The Commission on Legal Empowerment of the Poor: One Big Step Forward and A Few Steps Back for Development Policy and Practice

Stephen Golub*

The Commission on Legal Empowerment of the Poor has made a considerable contribution to the international development community by focusing attention on concrete legal needs of impoverished populations. As such, it constitutes a fine start for international, regional and domestic efforts to pull together a legal empowerment agenda that will directly benefit such groups. Nevertheless, the Commission's report falls short in key respects. It displays an inordinate faith in employing rational persuasion to grapple with a widespread problem it highlights – how to get self-interested politicians and other elites to forfeit their own advantage for the well-being of society. It is similarly stumbles in addressing how to best implement ambitious legal reforms, so that they have actual impact and do not simply exist on paper. And it does not reconcile the Commission's fundamentally top-down approach with an area of development that is bottom-up in nature. Going forward, it is important to build on the Commission's good start, but depart from its false and even counterproductive steps; the international community should instead draw on successful country-specific legal empowerment experience from diverse contexts. This features increased investment in civil society efforts to make the rule of law a reality, since such initiatives have a better track record than government-centered programs that mainly rely on elite good will. It more specifically involves enhanced long-term funding for domestic and international NGO efforts, both in the form of legal services for the disadvantaged and by integrating such services into broader socioeconomic development programs. The international community should also support impact-oriented applied research and move toward establishing a Millennium Development Goal for legal empowerment.

* Lecturer in International Development and Law, Boalt Hall Law School, University of California at Berkeley and Adjunct Professor in Strengthening Legal Systems and Legal Empowerment, Central European University, Budapest.

Hague Journal on the Rule of Law, 1: 101–116, 2009
© 2009 T·M·C·Asser Press and Contributors
doi:10.1017/S1876404509001018

Cambridge JOURNALS

http://journals.cambridge.org Downloaded: 13 Mar 2009 IP address: 76.102.27.161

Introduction

Background on the Commission

The provocative central thesis of Commission on Legal Empowerment of the Poor (CLEP) is that 'four billion people around the world are robbed of the chance to better their lives and climb out of poverty, because they are excluded from the rule of law.'[1] Co-chaired by former US Secretary of State Madeleine Albright and influential Peruvian economist Hernando de Soto, the Commission comprised 23 members, 19 of them current or former presidents, prime ministers, high court jurists or other top government officials. It was launched in 2005 with key initial support from the Norwegian government; commenced full-fledged operations in 2006; received financial support from several donor agencies; was administratively hosted and substantively assisted by the UN Development Programme; solicited input from an advisory board, specialized working groups and regional consultations; and delivered its report[2] and ceased operations in 2008.

Examining poverty through the lens of 'legal exclusion' – that is, exclusion from protection by the rule of law – the Commission's report asks the international community to consider certain livelihood-oriented rights and legal issues that directly impact the poor.[3] These feature what it calls the four 'pillars' of legal empowerment. Three of the pillars are property rights (mainly land-oriented), labor rights and (mainly micro and small) business rights. The forth is an enabling framework constituting access to justice and the rule of law, with legal identity (of persons lacking legal status and attendant rights) as a cornerstone.

The first three pillars in particular shift away from dominant, orthodox approaches that most international agencies mainly use to promote the rule of law (ROL). Such approaches, sometimes called 'rule of law orthodoxy' (though not

[1] Commission on Legal Empowerment of the Poor [hereinafter, CLEP], *Making the Law Work for Everyone: Volume One, Report of the Commission on Legal Empowerment of the Poor*, 2008, p. 1.

[2] The report comprises two volumes. The first volume constitutes the findings and recommendations of the Commission itself. The second consists of five chapters, each one representing the findings of the five working groups (on access to justice and the rule of law, property rights, labor rights, business rights, and road maps for implementation of reforms) that contributed to the Commission's thinking. However, as stated in the Introduction to Volume Two (at p. v), 'The chapters contained in this volume reflect the views of the respective working group members, though not necessarily the view of the Commission.' To avoid conflating working group conclusions with those of the Commission itself, this paper accordingly focuses on and draws all of its references from Volume One.

[3] Though the report grapples with a host of other issues, its consistent theme involves how legal exclusion robs harms people's livelihoods, income and assets. Thus, for example, it asserts (at p. 19) that '[f]our billion people are not protected adequately by law and by open and functioning institutions, and, for a range of reasons, are unable to use the law effectively to improve their livelihoods.'

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 13 Mar 2009 IP address: 76.102.27.161

by the Commission), concentrate resources on courts and other government legal institutions in a top-down manner. Two of ROL orthodoxy's underlying, unproven assumptions are that such aid substantially improves those institutions' performance and that such institutional improvement trickles down to alleviating poverty.[4]

To its credit, CLEP's report instead illuminates key property, labor and business rights issues that directly impact the poor. More generally, the report takes a big step up in raising the international profile of legal empowerment and its attendant emphasis on directly using law to benefit and strengthen the poor. This is a signal accomplishment.

Regrettably, however, despite the hard work of the Commissioners and many who helped them, the report also takes a few steps back in its integration of law and development. It similarly falters in its analysis of legal empowerment, a concept that pre-dates the Commission by a number of years. Among other drawbacks, the report:

- takes as its starting point the widely questioned and somewhat unproven ideas of Commission co-chair Hernando de Soto;
- accordingly attaches excessive importance to legal exclusion and downplays the many other legal and non-legal factors that perpetuate poverty;
- ignores prior research and experience that take broader though more modest views of legal empowerment;
- pays inadequate attention to gender;
- proposes a top-down approach to what it nevertheless claims is bottom-up development;
- implies that rational persuasion trumps political power and self-interest; and
- adopts often inconsistent assumptions and recommendations

Despite these flaws, the Commission merits praise for potentially moving the integration of law and development past the intellectual and programmatic staleness of ROL orthodoxy. The international attention it has garnered includes a recent United Nations General Assembly resolution endorsing CLEP's findings, as well as discussions, meetings and possible funding initiatives in the international community.

This special section of the Journal

In view of the CLEP's potentially valuable contribution to development, as well as its drawbacks, its report merits serious scrutiny by development scholars, practi-

[4] See, Stephen Golub, 'A House Without a Foundation', in Thomas Carothers (ed.), *Promoting the Rule of Law Abroad: The Search for Knowledge*, 2006, p. 105.

CAMBRIDGE JOURNALS

http://journals.cambridge.org Downloaded: 13 Mar 2009 IP address: 76.102.27.161

tioners and policy-makers. This overview essay and the four articles following it constitute initial attempts to meet that need.

The praise, critiques and recommendations in this section's five papers aim to build on CLEP's good start in recommending redirection of resources away from orthodox, trickle-down approaches to integrating law and development, and toward strategies that help the poor use the law effectively.

The papers inevitably generalize somewhat in characterizing the report. Persons familiar with the process by which the Commission put together the document are aware that there were both healthy disagreements and management shortcomings in its work. To some extent, this produced valuable and necessary nuance. But it also yielded internal inconsistencies; any review of the report must accordingly focus on the thrust of CLEP's analysis rather than trying the square the circle of such contradictions.

This essay first considers key elements of the other four papers. The papers and authors were solicited partly to provide a diversity of backgrounds and perspectives. Dan Banik offers a scholarly review of CLEP's report. Matthew Stephens complements this with a practitioner's point of view on the Commission's work. Jan Michiel Otto and Julio Faundez, respectively, place the property and labor rights aspects of the Commission's report in broader contexts.

The essay then moves on to tie together selected elements of the four papers and to add its author's own comments on the Commission report. It concludes by proposing some steps forward for the international community concerning legal empowerment.

One common thread that runs through all five papers must be emphasized at the outset. Despite the sometimes strong and detailed criticism of the CLEP report, the papers' authors and the Journal's editors recognize the great dedication and effort that the Commissioners and others associated with the report put into producing the document. The aim of the criticism is to build on the Commission's good start and hard work in focusing attention on the ways in which legal empowerment can help advance development.

What is legal empowerment?

What is legal empowerment? 'The Commission understands legal empowerment to be 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.'[5]

There are many alternative definitions of what the concept embraces, most pre-dating the Commission. CLEP's definition is certainly acceptable. But this

[5] CLEP, *Making the Law for Everyone*, 2008, p. 3.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 13 Mar 2009 IP address: 76.102.27.161

paper proposes one that, it is hoped, helps clarify the concept: *Legal empowerment is the use of legal rights, services, systems, and reform, by and for the disadvantaged populations and often in combination with other activities, to directly alleviate their poverty, improve their influence on government actions and services, or otherwise increase their freedom.* This definition is favored here to emphasize, *inter alia*, that:

- legal empowerment can work through different legal systems (including traditional, administrative or judicial) to address various rights and issues;
- disadvantaged populations (such as women in many contexts) served by legal empowerment are not necessarily impoverished, though that is typically the case;
- the relevant work is often undertaken by such populations themselves;
- the legal elements often build on or otherwise integrate with mainstream socio-economic development fields (such as rural development, natural resources management, or gender) or other activities (such as group formation, community organizing, policy advocacy, or the use of media);
- legal empowerment involves direct action and impact by and for the disadvantaged (as opposed, for instance, to generic judicial reform efforts that do not always benefit them or that do so indirectly); and
- this work may aim not only to reduce economic deprivation (as central as that is), but to also increase justice for the disadvantaged, their positive impact on governance (be it accessing health or educational services or enhancing accountability), and their control over their lives.

Those clarifications aside, the point of this paper is not to draw semantic distinctions between different definitions. It is the substance of the CLEP report that merits consideration.

Selected Aspects of the Four Papers

A scholarly overview

In 'Legal Empowerment as a Conceptual and Operational Tool in Poverty Eradication', Dan Banik of the University of Oslo – and the editor of a recent book on this topic[6] – contributes a thoughtful summary of CLEP's work and analyzes it in the broader contexts of legal empowerment and human rights-based approaches to development. He notes that the initial assumptions underlying the Commission's creation largely accepted De Soto's ideas, but that in the end its report moved away from solely reflecting those views.

[6] Dan Banik (ed.), *Rights and Legal Empowerment in Eradicating Poverty*, 2008.

CAMBRIDGE JOURNALS

http://journals.cambridge.org Downloaded: 13 Mar 2009 IP address: 76.102.27.161

Banik critiques the very ambitious nature of the Commission's central assertion – that four billion people are impoverished due to their exclusion from the rule of law – and its accordingly attributing their poverty to their assets and work being legally insecure. He points out that these are unsubstantiated claims and that many other complex, interrelated and arguably more important factors perpetuate poverty – social exclusion, economic inefficiency, high population growth and political instability, to pick just some from his lengthy list. Conversely, while seeing the value of CLEP's four pillars, he nevertheless questions why they were selected to the exclusion of other priorities that involve rights and legal issues important for poverty reduction – education and violence against women, for instance.

Banik similarly appreciates the importance of using the law to uphold rights and advance development, but highlights the shortcomings of excessive reliance on legal approaches and on assumptions that such approaches alone can overcome countervailing political actors and factors. Drawings on his own research in India, he points out how politicians there (and other countries) are often able to ignore laws and court rulings.

A practitioner's perspective

In 'The Commission on Legal Empowerment of the Poor: An Opportunity Missed', Matthew Stephens examines the CLEP from the perspective of a development practitioner who formerly headed the World Bank's pre-CLEP legal empowerment program in Indonesia, Justice for the Poor, and who now consults for the Bank on this and related issues.

Stephens credits CLEP with increasing international attention to the nexus of poverty, injustice, and legal exclusion. Yet, as he points out, the Commission, despite its proclamation that politics cannot be ignored, fails to grapple with political challenges (of getting elites to cede power to the poor, to name just one of many) and instead adopts a mainly technocratic approach. Nevertheless, he agrees with CLEP on a crucial matter, making a point that its report at least implicitly raises – justice sector reform initiatives too often start with the question of what is wrong with relevant state institutions, rather than the more important question of what issues matter most to the poor.

A key element of his article highlights the fact that civil society has been far ahead of major international development agencies in addressing such issues and carrying out legal empowerment work – even if such work often takes place under other rubrics. Another important part of Stephens' analysis is his point that integrating legal empowerment into broader development initiatives makes sense not just substantively, but in terms of leveraging more development funds than could be made available through narrowly conceived law initiatives. He cites the World Bank's experience integrating a legal empowerment component into a $100

CAMBRIDGE JOURNALS

http://journals.cambridge.org Downloaded: 13 Mar 2009 IP address: 76.102.27.161

million community development and local governance project in Indonesia, as an example.

Stephens also urges that efforts to support and implement legal empowerment come to terms with the reality that there will be winners and losers, despite Commission claims to the contrary. He agrees with the Commission's point that reforms must be country-specific, but takes the analysis a step further by citing a relevant example from Cambodia. As he notes, the linking of effective labor reforms there to a trade agreement with the United States that mandated compliance with labor standards (and which has been monitored by the International Labor Organization) shows that, even in a country plagued by severe judicial and human rights problems, progress can be made on a legal empowerment agenda.

Land tenure and De Soto

The special section contains two sector-specific papers. One is 'Rule of Law Promotion, Land Tenure and Poverty Alleviation: Questioning the Assumptions of Hernando de Soto', in which Professor Jan Michiel Otto of Leiden University critiques De Soto's arguments that underlie the Commission's thinking about property rights.

The article summarizes the main aspects of De Soto's thinking, including two crucial ways in which law fails the poor. First, there is inadequate law reform. Laws typically made by elite attorneys largely ignore or reject the actual practices of the disadvantaged, leaving them excluded from legal protection. Second, even laws that actually embrace and seek to formalize those practices are not properly implemented.

Otto offers preliminary findings of recent case-studies. These studies show that land registration often fails to provide the poor with full legal security for their property; that registration programs are more often used by the wealthy and middle class than by the marginalized they presumably aim to benefit; and, that, in general, such programs often fail to deliver increased access to credit for the poor. Otto is not saying that land registration is not worth pursuing; rather, he points out that a range of conditions must be in place for the promise of De Soto's ideas to be realized in practice, and that these conditions usually do not apply due to a complex combination of legal, political, administrative, economic, and social factors.

Labor rights and informality

In 'Empowering Workers in the Informal Economy', Julio Faundez complements Otto's article by scrutinizing another of the Commission's four pillars – labor rights.

CAMBRIDGE JOURNALS

http://journals.cambridge.org Downloaded: 13 Mar 2009 IP address: 76.102.27.161

His main argument is that CLEP's version of legal empowerment is not always the main route for workers in the informal economy to improve their economic and social well-being. He argues that informal workers are not really excluded from the legal system; rather, the system works to their detriment. He grants that the Commission correctly notes that legal empowerment is not purely a legal matter, but contends that its approach tends to ignore the non-legal obstacles and opportunities that affect their empowerment.

Faundez also points out that, contrary to CLEP assumptions and recommendations, international and national labor laws largely offer little protection to informal sector workers and those whose jobs otherwise fall under the rubric of family and/or small enterprises. For example, family enterprises are excluded from many international labor standards that protect children. And for the most part, the International Labour Organization confines its oversight of micro and small enterprises to non-binding recommendations for Member governments.

Faundez concludes that reforming laws is insufficient in the labor sector. He instead argues for a more comprehensive strategy embracing social, political and economic change. To a limited extent, his argument is consistent with that of De Soto, in that he asserts that factors such as corruption, poor administration, excessive bureaucracy, and dysfunctional legal systems fuel the desire of businesses and workers alike to operate outside the law. But drawing on research from India to Mexico, Faundez instead focuses on how businesses and markets employ trust, reputation, personal relationships, and social norms to achieve various kinds of self-regulation.

Building on the Four Papers

Power trumps law

The four papers in this section make the point that powerful politicians, officials and elites typically are not bound by laws or judicial rulings in many countries. As Banik illustrates in the context of India – which has a relatively sophisticated legal system compared to many nations – all too often power trumps the law.

None of the authors would contend that this problem is the only one undermining the rule of law or that it renders the law irrelevant. On the contrary, as the Commission rightly argues, legal empowerment can be a crucial weapon against poverty. However, as Faundez demonstrates, under some circumstances workers do not even invoke the law in successful efforts to improve their situations. The broader point that cuts across all of the papers is that law typically is just one part of the empowerment puzzle. Legal empowerment is about power more than about law.

Cambridge JOURNALS
http://journals.cambridge.org Downloaded: 13 Mar 2009 IP address: 76.102.27.161

The CLEP report acknowledges ways in which selfish elites and corrupt officials work to the detriment of the poor. But as Stephens emphasizes, the reluctance of the Commission to grapple with this fundamentally political challenge – how legal empowerment can be wielded by and for the poor to improve their situations where powerful interests weigh against them – constitutes a missed opportunity.

CLEP illustrates its argument with two examples. One is the plight of Nairobi market vendors whose stalls were destroyed by political riots.[7] The other is the situation of their counterparts in Delhi, who have achieved legal recognition entitling them to sell their goods, but who are still harassed by local politicians and police.[8] The Commission argues that these two examples demonstrate the importance of law. An alternative view, however, would regard them as illustrating the primacy of politics and power. The failure of the rule of law in these two examples is indeed a consequence, not the cause, of the problems in both locales.

Perhaps CLEP shied away from analyzing the political challenge to poverty alleviation out of concern that some governments would have found legal empowerment projects threatening. But better to acknowledge this reality than to pretend that legal empowerment does not have losers along with winners. The failure to do so can lead to development projects controlled by the very governmental forces that work against justice for the poor.

The four papers in this section criticize the legal reductionism underlying much of the Commission's analysis. They do not, however, fall prey to a political reductionism that views development and its obstacles solely through the lens of power dynamics. Banik's list of factors that fuel poverty is confined to neither the legal nor the political. Otto more specifically identifies failure of land registration efforts with social, economic, and administrative problems, and not just with legal and political constraints.

The importance of legal implementation

A corollary to the frequent primacy of politics and power is the fact that they often block the enforcement of even the best land, labor, and other reforms. This is not to render legal reform meaningless. The papers all depict a complex dynamic at work in legal empowerment, one that includes such reforms so that the disadvantaged and their allies can wield the law as a tool. But even the best laws and policies can be rendered irrelevant if the resulting laws and policies are not enforced. Legal implementation is crucial.

CLEP is by no means blind to this consideration. Commendably, it proclaims:

[7] CLEP, *Making the Law for Everyone*, 2008, pp. i-ii.
[8] Ibid., pp. 13-15.

CAMBRIDGE JOURNALS

http://journals.cambridge.org Downloaded: 13 Mar 2009 IP address: 76.102.27.161

> 'Reforming the law on paper is not enough to change how the poor experience it day to day. Even the best laws are mere paper tigers if poor people cannot use the justice system to give them teeth. Even the best regulations do not help the poor if the institutions enforcing them are ineffective, corrupt, or captured by elites.'[9]

Regrettably, however, along with commendable support for steps that can shift power dynamics, such as community organizing and paralegals, the report also proposes very orthodox means to address this reality, asserting that '[i]t is therefore vitally important to reform public institutions and remove the legal and administrative barriers that prevent the poor from securing their rights and interests.'[10] It does not detail how such reforms will address the perverse power dynamics that permeate such institutions to begin with.

A resulting recommendation entails a tremendous investment in the courts, even though the report acknowledges that 'many past [judicial reform] projects have not delivered for the poor.'[11] CLEP claims that there have been judicial reform successes, especially in middle income countries;[12] at the same time, it points to tremendous court backlogs in one such country, the Philippines,[13] perhaps unaware that foreign-assisted efforts to (unsuccessfully) pare back the problem there stretch back more than two decades. This period has similarly seen waves of failed judicial reform efforts come and go in Pakistan, Bangladesh and a host of other countries, and backsliding in the rule of law in even more affluent states such as Thailand and Russia.

This raises the question of the opportunity costs of international emphasis on rule of law orthodoxy and a problem with the Commission in effect endorsing its continuation. This array of trickle-down, government-centered strategies and activities has been of little value to the disadvantaged, particularly in impoverished societies that most lack the rule of law. Expenditures for ROL orthodoxy come at the cost of legal empowerment or mainstream socio-economic development, both of which aim to directly benefit the disadvantaged.

Top-down or bottom-up?

An unfortunate irony of the report is that its basic thrust is to persuade national leaders to adopt a legal empowerment agenda for the benefit of the poor, rather than pointing to ways in which the poor and their allies can formulate their own agendas, get relevant reforms adopted, and, most crucially, get good laws implemented to their benefit. A further irony, reflecting this orientation, is that CLEP's

[9] Ibid., pp. 32-33.
[10] Ibid., p. 33.
[11] Ibid., p. 63.
[12] Ibid., p. 33.
[13] Ibid., p. 31.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 13 Mar 2009 IP address: 76.102.27.161

original name was the High Level Commission on Legal Empowerment of the Poor – something of a contradiction in terms.

To be sure, while the report features a top-down, De Soto-style injunction that '[a] comprehensive [legal empowerment] agenda will be best run not by individual ministries, in competition for support and attention, but by presidents and prime ministers in cooperation with ministers of finance, justice, and labour'[14] it goes on to acknowledge that legal empowerment 'must also travel bottom-up'.[15] But it essentially casts the government as 'the key responsible actor',[16] with the poor and their civil society allies in supporting roles.

A key chapter in the report begins by declaring, 'In most countries, rich and powerful elites dominate politics and the economic sphere. Public policy and its outcomes are shaped by their interests, rather than those of the poor majority struggling to make ends meet.'[17] The document acknowledges that this is unfair, but claims that such a state of affairs is short-sighted on the part of the powerful and that legal empowerment embodies a long-term approach to 'smart politics' that will benefit the country as a whole, elites and disadvantaged alike. It simply remains for the international community to employ the logic of legal empowerment to make the elites see the error of their short-sighted, unreasonable ways. But as Banik and Stephens specifically illuminate in their papers, as Otto and Faundez more implicitly illustrate, and as history demonstrates, the long-term interests of a country's economic and political rulers are not necessarily the same as those of their nations.

This top-down view of legal empowerment accordingly reflects questionable assumptions. If the 'key responsible actor' is the government, and if in most countries the government is dominated by elites acting in their own interests, assuming that they will act otherwise would seem unrealistic. As the four papers note, reality is, of course, far more complex.

Many of CLEP's recommendations are commendable. They include support for legal services, including work by law students and paralegals. But they also lean toward, as already noted, starting at the top by getting the buy-in of presidents and prime ministers. They similarly embrace the adoption of resolutions, the convening of regional dialogues and the centralized coordination of various initiatives by the UN Development Programme (UNDP). The report's concluding section on strategies for implementing legal empowerment is quite nuanced in balancing and integrating top-down and bottom-up approaches. But the document as a whole tends to favor the former.

[14] Ibid., p. 9.
[15] *Idem.*
[16] Ibid., p. 10.
[17] Ibid., p. 43.

CAMBRIDGE JOURNALS

http://journals.cambridge.org Downloaded: 13 Mar 2009 IP address: 76.102.27.161

Livelihood or justice?

Another matter that merits consideration in this sketch of CLEP and the four papers reviewing it is whether legal empowerment is primarily a narrow matter of livelihood or a broader, more inclusive matter of justice. The Commission's definition of it could go in either direction, as could the alternative definition also offered at the outset of this paper.

Livelihood – sometimes phrased in terms of assets and income – lies at the core of CLEP's concerns. No doubt influenced by De Soto and quite possibly by Commission Executive Secretary Naresh Singh, who was UNDP's former Principal Adviser on Poverty and Sustainable Livelihoods, CLEP saw three of its four pillars of legal empowerment as based on 'the livelihoods of the poor: property rights, labour rights, and business rights.'[18] Even the fourth, broader pillar, access to justice and the rule of law, had as a cornerstone the issue of legal identity – that is, without proper certifications and identity papers, people may lose their jobs, rights to land and a host of other services and privileges.

Yet just as Banik points out that four billion people's poverty springs from far more diverse factors than legal exclusion, legal empowerment can involve much more than livelihood-oriented activities and benefits. It is somewhat questionable, for instance, that CLEP did not take gender as a starting point, given the vast array of legal issues impacting more than half of humanity and the fact that, on balance, when given an opportunity women play more constructive roles than men in advancing development. Such issues often involve livelihood, but they are by no means confined to that focus. Violence against women is arguably humanity's most widespread category of brutality. But its impact is not solely or even mainly about assets and income. It is about pain, powerlessness, humiliation, health and ripple effects of harm to children, to name just a few non-economic impacts.

Legal empowerment similarly involves an array of other issues and populations. Environmental degradation can impact disadvantaged populations' health, dignity, and control over their lives, even where their incomes are unaffected. Criminal defendants and convicted prisoners retain rights even – or especially – as they languish in jail, regardless of whether there are economic consequences at play. Housing is about shelter even more fundamentally than it is about income, assets, or access to capital markets.

Taking these factors into account can broaden the international community's approach to legal empowerment and make that approach less ambitious than CLEP's, yet more realistic and effective. Contrary to the Commission, legal empowerment no longer becomes the crucial mechanism for saving four billion people from poverty. Under this more modest view, it instead constitutes a still vitally

[18] Ibid., p. 31.

CAMBRIDGE JOURNALS

http://journals.cambridge.org Downloaded: 13 Mar 2009 IP address: 76.102.27.161

important vehicle for impacting specific populations and policies in ways that alleviate their poverty, but that also improve their input into governance.

More civil society

Faundez and Stephens both note the ways in which civil society – associations, movements, non-governmental organizations, community-based groups – can and do contribute to social and legal change. One final difficulty with the Commission's approach is that it did not adequately draw on the vast array of civil society experience that constitutes legal empowerment.[19] True, its report does acknowledge the roles of non-governmental actors, with the section on implementing legal empowerment being especially strong and nuanced in this regard. But much of its analysis falls within the framework established by De Soto in pulling together the Commission to begin with and how the report anticipates relying on national leaders to make legal empowerment a reality. As the four authors have suggested in various ways, and as CLEP itself has acknowledged, such reliance can be misplaced.

In fact, legal empowerment has been taking place around the world since long before CLEP was established, often despite a lack of support from national leaders. It typically is spearheaded by international and domestic NGOs dedicated to women's rights, penal reform, environmental protection and a host of other issues. It simply has gone by a variety of other names – legal services for the poor, developmental lawyering, alternative lawyering, and human rights advocacy. Even the term predates the Commission, extending back to a 2001 Asian Development Bank report. The problem for legal empowerment has not been a lack of ideas and effort; it has been a relative paucity of funding when compared to orthodox efforts at top-down, state-centered rule of law programming, and of research that can document legal empowerment impact.

It is to the Commission's credit that it has put legal empowerment on the development map. It would have been to its greater credit if it had focused more on lessons learned by groups already engaged with linking legal services to livelihood and a diversity of other issues.

Some Steps Forward

Where might the international development community go in terms of building on CLEP's work? Here are a few suggestions:

Invest in civil society. As this essay has emphasized, the actual track record of legal empowerment success resides far more with civil society than with governments

[19] See 'The Legal Empowerment Alternative', in Carothers, *Promoting the Rule of Law Abroad*, p. 161.

CAMBRIDGE JOURNALS

http://journals.cambridge.org Downloaded: 13 Mar 2009 IP address: 76.102.27.161

or major development agencies. There nevertheless will be a tremendous temptation to put resources into large multilateral organizations such as UNDP and governments that they partner with – the CLEP report seems to suggest that this is the direction to take. Some such funding may be warranted. The World Bank's Justice for the Poor program merits support for its engagement and research to date. UNDP likewise can play a valuable role in advancing a global legal empowerment agenda by trying to draw governments' interest.

But especially in view of the Commission's insight into the self-interested nature of many national elites constituting governments, an organization such as UNDP is not always well suited to help disadvantaged populations deal with such situations, since its partner is the government. UNDP is further hampered by extremely bureaucratic procedures that run counter to the flexible manner in which legal empowerment has been best supported and undertaken by other organizations over the years. Unless and until it can overcome these constraints, it merits a role but not the lead in advancing a global legal empowerment agenda. In fact, it would be in UNDP's own interest if donors pressed it to undertake administrative and management reforms that would facilitate its legal empowerment work. The organization has many fine, dedicated personnel who could contribute greatly to such work if freed from bureaucratic constraints.

A preferred course, then, would be for donors to establish funds on global, regional and nation levels that enable civil society groups, particularly those with a track record or potential to undertake legal empowerment operations, to provide legal services for partner populations and to help strengthen those populations' legal and advocacy capacities.

Engage domestic and international NGOs on a country-specific level. A more specific application of the previous recommendation is that donors tailor much of their legal empowerment funding to country-specific contexts. In some contexts, domestic NGOs are perfectly capable of setting their own agendas and strengthening the capacities of partner populations. They have the strategic, legal and financial management capacities to make use of direct donor funding. To pick just two examples, South Africa and the Philippines represent contexts in which domestic NGO capacity is well suited to handle donor funds directly.

In other contexts, there may be a need for an international NGO to act as a financial intermediary between donors and domestic NGOs, managing funds but allocating them in the form of grants that the domestic organizations can use to advance their partner populations' agendas. The international groups' role under such circumstances would involve the important but limited tasks of identifying grantees, making grants, and implementing evaluation-oriented research that could benefit all parties involved. The Asia Foundation is one of several international NGOs with such grant-making expertise.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 13 Mar 2009 IP address: 76.102.27.161

In post-conflict or other situations where domestic groups are of limited strength or sophistication it may prove useful or necessary for international NGOs to supplement a grant-making role by carrying out capacity-building for their national civil society counterparts. In some cases this could even involve helping to get new organizations up and running. Examples of this can be found in Sierra Leone, where the Open Society Justice Initiative helped launch a legal services NGO; in Ecuador, where CARE initiated a natural resources management program that include land titling and paralegal development for indigenous populations; and in Malawi (and elsewhere in Africa), where Penal Reform International has helped build local organizations and capacities addressing prisoners' rights. A valuable variation on this theme is for sophisticated domestic NGO personnel from one country to help build less experienced collegues' capacities in another.

One final element of country-specific approaches that merits mention is that, contrary to the suggestion of the Commission's report, bar associations and other lawyers' groups should not necessarily be a priority for legal empowerment support. The bar can be a positive force for development progress – but not in all countries at all times. It is in fact better to first focus on NGOs (be they engaged with legal services or other efforts) that have evinced a dedication to and expertise in advancing human rights or development.

Integrate with socio-economic development efforts. As Stephens mentions in his paper, there is both experience with and the opportunity to integrate legal empowerment initiatives into broader socio-economic development efforts. In other words, legal empowerment is not only or, in many instances, mainly the work of lawyers. And just as other development disciplines (such as public health and micro-finance) productively use field workers to assist partner populations, paralegals play a crucial role in legal empowerment.

Take a long-term approach. Legal empowerment is not a field that offers quick, predictable results. Civil society can go though many twists and turns before an idea takes hold, an organization is strengthened, a government official becomes responsive or a law gets changed.

Support impact-oriented research. Like most aspects of the field of law and development, legal empowerment suffers from a relative paucity of applied research when compared with other development fields. It merits both quantitative and comparative research in order to ascertain impact and learn lessons.

Make legal empowerment the focus of a Millennium Development Goal. Justice targets are oddly lacking from the MDGs. Whether framed in terms of availability of advice, increased access to justice, knowledge of the law, actual improvements in the poor's lives, or a host of other criteria, a legal empowerment MDG could help make justice more of a reality in the lives of the poor.

CAMBRIDGE JOURNALS

http://journals.cambridge.org Downloaded: 13 Mar 2009 IP address: 76.102.27.161

Create incentives for government personnel to support legal empowerment. Given that government leaders and other powerful forces typically will not support legal empowerment policies in their countries simply by virtue of rational persuasion, it can be very useful for the international community to find ways of making it in their self-interest to do so. The same applies to influencing lower level government personnel who can help build or block the implementation of those policies. To some extent, the logic of legal empowerment involves strengthening the knowledge, skills and above all power of disadvantaged populations so they can push for the adoption and implementation of reforms. But strategies employed by the international community must not end there. While the kind of full-fledged political economy analysis Stephens wished CLEP had delivered is far beyond the purview of this essay, his paper nevertheless provides an example of a creative, non-aid strategy for advancing a set of rights (in this case, those of workers) – the tremendous incentives that were created for Cambodian garment manufacturers by awarding them increased access to international markets in return for their ILO-monitored adherence to international labor standards. As with all legal empowerment initiatives, strategies must be context specific and this one is not easily replicated. But the point is that leverage to increase legal empowerment can and should reach beyond the usual approaches of development aid.

Development policy begins at home. Finally, it might make sense to emphasize the fact that the Commission's members' opportunities and perhaps obligations to advance legal empowerment reach beyond issuing their report. Most are or were very high government officials with substantial influence on the development policies of their countries, whether those countries be donors or aid recipients. To highlight perhaps the leading example, there is Commission member and UK Prime Minister Gordon Brown. Outside the realm of legal empowerment, his Department for International Development has performed a great service to international development policy by emphasizing the roles of safety and security for the disadvantaged (though the evidence of impact of that emphasis is not definitive). Yet the third prong of its Safety, Security and Access to Justice programming has been something of a neglected element, as access to justice and attendant support for civil society and legal services receive relatively little support from DFID.

Prime Minister Brown and other Commission members might exert appropriate influence to push their own governments to adopt legal empowerment agendas, and not simply let the issue rest in the lap of the international community at large. If in fact such country-specific efforts are under way, they should be publicized and promoted so as to galvanize similar initiatives by other nations.

CAMBRIDGE JOURNALS

http://journals.cambridge.org Downloaded: 13 Mar 2009 IP address: 76.102.27.161