needed to reach out to them with information about their rights (starting simply with the fact that they do have rights) and about the possibility to claim them, even – or especially – in the most remote places. As mentioned, schools can be a useful vehicle for this, but strategies to reach out-of-school children should also be designed in parallel (e.g. through youth clubs or community centers).

Through these and other vehicles, support should be available where children live – in their communities. If community-specific help is not provided, there is little chance that they would be able to find this necessary support somewhere else. Successful interventions are therefore to be decentralized and located in areas where the poorest, most excluded live.

This is the case for all three aforementioned programs. In all three, services are spread across the country, including in remote and difficult-to-reach locations where no or few other programs are running. The socio-legal defense centers in the oPt are available in strategically selected locations that provide the largest possible proportion of the population with the opportunity to access a center in spite of closures and checkpoints in place in the territory. To further expand the outreach, information sessions are organized in schools, community centers and institutions for children deprived of parental care. Grassroots organizations, especially women and youth organizations, are contracted to participate and help in spreading the information in their communities. In order to allow access during times of heightened conflict in the Gaza Strip, when crossing firing lines and blockades is obviously impossible, the PCDCR has opened 28 outposts that provide psychosocial support to children in all areas.

In PNG, the Village Courts Child Protection Program is implemented across a remote and peri-urban districts to ensure that government's strategy to take the Program to scale is both evidence based, and takes into account the challenges encountered by remote and rural communities. In Nepal, the PLCs include representatives of disadvantaged groups (in terms of ethnicity, caste and/or other socio-economic factors) as a way to reach to these populations more easily.

6.2 They are owned and run by communities

In order to be well accepted in communities and to operate efficiently, legal empowerment interventions need to be based on local resources and run by community members. This makes them less intimidating, more accessible to children and their families, and more in tune with the community's concerns. In Nepal, PLC members are women from the communities themselves. The process of establishing PLCs starts with a series of orientation meetings (usually over three days) organized to build the community's ownership for the project, followed by the endorsement of the local Village Development Committee (i.e. local, municipal authority). Meetings are typically attended by governmental officials, community frontline workers and volunteers, community leaders, and civil society representatives – both men and women. During these meetings, discussions are deeply rooted in the problems faced by women and children in the specific community and aim at determining how the community can contribute in responding to them. The 2009 evaluation of the PLCs indicates that the sense of ownership as well as motivation and commitment of the PLC members are among the main reasons for the success of the Program.

In the oPt also, the NGOs running the socio-legal defense centers are well rooted in the communities. Both Defense for Children International (DCI) in the West Bank and the PCDCR in the Gaza Strip are well-recognized community-based child rights advocates. Most of the staff in each of the five centers come from these communities. Information sessions in the socio-legal defense centers, in schools and in other community settings contribute to further anchor these centers in the communities.

In PNG, the Village Courts Child Protection Program is coordinated by advisors drawn from the communities where they deliver the Program. They support the communities to select their own women and youth representatives. The participating communities are also encouraged to contribute resources to the training, modeled on existing community contribution mechanisms, as in the way they carry out sporting or church-related community events. For example, in one remote district, the community built the training venue, provided and cooked all meals, and coordinated their own transport to and from the training daily.³⁵

The participation of selected community members, while crucial, must also be guided by rights-based principles. Participants carry authority and must be perceived as legitimate and credible members of the community if they are to be able to influence future decisions made by their community. At the same time, their participation should not reinforce power imbalances. In the Papua New Guinea Village Courts Program, the inclusion of an equal number of women participants marks a significant diversion away from the traditional model of training, in which magistrates, as *big men* (i.e. men with special stature and influence), would normally be invited to participate in training alone. In the PNG context, the involvement of women ensures that knowledge become available to women and children, and with it, the power to articulate and demand their rights.

In addition, for all three programs, community ownership is obviously a useful factor of sustainability for the future.

6.3 They are multi-disciplinary and involve a large number of partners

No profession can prevent and address cases of child abuse and violence on its own. It takes the specific and combined competencies of teachers, social workers, health professionals, psychologists, the police, community leaders, courts, lawyers, paralegals, *inter alia*, to prevent, detect, refer and respond to child rights violations. Obviously, coordination and referral between these different professions are crucial and often a challenge. All of these professionals also need training on how to address child rights issues, as well as clear protocols for cooperation. In addition, civil society organizations, often formally constituted but sometimes more informal in nature, typically play important roles.

Successful interventions that facilitate children's access to justice therefore need to take a multi-disciplinary approach and involve all concerned. The team in the socio-legal defense centers in the oPt include lawyers, social workers and psychologists available to provide advice and assistance to children during the centers' opening hours (and, in Gaza, also through a hotline). DCI in the West Bank has formed a network of NGOs, authorities and professionals where cases that need follow-up can be referred, such as NGOs providing psycho-social support, social workers from the Ministry of Social Affairs or medical services. Referral lines were agreed on among network members (specifying who should do what, which cases to refer where, etc.). Community-based and grassroot organizations were also involved, mainly to make the services available as well known as possible.

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In Nepal, the PLCs are also linked with various support service providers, government agencies and NGOs at the district level. They constantly engage with a range of actors including the police, local government authorities and lawyers to ensure a joint follow-up of cases.

In PNG, the Village Courts Program is led by the National Department of Justice, in partnership with provincial administrations. It is implemented by multiple provincial government authorities, including provincial village court officials, community development and welfare officers, and representatives from the provincial AIDS councils. Advisors draw on local technical resources wherever available, such as NGOs, church networks and local government councilors. As interest in the Program is generated across the district, trained village court magistrates are now supporting training in other districts

by accompanying the advisors on community consultations and acting as resource persons during the training.

6.4 They respond to a particular need and fill in a gap in a weak or failing formal justice system

Interventions described in this chapter respond to specific needs in communities and to a particular gap in the provision of justice. On the one hand, they deal with issues of core importance to the populations they serve (e.g. domestic violence, property, family issues) and, on the other, they fill in a gap in a weak or failing formal justice system.

This is the case in PNG, where over 85 percent of the population lives in rural areas with limited transport and communication infrastructure, and weak essential service delivery. In this context, government (including its formal justice apparatus) is of little relevance to the 800 different tribes that speak different languages, have different customs and live relatively secluded from each other. Many people in these communities lack legal literacy; even those who do understand their legal rights have little access to the formal system. As a result, most legal issues are brought to the village courts, which often lack the knowledge and skills to apply a rights-based approach to their decision-making and mediation efforts. The Child Protection Program empowers women and their communities with information on their rights; offers an opportunity for village court magistrates to develop strategies for meeting their obligations; introduces the participants to the government officials responsible for essential service delivery; and supports both village court magistrates and their communities with an ongoing support mechanism (through the follow-up and post-training mentoring) for enabling women and children to realize their rights.

In Nepal, as mentioned in the recent evaluation of the PLC:

...the absence of government has created an opportunity for an alternative community leadership to emerge and people have recognized that PLC's can play a valuable part in this process. [...] As a result some PLC's have extended the scope of their work beyond their core areas of women's and children's rights, most noticeably in the areas of property rights, citizenship and debt."³⁶ The conflict in Nepal created a very challenging environment for the PLCs but, according to the 2009 evaluation, "the withdrawal of government services from rural areas also provided them with opportunities. [...] The PLCs represent a major resource for any emergency response, as they possess a unique combination of protection expertise, local knowledge, a network of contacts and an organizational capacity that extends into every ward."³⁷

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In the oPt, where the formal justice system has been weakened by decades of conflict and occupation, the socio-legal defense centers have proven extremely flexible and rapid in adapting to ever-changing security situations on the ground; they have provided support and ensured mediation when the formal system was in difficulty.

6.5 They inform upstream policies and advocacy

As the first and sometimes only point of contact for child victims, the community-based, multi-disciplinary programs described above can play an important role in monitoring child rights violations and advocating for policies based on this evidence. They generally manage data on the cases brought to their attention that provide crucial information on the situation of children in their area.

In Nepal, for example, the PLCs maintain records of cases and rights violations, and share the information regularly with the district stakeholders. As a result, their work feeds policy dialogue by identifying structural problems through the analysis of accumulated individual violations. In December 2005, the Forum for Women, Law and Development (the NGO that has played a

crucial role in training for the program) filed a case against the Office of the Prime Minister and Council of Ministers, for the effective implementation of the law against child marriage. The NGO based the case on the fact that, although Nepal has a law against child marriage, the available statistics clearly show that the situation in practice is very different. FWLD also challenged the Marriage Registration Act, as it permits marriage at a lower age than is permitted by the general law (Country Code) and discriminates between men and women on the issue. In December 2005, the Supreme Court issued a showcase notice to the government; the case is still under consideration by the Supreme Court in 2009.

Similarly, the socio-legal defense centers in the oPt consolidate and analyze the sum of individual cases presented to the centers for the purpose of general advocacy for increased child protection. These efforts were instrumental in the development of a child protection law in 2007-2008 when DCI, PCDCR and their partners used the analysis of the records of child rights violations to advise on which protection gaps needed be addressed by law. The law is pending approval by Parliament.

In PNG, the advisors attached to the Village Courts Program monitor the implementation of action plans that participants develop during training, collect stories and lessons learned, and provide this information (via their provincial government counterparts) to the national government. The Program has already contributed to a greater awareness of the role and importance of the traditional justice system and is now informing a review of the legislation that covers the establishment and functioning of village courts.

6.6 They are part of a systemic approach

Effective and efficient child protection interventions require a systemic approach that ensures that:

- sound protective laws and policies (including the necessary budgetary allocations) in line with international standards are in place and enforced;
- professionals have the capacity and means to prevent and respond to abuse, violence and exploitation;
- adequate protective services are in place and accessible;
- children know about their rights and have the skills to protect themselves;
- the general public is aware of issues of abuse, violence and exploitation, and allowed to debate on them openly; and
- there is sufficient knowledge on issues of abuse, violence and exploitation, and mechanisms to monitor the trends and impact of interventions (including a national statistical capacity to monitor and report on children's rights).

In order to make a difference for children, all these strategies are required in parallel, reinforcing each other towards the same objective (i.e. the protection of children against abuse, violence and exploitation). This conceptual framework, used by UNICEF in its child protection programming, is also known as "building a protective environment".³⁸ The three programs described in this chapter all include elements of such a systemic approach.

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In the oPt, the Child Protection Program implemented by the authorities with the support of UNICEF and NGOs includes the development of a child protection law currently awaiting approval by Parliament, as well as awareness-raising campaigns on issues pertaining to violence against children, child rights education for children and the set-up of a child protection information system to monitor trends and inform policy-making and response.

In PNG, a relatively strong legislative and policy framework has been developed with UNICEF's technical assistance. Contemporary child protection legislation was passed in April 2007, focusing national child protection priorities on the CRC. This Act is complemented by a range of policies that aim to protect children, as well as additional legal provisions. Under

amendments to the Evidence Act (2002), child victims and witnesses of crime are entitled to give evidence to a court under child-friendly conditions. In parallel, a national directive was issued, requiring all provincial hospitals to establish family support centers, one-stop shop models where women and children can seek medical, paralegal and psychosocial care. The Village Courts Program provides participants, and subsequently their communities, with knowledge on available services, and links the participants with the relevant government and civil society actors.

In Nepal, this systemic approach currently is being pursued, starting with a review of the Child Rights Act in light of international standards. As mentioned, the PLCs themselves also carry out awareness-raising campaigns – for example, against child abuse or child marriage – that have achieved some success, as indicated in the 2009 evaluation.³⁹

Conclusion: the way ahead

This paper concludes by considering future directions for efforts to improve access to justice for the most vulnerable, excluded children. Although there are promising experiences, it is clear that access to justice is still a virtual concept rather than a reality for most children around the globe.

While certainly not the only potential directions, two important strategies come to mind:

- **Generating knowledge and supporting evidence-based policy-making and program-ming:** Child rights advocates and rule-of-law actors (including governments, inter-governmental organizations and NGOs) still need to have a comprehensive understanding of children's access to justice and how it best can be achieved for all children. One initial step in this direction could be for the implementers to better evaluate the impact of programs on children's actual access to justice, in order to identify the factors for success and lessons learned, and analyze their potential for replication in other contexts. The common features for successful interventions listed in this chapter could serve as a starting point in this respect, and their relevance and importance could accordingly be confirmed (or not). This would also require that the actual meaning of children's access to justice be further defined and agreed on – i.e. when do we consider that a child has full, satisfactory access to justice? The evidence of what does and does not work generated by such evaluations could then serve in developing governmental policies and establishing programs or taking existing ones to scale.
- **Integrating children's access to justice into broader rule of law initiatives:** In September 2008, the United Nations Secretary-General issued a *Guidance Note* on the United Nations Approach to Justice for Children, requesting all United Nations entities to give greater attention to children in their rule of law initiatives. Children therefore need to be fully considered and integrated in broader access to justice programs carried out by the United Nations, with their particular rights and needs specifically taken into account. Countries have started to implement this common approach. In Indonesia, for example, provisions on children in contact with the law have been incorporated into the National Strategy on Access to Justice, developed with joint support from UNICEF, United Nations Development Programme and the World Bank, thus ensuring that issues of justice for children are included in the national justice reform agenda. UNICEF certainly has an important role to play in this respect, both in terms of advocating for children's inclusion in such broader agendas and providing assistance to ensure that children's rights are respected in the process.

Endnotes

- 1 As per Article 1 of the *Convention on the Rights of the Child (CRC)* (1990), a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier.
- 2 As of August 2009, all countries except two (the United States of America and Somalia) have ratified the CRC and have therefore legally committed to implementing its provisions.
- 3 Article 12, CRC: "State parties shall assure to the child who is capable of forming his or her own views the right to express these views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rule of national law."
- 4 A States Parties meeting is held every two years at the United Nations in New York in December in order to hold elections for nine members of the Committee. Nominations are submitted by States Parties to the Office of the High Commissioner for Human Rights. Amended Article 43(2) of the CRC (18 November 2002) states that the "Committee shall consist of eighteen experts of high moral standing and recognized competence in the field covered by this Convention." Consideration shall be given to "equitable geographical distribution, as well as to the principal legal systems".
- 5 The definition of *access to justice* used in this paper is "the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards"; United Nations Development Programme (UNDP), *Programming for Justice: Access for All*, A practitioner's guide to a human rights-based approach to access to justice (2005) 5. Formal and informal institutions of justice are not the only avenue for people to claim for their rights. Other independent complaints mechanisms include children's ombudspersons, children's commissioners and human rights commissions. This paper however focuses on the justice system.
- 6 The six major international human rights treaties are: the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights (ICESC); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT); the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families; and the International Convention on the Elimination of all Forms of Racial Discrimination. An additional international human rights treaty came into force after the Committee's General Comment: the International Convention on the Rights of Persons with Disabilities.
- 7 Committee on the Rights of the Child, General Comment No. 5, General Measures of Implementation of the Convention on the Rights of the Child, CRC/GC/2003/5 (2003) Part V (25).
- 8 D O'Donnell, *The rights of children to be heard: children's rights to have their views taken into account and to participate in legal and administrative proceedings*, UNICEF Innocenti Working Paper No. 2009-04 (2009).
- 9 Article 167 of the Paraguayan Children's Code, in O'Donnell, above n 8, 9.
- 10 Law No. 272/2004 on the protection and promotion of the rights of the child, Article 29(1), in O'Donnell, above n 8, 27.
- 11 Children's Act of South Africa, sections 14 and 15, in O'Donnell, above n 8, 27.
- 12 Second report of Libyan Arab Jamahiriya to the United Nations Committee on the Rights of the Child, CRC/C/93/Add.1, para. 33-34 and 98 in O'Donnell, above n 8, 27.
- 13 O'Donnell, above n 8, 29.
- 14 Committee on the Rights of the Child, above n 7, 7 at para. 24.
- 15 Article 12, CRC.
- 16 See, for example, Naseem-Ur-Rehman, *At a glance: Yemen* (24 July 2009) Unicef, <http://www.unicef.org/infobycountry/yemen_50331.html> at 30 November 2009; R Sekkai, *Yemeni child bride gets annulment*, (16 April 2008) BBC News, <http://news.bbc.co.uk/2/hi/middle_east/7351336.stm> at 30 November 2009.
- 17 Although the minimum age is currently 15 years old in Yemen, parents are allowed to overrule the law if they judge that their daughter is "ready" for marriage.
- 18 Sekkai, above n 16.
- 19 As per the *United Nations Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime*, Art. 9(d), "child-sensitive" denotes an approach that balances the child's right to protection and that takes into account the child's individual needs and views.
- 20 UNICEF Sudan, *Technical Briefing Paper 3: Family and Child Protection Units* (2008) 4.
- 21 Information on the Paralegal Committees in Nepal is based on a briefing note and other documents prepared by UNICEF Nepal, on file with author.
- 22 UNICEF Nepal, *Paralegal Committees – An evaluation* (2009) 7, internal document, on file with author.
- 23 *Ibid* 7.
- 24 *Ibid* 7.
- 25 *Ibid* 26.
- 26 *Ibid* 24.
- 27 *Ibid* 24.
- 28 *Ibid* 24.
- 29 Information on the program in PNG is based on documents prepared by UNICEF Papua New Guinea as well as additional inputs from Anthony Nolan, UNICEF Child Protection Specialist in the country.
- 30 UNICEF East Asia and the Pacific, *Speaking Out! Voices of Children and Adolescents in East Asia and the Pacific* (2001). Women also report high rates of family violence, estimated in some communities at over 95 percent.
- 31 UNICEF Papua New Guinea, *Child Protection and Village Courts in Papua New Guinea* (2008), on file with author.
- 32 UNICEF Papua New Guinea, *Report of an "Impact and Reflection Workshop" on Children and Women in Village Courts* (2008), on file with author.
- 33 Information on the socio-legal defense centers is based on documents prepared by Defense for Children – Palestine section and the PCDCR.
- 34 The exception is an internal evaluation of the Paralegal Committees conducted by UNICEF Nepal in 2008 and 2009, on file with author.
- 35 Simbu Provincial Administration, Kerowagi District Training Report (2009), on file with author; UNICEF Papua New Guinea.
- 36 UNICEF Nepal, above n 22.
- 37 *Ibid* 8.
- 38 K Landgren, "The Protective Environment: Development Support for Child Protection" (2005) 27(1) *Human Rights Quarterly* 214-248.
- 39 A number of PLC members who met with the evaluator believe that their campaign reduced the incidence of child marriage. According to the evaluator, the fall in the number of child marriage cases handled by PLCs in certain districts "could possibly provide some support to this view, but establishing the true reasons for this reduction would require additional research." Above n 34, 27.

HIV and Legal Empowerment*

David Stephens and Mia Urbano

Executive Summary

From the beginning of the HIV epidemic, the law has been the axis around which debates have revolved on the restriction or promotion of rights. Today, there is growing recognition of the role of the law in addressing discrimination against people living with HIV and empowering vulnerable people and communities. This chapter examines the central role of legal empowerment to advancing the human rights of people living with and vulnerable to HIV, and how this leads to more effective outcomes in HIV prevention, treatment and care. It explores how HIV legal empowerment strategies are evolving and the challenges they still face.

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1. Legal empowerment and responses to HIV

From the beginning of the HIV epidemic, the law has been the axis around which debates have revolved on the restriction or promotion of rights. In western industrialized countries, those most affected during the early period were gay men, injecting drug users and sex workers. These people and communities had already been marginalized by stigma and prejudice and, in many cases, involved in illegal practices. At the same time, a significant heterosexual epidemic was developing in the countries of sub-Saharan Africa. As understanding grew of the limited modes of HIV infection and of effective prevention methods, insights were gained into the importance of the structural conditions that shape HIV risk and of involving communities in HIV responses. These insights stimulated a human rights-based approach to HIV prevention and treatment. The development of effective treatments in 1996, available initially only to people in the high income countries of the global north, further highlighted the global fault lines of inequality and inequity. Today, there is growing recognition of the role of the law in addressing discrimination against people living with HIV and empowering vulnerable people and communities.

HIV transmission almost always occurs through intimate and highly personal behavior, and it takes place in environments where the capacity to exercise rational choices about safe behavior can be severely constrained by social, economic and cultural forces. Information about the effectiveness of condoms for HIV prevention, or even their possession, is of little value if the women who carry them are targeted by police, harassed and arrested because they are believed to be sex workers. This is also the case if their condom use depends on men who have little concern for the health of their sexual partners. Similarly, scientific evidence is clear on the efficacy of needle and syringe programs, opioid substitution therapy (OST) and other harm reduction approaches for reducing HIV-related harm among injecting drug users and their sexual partners.¹ Nevertheless in many countries, drug control and law enforcement approaches to illicit drug use are still largely dominated by policies and practices that show little evidence of achieving their stated aims of reducing drug use. Further, they have highly detrimental effects on HIV prevention and the health and human rights of drug users.

2. HIV, human rights and legal frameworks: a background

The law as it is applied to HIV can be classified as either proscriptive, protective or instrumental.² Proscriptive laws forbid specific acts, such as sexual acts between men, sex work and illicit drug use. These laws interfere with harm reduction measures and may conflict with the obligations of states to respect human rights. This category includes laws that authorize coercive practices against marginalized groups. One example is the use of extra judicial processes to detain and “treat” drug users in mandatory detention centers. There is a growing body of international evidence implicating mandatory detention in increasing HIV transmission and human rights violations.³

Protective laws prohibit discrimination against people living with HIV and vulnerable groups. Instrumental laws reach beyond a focus on individuals and groups to address underlying structural conditions that shape risk and vulnerability. The instrumental approach encompasses social, economic and cultural conditions that contribute to structural vulnerability to HIV. This includes laws that promote the rights of women or create the conditions in which affordable treatments can be manufactured or distributed.

Legal responses to HIV have developed in a complex and highly contested environment. The authority of medicine as the dominant discipline in determining the HIV response has been challenged by the communities most affected. Consequently, social and structural accounts of living with HIV have assumed a place alongside the bio-medical model. These structural accounts are also the principal themes of the “new public health” as it relates to HIV.

The antecedents of the new public health can be found in the improvement of health by improving living conditions. This idea is incorporated into the World Health Organization's (WHO) definition of health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity".⁴

In the area of HIV, the new public health found its champion in Dr Jonathan Mann, the first head of WHO's Control Programme on AIDS (renamed the Special Programme on AIDS in February 1987). In 1989, WHO and the United Nations Centre for Human Rights organized an international consultation, which brought together experts from the fields of law, religion, ethics, human rights, public policy and public health to discuss HIV and human rights, including various forms of discrimination. This was the first international meeting convened to consider how international human rights instruments could be deployed to provide a template for HIV law and policy. Since then, the United Nations has been the central stage for discussions and consultations that have built on the link between HIV/AIDS and human rights.⁵

3. Legal empowerment and HIV

The concept of legal empowerment emphasizes strategies that use "legal services and related development activities to increase disadvantaged populations' control over their lives".⁶ Legal empowerment is fundamentally concerned with realizing the human rights of the poor, disenfranchised and marginalized, and is community-driven. In the context of HIV, the process is driven by people living with HIV and others who may be vulnerable to, or affected by, the disease. Legal empowerment does not preclude engagement with government or legislative change. However, it is fundamentally concerned with strategies that may be more nuanced and broader than orthodox rule of law approaches, and that emerge and are driven by the needs of those at the centre of the HIV epidemic.

For a person experiencing HIV-related stigma and discrimination, a legal empowerment approach affirms and restores his or her humanity and citizenship, and supports psychological wellbeing, essential dimensions to overall welfare and health. It describes a truly holistic approach to HIV.

The view that HIV transmission is largely a result of an individual's choices or agency underlies many HIV behavioral intervention models. In this view, risks can be reduced if an individual acquires a level of knowledge and motivation sufficient to exercise personal agency to make the necessary changes.⁷ For many poor and disadvantaged people around the world, vulnerability to HIV is more associated with structural and social impediments, and infringement of their legal and human rights than access to information on behavior change and risk. In this context, the enjoyment of human and legal rights has a direct impact on a person's ability to exercise choice. Without recognition of these structural constraints, responses to HIV are partial at best. Chief among these systemic barriers for people living with HIV is stigma and discrimination.

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4. HIV-related stigma

Stigma and discrimination are fundamental to understanding the HIV epidemic, both in fuelling the spread of HIV and as formidable barriers to care, support and treatment.

HIV-related stigma is a complex social phenomenon, a product of misinformation about HIV and deep-seated beliefs about disease, proscribed behaviors, sex and death. The impact of stigma is profound at the individual, community and institutional levels. Individual feelings and perceptions of stigma can become internalized causing social isolation, and depression and

other mental illnesses. Stigma – actual or perceived – creates a reluctance to seek health services and reinforces the desire to remain silent about one’s own HIV status. It is profoundly disempowering.

In 1963, Irving Goffman defined stigma as “an attribute that is deeply discrediting” and identified three levels, which affect, respectively, personal identity, social relations, and physical differences or defects. Goffman’s model has provided the template for understanding HIV-related stigma, later defined by the Joint United Nations Programme on HIV/AIDS (UNAIDS) as “any measure entailing an arbitrary distinction among persons depending on their confirmed or suspected HIV serostatus or state of health”.⁸ Stigma exists along a spectrum that spans “self-stigma” to “enacted stigma” (i.e. discrimination). Self-stigma (sometimes referred to as “internalized” or “felt” stigma) refers to the experience in which people living with HIV accept and internalize stigmatizing views and beliefs associated with their HIV status.⁹ Internalization of these negative feelings results in feelings of shame, worthlessness, self-blame and loss of self-esteem, leading to depression, withdrawal and even suicide.¹⁰

At the other end of the spectrum is “enacted stigma” (discrimination), which is the practical expression of stigmatizing beliefs and attitudes against people living with HIV. HIV-related discrimination can be found in the community and family as well as in institutional settings. Such discrimination takes many forms, including the exclusion of people living with HIV from family and community life and activities. Institutional discrimination includes denial of access – or reduced quality of – services, for example, in the educational or healthcare sectors.¹¹

While stigma may be recognizable in different settings, its underlying drivers may be specific to a particular place and time. Because HIV-related stigma is fuelled by cultural and social constructs, beliefs and ideas, its meaning and impact will vary across and between cultural settings.¹² Stigma is also important in ways that move beyond its impact on individuals or associated practices of discrimination.¹³ It must be understood and addressed as a structural and cultural force through which power operates to produce and reproduce inequalities in social relations. In this way, some groups become valued and made to feel superior, and others are devalued as stigma becomes embedded in institutions and culture.¹⁴

5. Discrimination

Discrimination, as defined by UNAIDS in the Protocol for the Identification of Discrimination Against People Living with HIV, is “any form of distinction, exclusion or restriction affecting a person, usually, but not only, by virtue of an inherent personal characteristic, irrespective of whether or not there is any justification for these”.¹⁵ In the case of HIV and AIDS, this is a person’s confirmed or suspected HIV-positive status. Discrimination occurs at the family, community, institutional and national levels.

Responding to HIV-related stigma and discrimination remains an important component of the larger health framework for HIV and AIDS programs. As Parker and Aggleton observe,

stigma is linked to the workings of *social inequality* (emphasis in original) and to properly understand issues of stigmatization and discrimination, whether in relation to HIV and AIDS or any other issue, requires us to think more broadly about how some individuals and groups come to be socially excluded, and about the forces that create and reinforce exclusion in different settings.¹⁶

A 2009 report by Weatherburn et al. reveals that stigma and discrimination in the United Kingdom still play a significant role in the lives of many HIV-positive people, affecting confidence, self-esteem and quality of life. Thirty-six percent of HIV-positive people (in a

sample of 1,777) had experienced discrimination in the previous year, with 22 percent experiencing it from their own community and 11 percent from their own family. The authors of the report note that “the widespread experience of discrimination and social isolation point to the particular harshness of living with diagnosed HIV, compared to most other chronic conditions.”¹⁷

A global example is the international travel restrictions imposed on people living with HIV. Travel restrictions promote the fiction that HIV can be avoided by restricting the entry of people living with HIV and legitimate public stigma. In a survey covering the 2008-09 period, 66 of the 186 countries surveyed had special entry regulations for people with HIV. Regulations in a further 22 countries are contradictory or imprecise.¹⁸

There have been many instances of people losing their homes and being forced out of their communities and neighborhoods due to HIV. In June 2009, the Cambodian Government began forcibly relocating families affected by HIV. The relocations were to substandard housing at Tuol Sambo, a remote site 25 km from the nearest city. The families were resettled into green metal sheds described as “baking hot in the daytime and lack[ing] in running water and adequate sanitation”. The site quickly became known as the “AIDS Colony” by local people.¹⁹

6. The role of people living with HIV

Some of the most successful and enduring responses to HIV could not have been achieved without the creativity, activism and involvement of people living with HIV and members of communities affected by HIV. For example, the concept of “safe sex” was pioneered by activists in the gay communities of the United States. Treatment activism changed the way in which drug trials are conducted, and the approval process for the release and access to new drugs.²⁰ This role is encapsulated in the term “Greater Involvement of People Living with HIV/AIDS”, and is often referred to as the “GIPA principle”. In December 1994, at the Paris Summit on AIDS, 42 nations declared their support for the greater involvement of people living with HIV in prevention and care, policy formulation, and service delivery.

The GIPA principle has been incorporated into national and international program and policy responses, and taken up as a model of best practice in the response to HIV and AIDS. Since the Paris Summit, GIPA has been referenced in numerous international statements, including the Declaration of Commitment on HIV/AIDS endorsed by the United Nations General Assembly Special Session on HIV/AIDS (UN-GASS) in 2001.

National networks of people living with HIV provide vital community support systems and hence are well-placed to understand the legal and other challenges faced by communities, including in accessing HIV-related information and services. To ensure policies are most effective, there must be HIV community representation in policy development and implementation. Such involvement must not be tokenistic; it must value and support the expertise and insights offered by people living with HIV. Many national HIV programs now include a position for a person living with HIV. Increasing the political influence of civil society groups, especially those who represent the poor or stigmatized, is not always a comfortable choice for governments. Legal empowerment has an important role to play in supporting this process.

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7. The law and national HIV responses

With few exceptions, HIV legal services remain small-scale, fragmented, and difficult to access. Even Uganda, while stabilizing HIV transmission in recent years, has “paid

comparatively limited attention to the epidemic's legal and human rights implications. This is especially true for marginalized populations who are most vulnerable to HIV-related human rights abuses".²¹

In Thailand, the law and law enforcement agencies have played a key role in the successful reduction of HIV prevalence in the sex industry. In the early 1990s, the existence of a widespread sex industry was tacitly acknowledged, and civil society organizations and groups of people living with HIV were engaged to design, implement and enforce the first 100 percent condom use campaign. This campaign has been credited with the reduction of HIV transmission in the country's extensive sex industry. The estimated number of people living with HIV fell from 660,000 in 2001 to 610,000 in 2007. HIV prevalence amongst adults aged 15-49 years fell from 1.7 to 1.4 percent.²²

However, this success was followed by the widely discredited Thai "War on Drugs", initiated in 2003 by the then Prime Minister Thaksin Shinawatra. Over 2,800 people were killed in the first three months of the campaign. An official investigation in 2007 found that over half of those killed had no connection with drugs at all.²³ The ferocity of this approach drove many drug users into hiding. These were people who might otherwise have sought support, information and treatment. The campaign also interrupted other public health approaches to drug use and HIV.²⁴

8. Access to treatment

The development of triple combination antiretroviral therapy in the mid-1990s mobilized a global movement of researchers, advocates, community activists, people living with HIV and national governments to reduce HIV treatment costs and increase access for people in low- and middle-income countries. Access increased from approximately 300,000 people in 2002 to 3 million by the end of 2007.²⁵ This represented 31 percent of the estimated 9 million people in need of HIV treatment at that time.²⁶

Ford et al note that Brazil and Thailand are among the few developing countries to achieve universal access to antiretroviral therapy. Ford and colleagues identify three factors critical to this success: legislation for free access to treatment; public sector capacity to manufacture medicines; and strong civil society action to support government initiatives to improve access.²⁷

In 1996, the Government of Brazil legislated to provide antiretroviral drugs through the public health system.²⁸ The impact of HIV in Brazil resonated with existing social justice and developmental concerns, and catalyzed affected communities to mobilize both socially and politically. Mobilization was based not only on HIV status, but also on other socially excluded identities, in particular homosexuals, sex workers, transgender people, and injecting drug users. In August 2005, proactive leadership by Brazil was an important factor in regional negotiations held between 11 Latin American governments and 26 pharmaceutical companies, which resulted in a 15 to 55 percent price reduction for the treatment regimens most commonly used in the region.²⁹

In Thailand, the Thai Network for People Living with HIV/AIDS in alliance with the Law Society of Thailand, academics, consumer groups and activists launched a legal action to revoke Bristol Myers Squibb's (BMS) Thai patent on didanosine (DDI), which was an important HIV drug at the time. BMS subsequently relinquished its patent on DDI in Thailand. The DDI case established the important precedent for consumers to be termed "interested parties" in Thai patent law. Prior to this case, interested parties only included rival companies, not potential consumers of the drugs.³⁰

In 2006, the Health and Development Foundation of Thailand challenged GlaxoSmithKline's application for a patent on a combination of the drugs zidovudine/lamivudine in a fixed dose on the basis that the combination was "nothing new". The drug had been produced since 2003 in generic form by the Thai Government Pharmaceutical Organization (GPO) at a retail price of approximately US\$276 per patient per year. If the patent had been granted, the cost would have increased to US\$2,436 per patient per year. The same legal challenge was filed by civil society groups in India, and activists in both countries coordinated their campaigns.³¹ GSK withdrew the patent application in both countries, asserting that it did so prior to demonstrations in India and Thailand. GSK nonetheless stated that the "focus on patents in addressing the challenges of HIV/AIDS is misguided and counterproductive".³²

In South Africa, the Treatment Access Campaign (TAC) embodies an approach where legal action, advocacy and social mobilization are brought together in the pursuit of human rights objectives. TAC was founded in 1998 to support access to HIV treatment, care and support, and to provide resources for people living with HIV in South Africa. The TAC objectives are to:

challenge by means of litigation, lobbying, advocacy and all forms of legitimate social mobilization, any barrier or obstacle, including unfair discrimination, that limits access to treatment for HIV/AIDS in the private and public sector.³³

TAC first took the South African Government to court for its failure to assure antiretroviral therapy to prevent mother-to-child transmission (MTCT). TAC won the case on the basis of the South African constitutional guarantee of the right to health care, and the government was ordered to provide MTCT programs in public clinics.³⁴ In 2000, TAC joined the South African Government in the litigation concerning the challenge to South Africa's Medicines Act by international pharmaceutical companies. In 2001, the pharmaceutical companies unconditionally withdrew their lawsuit as a result of a combination of stringent public criticism and the legal arguments prepared by TAC and the South African Government. This was prompted by very negative publicity generated by demonstrations outside the court house where the case was being heard and televised around the world.

High profile and highly publicized court cases are but one aspect of the movement for treatment access around the world. Social mobilization and community activism are central to ensuring a deeper and broader sense of empowerment and understanding of what human rights can achieve for movements such as TAC. The core of TAC's work in community empowerment is located within its treatment literacy programs with poor people. These programs provide the foundation for community based human rights advocacy, which demands "the delivery of health care services within poor communities as a matter of right and law".³⁵

9. Vulnerable communities

Law reform to create a framework to address HIV-related stigma and discrimination must take into account the vulnerability and associated stigmas attached to specific communities, lifestyles and behavior. In a review of legal frameworks and human rights as they relate to sexual minorities in low and middle-income countries, Cáceres et al. found that social exclusion remained the overwhelming reality for the majority of gay, bisexual transgender and other men who have sex with men (MSM).³⁶ This situation is sustained by: unjust laws that criminalize same sex relations and sexual diversity; cultural norms or barriers that inhibit the promotion of HIV prevention care and treatment among sexual minorities; and deficiencies in health planning that do not account for the relative invisibility of sexual minorities or conversely, that over-identify them with HIV, which leads to further stigmatization. Repressive legal frameworks still exist in countries in sub-Saharan Africa, the Caribbean, the Middle East and North Africa, South Asia, East Asia, and the Pacific.³⁷

A 2008 report by the International Lesbian and Gay Association, which undertook a similar survey, notes that even if these countries do not enforce repressive laws, their very existence reinforces and gives legitimacy to cultures of homophobia and discrimination.³⁸ In 2009, nine men in Senegal were sentenced to eight years in prison for “committing acts against nature” and “establishing an illegal organization”. All were members of an AIDS service organization (AIDE) that provided HIV prevention services to marginalized groups, including MSM.³⁹

Activists are challenging repressive legal frameworks in the courts. As a result, in 2009, the Delhi High Court, New Delhi, India, overturned a 148-year old colonial law criminalizing consensual homosexual acts as a violation of fundamental human rights protected under India’s Constitution.⁴⁰

10. Drug users

Outside sub-Saharan Africa, injecting drug use accounts for one in three HIV infections.⁴¹ It is estimated that there are about 16 million people who inject drugs globally⁴² and that 78 percent of injecting drug users live in developing and transitional countries. The largest numbers of injectors are found in China, the United States of America and the Russian Federation.⁴³

The criminalization of drug use impacts directly on HIV prevention activities. Laws that criminalize the possession of needles and syringes enable police harassment and arrest of drug users. These laws also allow the compulsory and extrajudicial detention of drug users in centers where they are forced to undergo detoxification with little or no medical support. In many countries, there have been moves towards the resolution of legal and policy conflict between drug control and harm reduction frameworks. However, there remains a continuing reliance among drug control and law enforcement actors on punitive approaches.

Harm reduction policy is heavily influenced by the “war on drugs”. In the 1970s, the Nixon Administration in the United States aimed to reduce drug demand by reducing drug supply. This has resulted in a global, regional and national architecture of narcotic agreements, and law and financing arrangements. In 2004 alone, the US Government spent almost US\$12.1 billion on the War on Drugs Campaign.⁴⁴ In 2008, Paul Hunt, the then United Nations Special Rapporteur on the Right to the Highest Attainable Standard of Health, noted that the United Nations Commission on Narcotic Drugs is almost exclusively concerned with the three conventions on drug control and pays “scant regard for the international code of human rights that emerges from one of the principal objectives of the UN Charter”.⁴⁵

292 11. Legal services

Legal services provide case-based support for people with HIV and vulnerable populations. In addition to client case work, legal services can play a powerful role in improving the understanding of HIV legal and policy frameworks through information and education, and through training for law enforcement actors, health workers, clients of services and the general public.⁴⁶

In Viet Nam, the HIV legal clinic in Ho Chi Minh City provided advice to over 200 people during the first six months of operation in 2007.⁴⁷ In Ukraine, a variety of approaches has been used to strengthen legal support to drug users through health services. These include employing a lawyer on site, and contracting legal firms to provide services as needed.⁴⁸ The Street Lawyers (*Gadejuristen*) of Copenhagen provide another model of legal assistance to street-based drug users. This organization provides legal aid to the most disadvantaged drug users in the city. In addition to sterile injecting equipment, they distribute pocket-sized cards with questions and answers about drug laws and harm reduction.⁴⁹ Other services

train HIV-positive people and drug users to know their rights and advocate on behalf of themselves and their friends and peers when they are arrested or harassed by the police or refused access to services,⁵⁰ and provide training for lawyers and judges through professional associations.⁵¹

Organizations such as the AIDS Law Project in South Africa are engaged in legal support for individuals affected by HIV, and in the broader mission of law and policy reform. In alliance with other national actors, such as the Treatment Action Coalition, they advocate for change to the underlying structural conditions that increase HIV vulnerability of the marginalized and poor in South Africa.⁵² The AIDS Law Project convenes the South African Budget and Expenditure Monitoring Forum. The forum is comprised of HIV organizations and reviews provincial health budget allocations to ensure they are adequate to meet the need for HIV treatment.⁵³

12. Criminalization of HIV transmission

A significant challenge to the legal empowerment model is the increasing use of the criminal law in the context of HIV transmission (“the criminalization of HIV transmission”). The debate on criminalization balances criminal law and public health, and personal versus shared responsibility for protection from HIV transmission. The public health community has generally not favored the use of criminal law as a tool to deter transmission of HIV. Typical prevention programs aim to provide people with the information and resources necessary to avoid infection. The criminal law has been used as a last resort for exceptional cases not amenable to public health approaches.

Since 2004, nine West African countries have introduced national legislation based on a “model HIV law” that criminalizes the transmission of HIV if the infected person has knowledge of his or her HIV status, regardless of any intention to do harm.⁵⁴

The move towards criminalization of HIV transmission is partly motivated by the need to create meaningful legislative protection for women in Africa, who are often infected through sexual oppression and violence.⁵³ However, because women are more likely to come into contact with health services (particularly in the context of pregnancy), they are also more likely to be diagnosed with HIV before their sexual partners. They may then be accused, often inaccurately, of “bringing HIV into the home”, exposing them to violence, expulsion from the family home and criminal prosecution. When viewed from a gender perspective, such well-intended laws can have unintended negative effects.

There are other compelling reasons why the criminal law may be inappropriate:

- Criminalization of HIV transmission legitimates discrimination against people living with HIV and reinforces the quarantine mentality of “us” and “them”.
- It ignores public health knowledge of measures that prevent HIV transmission, and acts as a powerful deterrent to people knowing their status *voluntarily*.
- Fear of criminal sanctions drive people vulnerable to or living with HIV away from the very services they need to support them.
- It jeopardizes the relationship with carers who hold information on a person’s status that could be relevant to criminal proceedings; it violates the confidentiality of a provider-patient interaction, and a person’s right to privacy.
- Criminalization also reverses the progress made on countering taboos and the silence on sexuality, sexual health and lifestyles.
- Given the resource-intensity of criminal proceedings and court caseloads, it is likely that HIV-related prosecutions will be few and sensationalized. The overwhelming impact will be to discourage voluntary testing and exacerbate stigma.⁵⁶

Consequently, UNAIDS urges governments to limit prosecution of transmission to cases where there is a clear intention to transmit the virus.⁵⁷

Laws that are *indirectly* intended to reduce vulnerability to HIV infection, such as those to protect vulnerable groups from sexual exploitation and trafficking, can also have unintended consequences.⁵⁸ In Cambodia, the Law on Suppression of Human Trafficking and Sexual Exploitation, introduced in 2008, has been used by police to close brothels and arrest sex workers. It has significantly reduced HIV prevention activities with sex workers and drug users. More than 500 women were arrested for soliciting sex in the first nine months of 2008, according to the anti-trafficking organization *Agir pour les femmes en situation précaire* AFESIP, with many of them forced into rehabilitation centers. One result of this law is that sexually-transmitted infections including HIV will likely increase because sex workers are reportedly not carrying condoms out of fear they will be used as evidence against them.⁵⁹

13. HIV, legal empowerment and gender

Since the late 1990s, globally, about 50 percent of people living with HIV have been female. Women and girls represent an increasing proportion of new infections in several regions, notably sub-Saharan Africa, with rates as high as 60 percent.⁶⁰ In certain countries, there are two to five times the number of young women (aged 15-24) living with HIV than their male peers.⁶¹

UNAIDS estimates that one-third of countries globally lack legislation protecting people living with HIV from discrimination. The impact of this is compounded for women living with HIV. First, women in general endure disparities in protection and recognition of their rights under law. Discrimination is embedded in the statutory and customary laws and practice of many countries. Second, owing to the pervasive economic, social and legal dependence of women on male family members, they can suffer injustices both as women living with HIV, and as women affected by HIV, for instance, through the death of an HIV-positive husband. In 2001, all United Nations Member States undertook to take measures to respond to HIV, including addressing the impact on women and girls.⁶²

In 2008, an international expert group reviewed good practices in legislation on violence against women.⁶³ In many countries, women are deprived of equal rights relating to land tenure, inheritance, marriage, custody and divorce, and access to credit. Denial of legal protections for women generates and exacerbates poverty, homelessness, insecurity, exposure to physical and sexual violence, and health harm. A 2007 study in Botswana and Swaziland reported that:

women who lack sufficient food are 70 percent less likely to perceive personal control in sexual relationships, 50 percent more likely to engage in intergenerational sex, 80 percent more likely to engage in survival sex, and 70 percent more likely to have unprotected sex than women receiving adequate nutrition.⁶⁴

Laws that authorize the marriage of “minors” (i.e. under 18 years) also increase HIV vulnerability. UNAIDS reports that early marriage is the overwhelming risk factor for HIV transmission among young girls in low and middle-income countries. Young married women have more frequent unprotected intercourse than their unmarried peers, and with typically older husbands, and have less ability to negotiate sexual encounters.⁶⁵

The following two examples illustrate the importance of enhanced legal protection and empowerment of women living with or affected by HIV.

13.1 Property and inheritance rights

Women's equal right to property is clearly established under international human rights law. Article 16 of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (1979) requires States to:

take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular to ensure, on a basis of equality of men and women... the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property.

Land is the single most important source of wealth, and allows households to adapt to and survive financial and familial shocks and losses. Land provides food, nutrition, shelter, access to water, energy (i.e. gas and electricity) and sanitation. Productive land is paramount in agriculture-based economies where it also provides access to employment and income.

Laws and practices pertaining to the use, ownership, management and disposal of property are instrumental in the cycle of HIV risk, illness and poverty.⁶⁶ Sex-disaggregated data on the scale of women's property ownership is piecemeal, but indications are predictably low. For instance, in Nepal, rates of female land ownership reach 25 percent; in Pakistan women own less than 3 percent of the land they till; and in Cameroon, women own a mere 10 percent of the land despite doing 70 percent of the agricultural work.⁶⁷

In many countries, national laws restrict women's ability to own and inherit property. Although customary law in several sub-Saharan African countries prescribes that women should receive maintenance from the male heir of the deceased person (e.g. the woman's husband or father), this practice has virtually disappeared. Further, women's indirect contributions to the acquisition of property go largely unrecognized. In countries where the title deeds are vested in the male head of household, women are without secure tenure upon the death of or divorce from their husband. In this environment, women have a strong structural impetus to endure abusive or violent relationships, or polygamous marriages. After the death of their male partner, women may be evicted from their homes, and face property grabbing, stealing of their children and even accusations of witchcraft.⁶⁸

Women who lose their property or are evicted are often forced to accept undesirable living, family and working conditions. Research from South Africa has found that women will sometimes engage in transactional sex as a way of resolving basic needs, such as food security, but also as a means of temporary shelter.⁶⁹ Rural women who lose access to land may be forced to migrate to urban areas, leaving behind social support networks and often their children. Without property collateral, women live with the constant threat of destitution, which is amplified for those who head households and are primary carers.

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Women whose property and inheritance rights are upheld are better equipped to cope with the unpredictable course of HIV-related illness, and intimate and economic losses, including lost wages for the ill person or carer, antiretroviral therapy and health care costs, and even funeral arrangements. Property allows for land and household assets to be sold and monetized, confers guarantees for access to credit, and provides food security through access to land and liquefiable assets. Although less tangible, securing property rights for women provides physical and psychological security in circumstances of loss and precariousness, and empowers women to cope with HIV and take positive action to mitigate its impacts.

NGOs are initiating programs to address the property rights of women in the context of HIV.

In the United Republic of Tanzania, the Gender and Poverty Project, implemented by the Women's Legal Aid Centre (WLAC), promotes gender equality in property rights. Equality in property matters is recognized under local legislation; however, rural women in particular find themselves subject to traditional, patrilineal norms. WLAC provides comprehensive support and redress to women facing eviction and inheritance theft. Many of its clients are women living with HIV. WLAC holds community education campaigns to promote understanding of women's rights to property ownership, title deeds and to have a mortgage among the judiciary, law enforcement personnel and community. WLAC also offers a legal service for women to pursue property claims through legal action and the court system.

Adopting a community mobilization approach, the Women's Property Ownership and Inheritance Rights Project (KWPOI) in Kenya, which partners with the Kenya National Commission on Human Rights, engages with cultural institutions that informally govern rural communities to educate them on the property rights of women living with HIV and widows, and HIV widows KWPOI works with local elders to raise their awareness of statutory laws and the hardships faced by women in their communities. It also highlights traditional social norms that can be applied for the protection of women and widows. The approach is regarded as more "socially acceptable and accessible" than recourse to formal legal processes.⁷⁰

Using HIV clinics as a contact point, The AIDS Support Organisation (TASO), based in Uganda, provides care for people living with HIV and AIDS. When clients – 65 percent of whom are women – seek care and treatment services, TASO counselors provide information and encourage discussion of related legal matters, such as property and inheritance. TASO actively monitors policy directions and legislation regarding women's rights.⁷¹

Given the complexity of property regimes, diversity in the degrees and kinds of women's access to and use of property, and the overlay of customary laws, research is needed to comprehend the particular impact of these factors on women in various settings.

13.2 Sexual and reproductive health rights

The right to access and exercise choice over one's sexual and reproductive health is enshrined in international human rights law. Article 12 of the Committee on the Elimination of Discrimination against Women (CEDAW) directs States to "take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning". However, women are subject to abuse such as violations of their sexual and reproductive rights in multiple ways, which are amplified for women living with HIV.

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Among the grave violations of women's rights is mandatory HIV testing. Confidential and voluntary testing and counseling is fundamental to respect for women's reproductive autonomy and privacy. Mandatory testing may be authorized by law or may occur in the absence of legal prohibitions. It can also occur in countries where it is unlawful, but applied in practice, especially by health facility directives. For example, Kenya has regulations requiring informed consent for HIV testing, but a study by the United Nations Population Fund (UNFPA) and WHO found that only "half of its public health facilities and 15 percent of its maternity facilities follow them".⁷² Compounding the violation of reproductive rights and of a woman's bodily integrity, mandatory testing is often combined with breaches of confidentiality about the test result. This places women at risk of violence, ostracism or neglect by their partners and families, and can trigger the property and economic insecurities described above. Mandatory testing for all pregnant women also acts as a powerful discouragement to seeking antenatal care, which establishes crucial contact with women for early detection or timely referral of obstetric complications.

The coerced sterilization of HIV-positive women is increasing in several regions. These measures are directed to preventing the transmission of HIV to a fetus, and are often the outcome of mandatory HIV testing relating to routine medical procedures. Coerced sterilization has been documented by *Vivo Positivo* in Chile and by the International Community of Women Living with HIV/AIDS in South Africa and Namibia. In some cases, the women are not counseled about the risk of HIV transmission to the child, and the available ways to reduce it. Cases have also been reported where a woman's sterilization is made a precondition for obtaining access to other health services.⁷³

Several organizations in sub-Saharan Africa have integrated legal services within health care clinics. These are designed to provide holistic care and access to justice for HIV-positive women who have faced abuse and discrimination. The Christian Health Coalition in Kenya provides legal services to women in 30 of its HIV clinics. CARE has added paralegal services to a microfinance initiative to support women to improve their economic security and redress rights violations.

Conclusion and recommendations

A central insight from this overview of legal empowerment and HIV is the importance of the inclusion of people living with HIV and affected communities in addressing social vulnerability and injustice. The authors propose a number of broad recommendations to support HIV-related legal empowerment.

- (i) greater investment in HIV-related legal services and expansion of existing services to increase community reach. This should include investment in emerging service models, e.g. formal services hotlines, mediation tribunals, centers and outreach, referral pathways, law reform linkages, medico-legal partnerships;
- (ii) universal access to legal services incorporated into the advocacy agenda of organizations working with vulnerable populations and people living with HIV;
- (iii) development and implementation of legal services as part of a comprehensive continuum of HIV prevention, care and treatment services;
- (iv) increased legal empowerment through rights education. In parallel with law reform, there is a need to raise the awareness of women and men living with HIV of their rights, especially as protection gaps under law are addressed. Education needs to include information on legal and human rights, their infringement and consequences, and options for redress;
- (v) improved competence of legal services and practitioners on HIV-related matters. Raise awareness of legal providers to the evidence and myths of HIV to support non-judgmental lawyer-client interactions. This could also be expanded to include HIV-related modules within tertiary-level law curriculum and legal practice training;
- (vi) support in the training and development of paralegal capacity among people living with HIV and their representative networks and organizations;
- (vii) increased research in critical areas on the impact of legal frameworks on men and women living with and affected by HIV: This should include laws criminalizing HIV transmission, narcotic control legislation, extra judicial detention of drug users, as well as laws prohibiting sexual acts between men;

- (viii) applied research on the impact of legal aid and support programs, for example in relation to the role of legal empowerment in increasing HIV prevention, treatment and support outcomes;
- (ix) investment in developing strategic legal empowerment fora, for example, an international conference or series of regional conferences on the role of the law in HIV responses, including human rights and legal empowerment.

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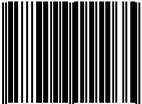
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