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Legal Empowerment of the Poor: Innovating Access to Justice

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The relationship between law and development is both promising and troubling. In the early seventies a famous article declared the field of law and development studies to be in crisis (Trubek and Galanter 1974). Two decades later, after fresh experiences with bringing the rule of law to ex-communist countries, some claimed that this crisis was continuing (Adelman and Paliwala 1993). At the same time however, from the late 1980s onward, attention to the role of governance in development increased, and as a consequence the functioning of the legal system in developing countries drew fresh interest. Economists started to uncover promising relationships between economic growth and the quality of legal institutions (Rodrik, Subramanian, and Trebbi 2004). In this context the focus was initially on promoting the rule of law and the reform of the formal institutions of the justice sector such as the judiciary and the legal profession. Partly in response to these top-down, state-centric reforms, "access to justice" as a bottom-up approach has been adopted by numerous organizations and experts over the past decade or so (van Rooij 2007). In the process, the meaning of access to justice has broadened from gaining access to the formal legal system to a more general emphasis on obtaining

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just remedies for rightful grievances, as well as achieving personal security and the protection of property rights (UNDP 2004).

These days, legal empowerment of the poor is gaining steam as a new approach more relevant to poor people's daily struggle for survival, one that links more directly to poverty reduction and human development than traditional rule-of-law promotion and law and development (Golub 2006). It shares many of the goals of these approaches, but chooses different strategies to achieve these goals. It overlaps with the "access to justice" approach, but prioritizes three domains that are crucial to the livelihoods of the poor: their property, their labor, and their business undertakings. In this chapter we consider the legal empowerment approach as a new agenda for access, exploring whether it takes a more realistic approach to improving the poor's access to justice.

Currently, one prominent advocate for this new approach is the Commission on Legal Empowerment of the Poor, an independent global commission, with its report "Making the Law work for Everyone" (Commission on Legal Empowerment of the Poor 2008a). This commission was co-chaired by Madeleine Albright and Hernando de Soto and hosted by the United Nations Development Program (UNDP). The commission's starting point was the observation that around the world, the poorest and most disadvantaged groups in society conduct the majority of their social, economic, and even political transactions and interactions in what is called the "informal sector," the "informal economy," "outside the rule of law," or the "extralegal economy." In the words of Co-chair Albright (2006, 10):

> These citizens do not own the houses or apartments in which they live, have no title to the land they till, cannot prove that the livestock they feed and care for are their own, do not qualify for credit, and have no legal license to sell what they produce. Many do not possess any legal documents, even a birth certificate or proof of identity. . . . Constantly vulnerable, they may be exploited by all who wield power, including criminals, predatory government officials, unscrupulous employers, and single-minded developers who may want to move the poor out of the way.

In this chapter we begin with some general observations on the state of access to justice around the world. Because access to justice is hard to measure and data on such access are scarce, we will give a description of the barriers to justice and mechanisms of exclusion and analyze how these work out for the poor in developing countries. Next we describe various strategies to improve access to justice, focusing on the innovative bottom-up approaches highlighted by the Commission on Legal Empowerment of the Poor. We will then discuss the agenda for access to justice in terms of what we know and what we do not know yet. We conclude by stressing the need for an innovative approach to the delivery of justice:

combining insights from academic research, smart innovation processes, sustainable "business models," and know-how from practical experience.

The State of Access to Justice

Some people may know justice when they see it. Most people have a keen idea about injustice. But we know very little about the extent to which the demand for justice is fulfilled—what share of people's legal needs is being met. Laws and legal systems can be designed on paper by legislatures building civil codes, criminal law, and court procedures. Justice, on the other hand, is delivered piecemeal, case by case, person by person. Whether a system works for groups of people with similar problems is hard to establish. It is much easier to survey people about the way they access water than to ask them whether they have access to personal security, to protection of their property, or to fair redress of their grievances in relation to other people. Justice needs are context-specific: they emerge in particular situations when people's interests are threatened by others, and the services required to serve these needs are highly variable.

In a recent paper, one of the authors of this chapter tried to identify the most urgent justice needs on the basis of legal needs surveys carried out in a number of countries (Barendrecht, Kamminga, and Verdonschot 2008). Arguably, many of the most urgent needs are related, first, to basic personal security against aggression from outsiders as well as members of the community; second, to protection of property rights, particularly rights to land and housing; and third, to legal issues that arise in connection with the two most important forms of relationships in which people invest their time and effort: their families and their work. Investments in these relationships may lead to mutual dependency, and sometimes to power imbalances. This interdependency can in turn engender conflict, making it hard to arrive at reasonable results in negotiations among those involved in the relationship. Thus, a need emerges for mechanisms that ensure that such relationships can be terminated on fair terms. For example, women often invest more time, effort, and even assets into their families than their husbands do. These investments will be lost if they end their relationships, making it difficult for them to choose to do so. This then leaves them vulnerable to exploitation. Other justice needs relate to neighbor conflicts, access to water, business relationships, and access to public services.

Legal need surveys consistently demonstrate that individuals employ a range of strategies to deal with these problems besides the official legal system. Fences and other landmarks mark off territory people consider theirs. Problems in relationships may be tackled with the help of priests, local leaders, friends, peer groups, clans, or the occasional police officer. Business relationships may be kept on track by means of reputation mechanisms that have little to do with the official legal system. In Latin America, *tramitadores* ("transactors"), local service providers

without formal legal training, help people, for a fee, to deal with the paperwork that the bureaucracy requires. Sometimes these social processes work well, and sometimes they do not.

What we know is that many people live and interact outside the official legal and economic system. The Commission on Legal Empowerment of the Poor presents some interesting figures in this regard. In Bolivia, an estimated 25 percent of the population has no official documents proving their identity and their status as a citizen. In sub-Saharan Africa, 90 percent of all rural landholding is unregistered (Commission on Legal Empowerment of the Poor 2008b, 91). Customary rights may be recognized, but in practice such rights often do not have validity beyond supporting conflicting claims to ownership by farmers, the local community, and village leaders. Cities in developing economies show a similar pattern: 60 to 80 percent of urban dwellings are outside the official property registration system. Informal employment is very common for the poor. In Latin America, 58 percent of women and 48 percent of men who work are employed informally (ibid., 144). Similar patterns of up to 60 percent nonregistration can be found for businesses.

No comparable data exist for the degree of access to justice in situations where someone has a grievance or there is interpersonal conflict. It is safe to assume, however, that access to official judicial procedures in the case of personal conflict is even more limited than access to identity documents and registrations. Even in developed countries, for the poorest 25 percent of the population most court procedures are only accessible if the claimants have access to subsidized legal aid or if they have a claim that is so valuable and likely to succeed that they can sell part of it to a professional lawyer, who works on commission. A legal needs survey conducted in the Netherlands (a country with a reasonably accessible court system and one of the most sophisticated legal aid schemes available) shows that around 45 percent of legal problems remain unresolved, and around half of these can be attributed to the high costs, time demands, and emotional strain of legal proceedings (van Velthoven and ter Voert 2004).

However, interpreting these estimates of exclusion from access to formal legal identity, access to formal employment, access to formal business rights, access to formal property rights, and access to formal courts is difficult. The percentages cited, ranging from 25 to 90 percent of the population, at the very least underline the importance of focusing on the problem of lack of access. Whether or not a person chooses to, or can, access the formal legal system is likely to depend on a variety of factors. Registering as a citizen, property owner, or businessperson has costs: there may be fees or other expenses, and dealing with the bureaucracy takes time. Registration may also have disadvantages, for example, taxes that would otherwise be avoided. Where services connected with public status are of low quality or are equally available to unofficial enterprises, an individual, entrepreneur, or owner of property may decide that official registration is not worth it.

Moreover, an informal system may exist that offers similar benefits at lower cost. These factors may differ from individual to individual, depending on the extent of that person's interests, the local alternatives to official governance structures, and the accessibility of the official system.

When we combine the information on legal needs with the figures about informality, we can safely conclude that for a large proportion of the population in developing countries, the costs of accessing official procedures are higher than the benefits. Since lowering these costs will give more people more choices, a more detailed analysis of the structure of these costs is warranted.

Barriers to Justice

Access to justice is the rule of law as it works out in practice for individuals. A country may have a functioning legal system, but the system may not serve all citizens, or it may only engage in a limited range of cases. The barriers that people face in obtaining access to justice are well known and have been analyzed by academics and practitioners alike (UNDP 2004; Commission on Legal Empowerment of the Poor 2008b, 12–15). Six of the most visible barriers to access to the formal justice system are already insurmountable for many people in developing countries: geographical barriers, financial barriers, language problems, complexity, cultural norms, and delay.

One of the most obvious barriers is the *geographical distance* from courts. In most developing countries, there are too few judges, lawyers, and courts, and those that exist are generally concentrated in the capital or larger cities. Traveling to the courts takes a lot of time and is too expensive for most poor people. This effect is obviously stronger in vast, thinly populated countries lacking modern transportation systems and infrastructure.

Financial barriers can hinder access as well. Court fees can be high and are frequently an obstacle for people even to begin legal proceedings. In addition to official court fees, there are all kinds of additional costs, particularly for poor people. If they cannot read or write they will have to find or pay someone to write their documents. If they do not have an identity document they will have to obtain one first, which costs money; for poor people even the cost of an ID picture is substantial. The legal services of lawyers, advocates, and notaries are expensive anywhere in the world. In many cases there is the obligation for representation by a legal professional, and the market for legal services is often highly restricted. Legal aid systems, if they exist at all, are severely inadequate, even in rich countries (see chapter 11, this volume), but even more so in developing countries. If they exist, they often have to focus their efforts and budgets on criminal defense, and have little left for helping the poor with other legal problems.

The third barrier is *language*. Norms and procedures have to be understandable. Laws are generally drafted and courts operate in the national language(s) of

the country, an automatic barrier to all who have not mastered that language. In almost all African countries, the official language is that of the former colonial power, but almost the entire population has a different language as its mother tongue. Even if there is a shared language that all or most people speak, the official language for legislation and court procedures remains that of the former colonial power.[1] An even higher barrier is illiteracy; those who cannot read and write are at a huge disadvantage in modern legal systems, which are strongly based on written documents, in the form of laws, regulations, and legal documents. Even when testimony can be oral, almost every step of a legal procedure requires the submission of written documents. It is easy to understand the impact of these requirements in countries with high illiteracy rates.

Related to language is the *complexity* of laws and court procedures. Because laws are intended to be unequivocal, those who draft laws often resort to highly technical language and sophisticated analytical distinctions. Lawyers the world over are known for their extravagant language and often are accused of unnecessarily complicating things. This is no different in developing countries, though the impact of this complexity is obviously more substantial when the average education level is lower. In addition, drafting laws costs money and better drafting costs more money, so the quality of drafting may be lower in developing countries. The quality of drafting suffers further from lack of institutional capacity, faltering relations between technical ministries and a country's justice ministry, and a general dearth of drafting capacity of national parliaments. Finally, in most developing countries there are different layers of law, which can be analytically separated into four ideal types. The first layer is local norms, and the second is religious norms; some would call these law, but others would not. The third layer is the legislative legacies from colonial periods, and the fourth is legislation adopted since independence, often including fairly recent and sometimes state-of-the-art constitutions (Otto 1991). Thus, there may be a profusion of regulations dating from different periods and arising from varying traditions that can be applicable to one single issue. Lack of rules that establish a hierarchy, as well as fundamental incompatibilities between these different layers, add to the general uncertainty about which rules apply (de Langen 2001). The barriers of language and complexity obviously reinforce one another when one is obliged to decipher complex laws in a language that is not one's mother tongue.

Another barrier is the existence of *cultural norms* that lead to social pressure against pursuing remedies for grievances in court—for example, because taking a conflict to court is seen as dishonorable. Sometimes such pressures arise because taking a case to court is perceived as an embarrassment to community leaders or as a sign that the community cannot handle its own problems (Bappenas, United

1. Even in the Netherlands it was not until January 1, 2003, that the last piece of legislation in the French language was abolished. Until that day, the Mining Law of April 21, 1810, promulgated by Napoleon, was still in force, though French rule over the Netherlands ended in 1813!

Nations Development Program Indonesia, and Center for Rural and Regional Development Studies 2007). In yet other cases, the court system is seen as something solely for criminals, and hence to be avoided altogether (UNDP 2004). The common denominator of these cultural norms is that the legal system is seen as external to the small-scale community in which the majority of poor people live their lives.

These are barriers to justice that are encountered mainly when a case is started. But legal proceedings also must end. As the saying goes: Justice delayed is justice denied. Courts in developing countries often have impressive backlogs, and these *delays* form barriers of their own. As the report of the Commission on Legal Empowerment of the Poor indicates, in India over 20 million legal cases are pending, and some civil cases take over twenty years to reach court. Around a million cases are pending in Kenya, and the average judge in the Philippines has a backlog of 1,479 cases (Commission on Legal Empowerment of the Poor 2008a, 32).

Mechanisms of Exclusion from Access to Justice

In addition to these relatively straightforward barriers, there are less visible mechanisms at play that create unequal access. Such mechanisms of exclusion operate differently from country to country and understanding them requires detailed inquiry into the local context. Some examples from Mali can serve to illustrate how such mechanisms operate.

In a small dusty town in the north of Mali, Ousmane, a farmer who was born and raised here, has a conflict with one of his neighbors over who owns a particular piece of land.[2] How can Ousmane find out what the law is? There are no bookstores or even libraries in this town, and Ousmane, like most people here, cannot read. But he does know that there is a justice of the peace. His courthouse is one of the few concrete buildings in the town, so everyone knows it. One day, Ousmane musters up his courage and goes to the courthouse. When he gets to the compound, the first person he runs into is the guard, who tells Ousmane either to come in or when to come back. Ousmane shyly walks toward the building, where he meets a second person, the janitor, who tells him to wait on a small wooden bench on the porch of the courthouse. So Ousmane waits. If he is lucky, he might eventually be able to talk to the official interpreter of the court. The interpreter is the one who de facto grants access to the court clerk. Or not. The clerk, of course, is not always there, does not always have time, and may not feel like helping Ousmane, who is visibly a poor man. Yet if the clerk does not tell

2. This example is fictitious; it is based on observations and combines characteristics of multiple cases studied and persons interviewed during field research conducted by Maaike de Langen from January through April 2001 and from January through April 2002, in Douentza, a small town in Mali about 125 miles south of Timbuktu (see de Langen 2005 for the results of this research).

Ousmane how to submit the papers to start a case, or even that there are papers to submit, how will Ousmane move his case forward? Obviously, the four people mentioned could be very friendly and competent and help Ousmane start his case. Sometimes they are—but sometimes they are not. Ousmane is entirely dependent on these people to show him how the process works, how the court works, and what he has to do.

Since the guard, the janitor, the translator, and the clerk are all poor people themselves, scraping to get by on meager government salaries that are often paid months behind schedule, the knowledge and access that they have can easily be turned into a source for supplementing their salaries. Perhaps not when it is their brother or neighbor looking for help, but when it is someone whom they do not particularly like or do not know at all, what is to prevent them from making a little money on the side? Or when it is not Ousmane, but his wife who comes to the courthouse? They might feel that a woman should not even be able to start a court case. It is easy to see how petty corruption as well as racial or ethnic and gender discrimination can creep into relatively casual daily interactions. The sum of these interactions nevertheless has a strong influence on de facto access to justice. In practice, these people become gatekeepers because of a profound lack of transparency in the institutions and tremendous difficulties in obtaining even the most basic legal information. These factors combine with the fact that there is no functioning mechanism to hold these gatekeepers accountable when they create or become obstacles to access.

Another mechanism of exclusion is the inability of the legal system to distribute information about the law. Many legal systems, particularly in the poorest countries, are dysfunctional to the point that it is impossible to know the laws, rules, and regulations that are in force (Barron, Smith and Woolcock 2004). This is often hard to imagine for lawyers trained in Western countries, where the process of law-making is sophisticated, rules for the publication of laws are clear, and the state has the financial and human resources to sustain the channels of publication and communication necessary for the flow of legal information. In developing—particularly the least developed—countries, this is very often not the case and it may simply be impossible to know the law.

Research in the same town in Mali provides some examples of this unavailability of legal texts. The objective of this study was to look at the effects of national decentralization policy at the local level through a case study of a particular land parcellation and distribution process, called *lotissement*. For four months in early 2002, everyone involved in land issues at the local level was interviewed: the justice of the peace and his assessors, the mayor and his deputies, the village chief and his advisers, local bureaucrats and businessmen, and a judge of the regional court of appeals. All these people used and referred to the law that determines land relations, the *code foncier*, of 1986. The problem was that this law was no longer applicable; it had been replaced by new legislation eighteen months earlier. Yet because

the text of that new law had not yet been distributed in northern Mali and no one knew of its existence, it was not being applied (de Langen 2005).

The Malian Penal Code was, similarly, unavailable in this town. In 2001 the judge proudly showed a copy of the French Penal Code, which he was using in his courtroom.[3] It had been easier for him to obtain through his networks a commercially available and annotated version of the French Penal Code than an edition of the Malian Penal Code, which it was his official responsibility to apply. Even though the Malian code is derived from the French one, the French Penal Code is still a foreign piece of legislation. But simply because the text was available, the judge applied it to the cases he had to decide. This problem of the unavailability and inaccessibility of legal texts is widespread, not just in African countries.

Unequal Access to Justice

We have identified six main barriers (geographical, financial, and language barriers, complexity, cultural norms, and delays) and two mechanisms of exclusion (gatekeepers and uncertainty about the law) and this analysis is not exhaustive. The question is how, then, these factors affect people. The law is almost always neutral in theory; nearly all legal systems recognize the principle that all people are equal before the law.[4] However, barriers are far from being neutral. It is a truism that financial barriers impact poor people differently than they do rich people. But the same holds for other kinds of obstacles. If the closest court is fifty miles from your home, it makes a huge difference whether you own a car, can afford public transport, or have to walk. In poor and rich countries alike, it is typically the most vulnerable groups, those with fewer resources, lower levels of education, and less social capital, that have the most difficulty surmounting barriers of language and complexity. The effect of cultural norms that stop people from turning to the formal legal system may be harder to pin down, but it would be an acceptable hypothesis that such cultural norms affect the poor more than the elites. With regard to delays, poor people typically have fewer resources to weather long periods of uncertainty about the outcome of a case. And though we might imagine that delays apply equally to rich and poor, in practice, for the rich there are frequently both formal and informal ways to obtain "expedited" service—thus, even delays in the court system are unlikely to affect rich people as badly as they do poor people. Analytically, all barriers to justice can be seen as factors that increase the costs of achieving redress for grievances and protection of assets.

3. Author interview, April 10, 2001, Douentza, Mali. (Interviews were done on the condition of anonymity.)

4. See Article 7 of the Universal Declaration of Human Rights: "All are equal before the law and are entitled without any discrimination to equal protection of the law." Despite this widely shared principle, it has to be recognized that upon closer inspection, discrimination persists in many legal systems, particularly against women.

The two mechanisms of exclusion, the existence of gatekeepers, and uncertainty about the law also hit poor people harder than rich. Those who are responsible for delivering justice have fewer incentives to help the poor than to help the rich. Generally, the rich get better teachers, psychologists, and doctors because they can give more in return. There is no reason why justice would be an exception. Uncertainty about the law can actually become a powerful tool in the hands of those with resources, since they can spend time, or hire a lawyer to spend time, researching the law and selectively using what laws they manage to get their hands on. Furthermore, because the texts of laws and decrees often circulate mostly in government circles, those who have networks that extend into these circles have a greater chance of obtaining photocopies of particular pieces of legislation that support their case.

Deeper power relations cannot be ignored in the analysis of access to justice. For example, the gatekeepers themselves are often poor and relatively powerless. Their behavior may be only a symptom of a larger dysfunctional system, in which some interests may purposely or inadvertently perpetuate inaccessibility for the have-nots. Barron, Smith, and Woolcock (2004) describe how conflicts are also an opportunity for groups to define themselves. Rallying around a cause or refusing to use group pressure to redress grievances are both mechanisms around which extended families, clans, communities, or work-related groups can organize, making it more attractive for members to belong to said group. These strategies make the group (and its leaders) more powerful. Individual grievances and interests may thus be transformed into (or strategically excluded from) group interests, sometimes getting deformed along the way. What starts as a particular problem about payment of salary with an individual employer may end up as a rally against employers in general about working conditions. In environments where group pressure and protection are much more easily accessible than a neutral intervention, the rights and interests of individuals are more likely to become part of a complicated package deal. The group grants protection and informally regulates access to essential goods and services among group members. The individual sees some of his interests and rights protected, and has to submit to the norms and wishes of the group in other matters.

The well-being of the collective may thus become relatively more important than that of the individual. Formal legal systems tend to take the individual as the unit of protection, and thus have difficulty dealing with this social reality. This becomes apparent when legal institutions have to deal with customary land law, which often assigns rights to communities instead of individuals. One of the possible outcomes of these "dynamics of difference," as Barron, Smith, and Woolcock (2004) call them, is that local, customary norms come to be seen as unjust when viewed through the lens of Western human rights lawyers. Because these norms are more or less the result of a trade-off between protection and other interests, they often discriminate against individuals who are disadvantaged

within these relationships: women, subsistence farmers, or the poor more generally. Unjust norms at the local level may even migrate upward into the formal legal system.

Because barriers to justice and mechanisms of exclusion affect some people more than others, de facto equality before the law is not achieved and the law then becomes a resource to those who have the knowledge, the networks, and the means to use it.[5] The better-off can use the law to strengthen their positions, while the poor have a much harder time asserting themselves and claiming their rights. Typically, preexisting inequalities will be reinforced or even exacerbated when some people can make use of the law when it benefits them and ignore it when it does not.

Rule-of-Law Reform and Access to Justice Programs

The promotion of the rule of law, which often comprises, but is broader than, technical assistance to law reform, remains very high on the international agenda. Traditional rule of law promotion is dubbed the "rule-of-law orthodoxy" by Thomas Carothers (2006) in his sobering analysis of the lack of success of this "industry" so far. He mentions three types of rule-of-law reform: "Revising laws or whole codes to weed out antiquated provisions[;] . . . the strengthening of law-related institutions, usually to make them more competent, efficient, and accountable[; and] . . . reforms aimed at the deeper goal of increasing government's compliance with law. A key step is achieving genuine judicial independence" (7).

An increasing volume of literature is suggesting, without disputing the importance of the rule of law, that there are still large gaps in our knowledge about how the rule of law develops and what can be done to support or stimulate this process in a way that delivers tangible results for poor people (Carothers 2003, 3). In providing support to justice sector reform, the vast majority of donor efforts focus on the formal legal system, neglecting informal justice systems (Wojkowska 2006). Frequently, such legal development cooperation starts with an analysis of the system. It compares the legal system of a given developing country to functioning systems, mostly in Western countries. This especially happens in areas such as commercial law and the functioning of the financial system, but is also still a prominent aspect of civil justice reform. Based on this comparison, reformers identify what needs to be fixed and (theoretically) how these changes can be achieved, in a process called "attempting to reproduce institutional endpoints" (Carothers 2006, 21).

Does this work? Carothers and his colleagues seriously doubt that such top-down approaches do much good. In particular, it is difficult to see how they can

5. For a groundbreaking discussion see Galanter (1974).

improve access to justice for the majority of the population deprived of the ability to use the formal legal system. Redrafting laws in the economic domain will not do much to help small and medium-size enterprises to protect their business interests, though it may remove some red tape. Training and paying judges will have little effect on the geographical, financial, linguistic, and complexity barriers that individuals face. Fighting court delays and the cultural norms that inhibit taking legal action seem to require something other than fostering legal education and professional standards for lawyers.

Expanding access to courts by setting up local branches or alternative dispute resolution systems with sufficient capacity to serve the justice needs of the poor is expensive. The Council of Europe countries, most of which are stable and lack the conflict triggers that beset developing countries, tend to employ twenty to forty professional judges and ten to forty nonprofessional judges per 100,000 inhabitants (European Commission for the Efficiency of Justice 2006, 77). Court clerks, lawyers, experts, and many other professionals are also required to deal with disputes and crimes satisfactorily. Thus, an average developing country of 20 million inhabitants needs to select, pay, train, manage, and supervise at least 10,000 (semi)professionals to make the legal system work. Given the numerous competing development priorities, developing country governments are unlikely to be able to free up the necessary resources for such a large-scale, long-term investment.

Moreover, a functioning legal system requires a delicate interplay among these professions. Judges cannot work without clerks and access to legal information. Lawyers cannot help their clients without judges. Even finding a path leading to institutional equilibrium on a countrywide level is likely to take many years. In the meantime, the poor will still have problems with local gatekeepers and uncertainty about the law. Not one rule-of-law reform program has originated a really comprehensive or sustainable solution to the challenge of funding and supporting the various interlocking parts of the legal system at the same time.

The best that may be expected from these top-down rule-of-law approaches is that they can gradually spread legal access to larger portions of the population once a nation's economy can support more extensive and better legal institutions. According to one strand of literature, economic development is likely to increase the reach of the rule of law because stronger suppliers of goods and services become interested in bigger consumer markets, and thus need richer customers, which they can only get by guaranteeing them more legal protection. Still, this is not exactly the type of shortcut the law and development world is looking for.

A New Agenda for Access: The Legal Empowerment Approach

The term "legal empowerment" has been around for some time. The concept, as it is used in a number of publications, brings together a range of alternative approaches to promoting access to justice that have been developed largely in

response to discontent with traditional rule-of-law and law-and-development approaches. Though certainly not mainstream, the activities and underlying ideas that have been grouped under the concept of legal empowerment are now fairly common throughout the world, and have been applied by many different organizations, in particular by NGOs, at local, national, and international levels. Stephen Golub is the author of a number of texts on legal empowerment, published in reports for the Asian Development Bank, the Carnegie Endowment, and the World Bank (Asian Development Bank 2001; Golub 2003, 2005, 2006).

In these publications, legal empowerment is defined as "the use of legal services and related development activities to increase disadvantaged populations' control over their lives" (Golub 2003, 25). It is seen as both a process and a goal. Golub sees legal empowerment as a strategy combining a number of activities that can be grouped into two main categories, one focusing on access to information and awareness raising and the second on direct support for meeting the legal needs of the target group. In the first category, the activities mentioned include using accessible printed media and broadcast media, performing arts, popular entertainment, community law libraries, and the Internet to deliver legal information. Other activities are different kinds of training, such as community-based training, distance education, youth education, and training of trainers. The second category comprises the use of paralegals, alternative dispute resolution, legal aid, public-interest litigation, administrative advocacy and education, and training for government officials (Asian Development Bank 2001, 41–49).

Legal empowerment as advocated by Golub can be seen as a collection of interventions in the field of law and development that have proved successful in practice. More recent writings have identified five common elements as typical of legal empowerment strategy. These include strengthening the capacities and power of the disadvantaged; selecting issues on the basis of the needs and preferences of the poor; focusing on broader societal, political, legal, and administrative actors, and not only the justice sector; supporting civil society; and relying on domestic ideas and initiatives (Golub 2006, 164). Finally, an important characteristic is the rejection of the traditional, state-centric, justice-sector-focused, and lawyer-dominated "rule-of-law orthodoxy."

The Commission on Legal Empowerment of the Poor takes a somewhat different approach to legal empowerment because the main problems that the commission focuses on are poverty and exclusion, which, it argues, are intimately related. The rallying cry of the Commission on Legal Empowerment of the Poor is that 4 billion people in the world are excluded from the rule of law. This indicates that the agenda of the commission is broader than access to justice alone, because it looks at exclusion from the rule of law more broadly and draws particular attention to the property, the labor, and the business undertakings of the poor. Three shifts of emphasis distinguish the legal empowerment approach:

1. Adopting a legal perspective on the economy at the micro-level
2. Adopting an economic perspective to supplying law at the micro-level
3. Taking a realistic approach to the law and the economy

A Legal Perspective on the Economy at the Micro-Level

The Commission on Legal Empowerment of the Poor (2008a, 3) states, "No modern market economy can function without the law." Inclusive economic growth can only be achieved if the necessary legal framework is in place. The law is seen as a fundamental underpinning of the economy: the invisible hand of the market can only function if there is also the visible hand of the law to organize economic interactions, not only on the level of macro-economic institutions but also on the micro-level of economic interactions.[6] This shift impacts the analytical starting point of the commission: the livelihoods of the poor, livelihoods that are composed of their assets and the activities they undertake. The domain of property rights is relevant to their assets; the domains of labor and business rights are relevant to their activities. The poor need effective legal tools and protection in these areas in order to have a fair chance to improve their lives. Access to justice is the necessary underpinning of these three substantive areas of law.

Legal empowerment is a dual approach based on both protection and opportunity: protection of what poor people have and hold, and opportunity to increase the productivity of their assets and activities. A focus on protection is fairly common when the law in developing countries is assessed, which is often undertaken under the rubric of human rights, especially civil and political rights. Protection of people and of their property is the first step to any kind of development, and for this reason legal empowerment starts with protecting what people have. Yet legal empowerment focuses on the law not only as a means of protection but also as a means of creating opportunity. Access to justice from this perspective implies equal access to remedies against injustices suffered—protection—but also equal access to participation in society and the economy—opportunity.

Particularly in relation to opportunity, the idea of legal empowerment is broader than strict access to justice. In both the access-to-justice approach and the protection dimension of legal empowerment there tends to be a focus on finding resolutions to situations of conflict, but in the opportunity dimension of legal empowerment the focus is more on the institutions that the law creates and the economic transactions that the law facilitates, even when conflict never emerges. The fact that the law organizes behavior and expectation without ever explicitly coming into play is called the shadow function of the law. This shadow function exists only when the possibility of recourse to legal proceedings is genuine—when there is access to justice.

6. Credit for this metaphor of the law as the "visible hand" goes to Jens Chr. Wandel.

In a way, the notion of legal empowerment is a more instrumental perspective on the law, a way of seeing how the legal system as a whole underpins the functioning of society and the workings of the economy. The focus is therefore on law and legal tools as one of the crucial elements that people need to make their economic agency more productive, thereby improving their standard of living. When we look at the law through this lens our attention shifts from the more traditional focus on criminal law, commercial law, and some areas of civil law such as family law to administrative law and other areas of civil law, most notably the domain of property rights.

Where traditional access to justice programs often focus on training judges, building more courts, raising legal awareness, and revising legislation to implement international human rights treaties, legal empowerment programs are more likely to focus on helping people obtain a legal identity, a recognized street address, and an enforceable and protected title to land; increasing the accessibility of business registration; mending dysfunctional permit systems; protecting street vendors; and improving access to financing. Other important elements are enabling multinationals and micro-entrepreneurs alike to enter into and realistically enforce contracts.

An Economic Perspective to Supplying Law at the Micro-Level

We believe that legal empowerment also demands a different way of thinking about access to justice. It does not deny the fundamental importance of access to justice nor the right of all people to be treated equally before the law—on the contrary—but argues that the use of supply-and-demand analysis and the adoption of more pragmatic economic approaches to implementation can be beneficial in making access to justice a reality.

One of the problems of an analysis in terms of barriers to justice is that it focuses on the formal legal system as the sole locus of the "justice" that people want to access. The reality of access to goods and services is that many different types are on offer, of different qualities and fitting different needs. They must also be measured against higher or lower costs of access. Justice is no exception to this rule. From the perspective of the poor, the formal legal system, with its lawyers and courts, is often out of reach, but as we have seen, the poor may have access to informal justice systems to settle their grievances, to local authorities, to religious authorities acting as intermediaries, to groups of the similarly disadvantaged that can take collective action, and to other local routines and ad hoc ways of solving disputes and protecting rights. Therefore, legal empowerment focuses on broader societal, political, legal, and administrative actors, and not only the justice sector.

When we adopt an economic perspective on access to justice, the question becomes, which goods or services have to be supplied by this range of actors?

Law and development literature has not yet produced a convincing definition of the "justice" that should be provided, at least not one that is independent of any particular justice system. We may, however, tentatively list the following elements that should be accessible:

—A setting in which a dispute or a need for protection can be discussed and solutions can be negotiated

—Principles, rules, criteria, or schedules that guide the outcomes of discussion

—A (neutral) person who can decide on outcomes, particularly if the disputants are not able to settle their differences

—Sufficient incentives for the disputants to live up to the outcome that is reached through settlement or neutral decision

These four elements do not fit every need for justice in the same way. Access to justice is not only a matter of norms and processes that enable the settlement of disputes, as the Commission on Legal Empowerment for the Poor has stressed, but also an approach that supplies other goods and services. An inclusive legal system gives access to smoothly functioning legal norms and institutions and allows citizen participation in government law making, as well as providing more tangible services such as birth registrations, identity documents, personal security, and well-defined and secure property rights.

Another consequence of this shift in thinking is that it draws attention to the demand side of justice. This is particularly relevant for states that have very limited budgets for the justice sector but that nonetheless wish to improve their justice systems. By focusing on finding solutions to the needs of the people that are within the means of both the government and the poor, legal empowerment can lead to focused interventions that have a disproportionately large impact. Legal empowerment is context-specific, so the best way to achieve this impact is to base any reforms or programs on an initial analysis of the justice needs of the poor as they themselves perceive them.

Thus, there is a strong emphasis on participation in the legal empowerment approach when it comes to defining problems and designing solutions. Though this approach is not new, there are very few programs that truly take the needs of poor people as a starting point for reforms in the justice sector. One such recent (and impressive) example is research conducted in a project for the Indonesian government and executed with support of UNDP Indonesia (Bappenas, United Nations Development Program Indonesia, and Center for Rural and Regional Development Studies 2007). Extensive research underlying this report focused on identifying the key justice-related issues affecting citizens at the village level, especially the poor and disadvantaged.

The next step is to determine the capacity of the poor to cope with their justice needs and to develop ways to incorporate these findings in planning services. One way of doing this is to follow the base-of-the-pyramid method for developing

products and services tailored to the needs of the poor, as proposed by proponents for developing microjustice as the next form of microservice.[7] This method adapts first world technology, management processes, and product development techniques to third world circumstances. It aims to develop products and services that are affordable for the poor, yet sustainable to deliver for legal entrepreneurs on a for-profit basis.[8] One element of microjustice is the idea that justice should be provided by local labor, abundantly available within the communities where the poor live. Microjustice facilitators could provide neutral assistance with communicating and negotiating conflicts, extending local conflict management capacities. These neutral, problem-solving legal services can be provided with information about essential rules of thumb for dealing with the most common legal problems; these rules would correspond to the most urgent legal needs identified at the outset of the program. This information could in some situations be delivered by a Web interface, which would supply both local rules regarding these problems and similar rules for the corresponding problems in other locations. Transparency of informal and formal rules of thumb—for example, on how to calculate indemnities when someone is fired, what a reasonable compensation is for ending a lease, or how to arrive at acceptable amounts for alimony in the case of divorce—could establish "the going rates of justice." This would not only lead to lower costs for dispute resolution but also, it is to be hoped, would enhance the possibility of comparison between locations and jurisdictions, which would also lead to a gradual adjustment of unfair rules in the direction of international standards.

Taking a Realistic Approach to the Law and the Economy

Perhaps it is surprising that taking a realistic approach should constitute a shift in thinking about access to justice, but it is a shift. Lawyers, who generally make up the majority of practitioners in law and development projects, are trained to look at things not as they are but as they ought to be. If a lawyer is in a different country and wants to understand how the law there works, he or she will generally read the country's statutes and laws. Only socio-legal scholars would think to observe actual court sessions and conduct interviews to find out what really happens. Public policymakers often fall into the same trap. They base their policies on assumptions about how the economy works or how society is organized.

Legal empowerment, by contrast, focuses on the economy as it really is, not as models describe it, and on the law as it really works in practice, not as it appears on the books. The informal economy and informal justice systems must be taken into account and should form an integral part of the context analysis. In real life, formal and informal are not opposites, but are two extremes on a continuum. People use a mix of formal and informal institutions, depending on the attrac-

7. See Barendrecht and van Nispen (2008) and other papers available at www.microjustice.org.

8. For more information, see the Base of the Pyramid protocol website (http://bop-protocol.org).

tiveness of the alternatives they see in their particular situation. Legal empowerment is about explicitly recognizing the informal sphere and proposing solutions based on a thorough understanding of the informal and the formal spheres and the interplay between the two.

Thus, legal information is a matter not only of learning the law but also of learning how to cope with disputes through negotiation techniques and appropriate communication. Legal services and justice goods not only can be provided by professional lawyers but also can be delivered by forming peer groups that press local power interests gently, or by paralegals who coach clients in dealing with their opponents. Microjustice facilitators may intervene on behalf of clients while maintaining a generally neutral stance, but also may have to create incentives for solving the problem in a mutually satisfactory manner.

Revisiting the Barriers and Mechanisms of Exclusion

Legal empowerment addresses the issue of access to justice in a much broader and more realistic manner than has otherwise been attempted, by looking at linkages that can be created between the informal mechanisms that exist at the local or community level and the formal legal mechanisms that operate at the level of the state. Because local informal mechanisms for dispute resolution are taken into account as an integral way of handling conflicts, the question of access to justice becomes inverted. Are those mechanisms that are accessible just? Legal empowerment starts to work with mechanisms at the local level with three objectives. The first is to create local interaction and discussion about how these mechanisms work and how they compare with similar rules elsewhere, with broader principles of human rights law, with the constitution, and with national legislation. The second objective is to use these local mechanisms as building blocks for improved functioning of the formal legal system and state courts. Third, reformers can create a workable interface between local, informal practices and the formal national legal system through recognition, incorporation, and standardization of elements of these informal practices where appropriate.

In terms of geography, a legal empowerment approach emphasizes local solutions and builds on local mechanisms. Financial barriers to justice will also be reduced: informal mechanisms for dispute resolution have a fee level set to accommodate what the market will bear—in fact, there may be no fees at all. If court proceedings are necessary only in exceptional cases, courts and legal aid will become easier to fund. A hierarchical system of appeal with recognition for lower-level judgments is one option, but there may be other ways to monitor performance of local systems and to make them answer to client needs. Informal mechanisms typically operate more quickly, without formal procedural complexities that tend to delay court proceedings. There may also be a deescalating effect, which is a central element of alternative dispute resolution mechanisms. Whereas

court procedures tend to exacerbate conflict by encouraging parties to take extreme positions in a winner-takes-all situation, local mechanisms may be more geared to facilitating settlements and finding solutions acceptable to both sides. The language barrier is easier to deal with at the local level, and procedural and substantive complexity can be significantly reduced. Paralegals and legal clinics can operate in the local language(s). Simplification of all kinds of administrative and licensing procedures will lower barriers of complexity, language, time, and costs. As in all things, however, much depends on the execution. Dispute systems have a natural tendency to become more complex and formalized over time, and the conflicting interests of both clients make them poor guardians of the quality and costs of the justice products they receive.

Cultural norms that prevent people from using the legal system may not operate in the same way for informal justice mechanisms. Of course, other cultural norms will continue to prevent people from meeting some of their justice needs, such as women who dare not speak up against abusive husbands, but resistance can perhaps be reduced. If the dispute system is more accessible and in greater sync with the realities in which people live and organize their economic transactions, it is less likely to be perceived as alien. Involving communities in processes through which nonstate and formal institutions are linked will be crucial. One of the challenges, however, remains to see how local justice reformers can cope with unjust local norms and existing power relations that are often the result of the very institutions that offer the poor some degree of economic and social protection.

Reducing exclusion is what the legal empowerment approach is all about. There are several ways in which legal empowerment removes the obstacles to access enumerated earlier. If legal knowledge is available and shared, gatekeepers will no longer be able to exclude disadvantaged parties with their monopolies on procedural knowledge. There is, of course, the risk that paralegals, microjustice facilitators, or other new legal service providers will themselves become new gatekeepers; mechanisms of accountability and transparency will have to be built in to avert this. Increased transparency of legal information also makes it easier for clients to monitor the quality of legal professionals and increases choice, just as medical information available through the Internet makes it easier for patients to monitor health care providers or to choose less costly self-help medication. Increased transparency of ground-level mediation and negotiation may also prove to be an antidote to power relationships that go awry.

Conclusion: An Access Agenda under Construction

Legal empowerment has the potential to address both obstacles to access and mechanisms of exclusion, thus contributing to a more inclusive rule of law. Mak-

ing the law work for everyone is a very ambitious target, but bottom-up processes may be able to usher in real progress toward this goal. Legal empowerment employs preexisting mechanisms inducing the market to deliver justice services; it also takes as its starting point the justice needs that are most clearly linked to participation in the economy and to other processes that are essential for human development. Legal empowerment means more than safeguarding certain human rights against government intervention. We must emphasize its focus on the informal economy and informal justice systems, its work with civil society and paralegals, its privileging of legal needs of the poor, its insistence on mediating between local and national legal processes, and its commitment to lowering costs.

However, a promising approach does not yet constitute a feasible strategy. Translating the approach into concrete programs and getting the implementation right will be crucial. It is also difficult, because of weak incentives in a setting of conflicting interests (Barendrecht and de Vries 2004). Before legal empowerment can be made to work wholesale, we need to investigate further the delivery of the four crucial elements of a dispute system. How can reformers create a neutral setting for discussing disputes? How can practitioners ensure that applicable norms and other knowledge they need to solve disputes are made available? Support by information technology may be a solution, but who will publicize the information? Why does the multi-billion-dollar legal information market only seem to serve the legal profession, and not the clients themselves? Making a qualified neutral person accessible to resolve disputes is still a huge challenge. Even developed countries suffer from court delays and high costs of access to justice, so it is hard to find examples of a working technology that can be scaled up for mass production of justice goods. Such advances can only be made in the long run through determined efforts at standardization, cost reduction, and making good use of available best practices. Incentives to live up to outcomes also deserve much more attention. Sanctions provided by the formal legal system may be much more expensive to organize than informal triggers to live up to norms and outcomes of dispute resolution processes. Examples, rewards, reputation mechanisms, and according to one author even limited forms of harassing may be much more effective (Fafchamps 1996). At the same time there is always the danger that these may lead to new inequalities.

Perfect justice is as unlikely to exist as any other perfect service. Implementing perfect justice from above seems to be an impossible mission. Improving justice from the bottom up by empowering clients and by stimulating justice entrepreneurs to innovate legal services is a more realistic approach. Making it happen will be a matter of hard work and of smartly organized trial and error processes, informed by the social sciences. That is the innovation that we think the legal empowerment approach can bring.

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