

## Regional Dialogue on Legal Empowerment of the Poor Discussion Paper<sup>1</sup>

*“Amidst the modern skyscrapers and neon-lit shopping complexes of Mumbai, Dharavi sits like a cancerous lump in the heart of the city. And the city refuses to recognize it. So it has outlawed it. All the houses in Dharavi are ‘illegal constructions’, liable to be demolished at any time. But when the residents are struggling simply to survive, they don’t care. So they live in illegal houses and use illegal electricity, drink illegal water and watch illegal cable TV. They work in Dharavi’s numerous illegal factories and illegal shops, and even travel illegally – without ticket – on the local trains which pass directly through the colony.*

*The city may have chosen to ignore the ugly growth of Dharavi, but a cancer cannot be stopped simply by being declared illegal. It still kills with its slow poison.”<sup>2</sup>*

Legal empowerment of Dharavi residents, human beings who “**are born free and equal in dignity and rights**”, is the cure for this cancer.

### *Purpose of the paper*

**This paper has been prepared as one of three background documents** for the regional dialogue on legal empowerment, held from 3 to 5 March 2009 in Bangkok.

The present paper poses a series of questions and seeks to generate ideas, stimulate discussion and seek input from the dialogue participants on how key challenges surrounding legal empowerment can be addressed and how best to take the legal empowerment agenda forward in the region.

A background paper has also been prepared, which aims to provide a briefing to dialogue participants by outlining the key issues around legal empowerment. The paper aims to provide participants with an overview of the key themes within a legal empowerment framework and an introduction to those issues, which will be discussed at the regional dialogue. This paper also provides a range of illustrative examples from around the Asian region of how elements of legal empowerment have been applied in practice.

A third paper has been prepared, which provides a discussion of poverty in Asia and the impact of the food, fuel and financial crises. The paper also provides an overview of the work of the Commission on Legal Empowerment of the Poor and the national consultation process across the region.

### *The Commission on Legal Empowerment of the Poor*

The Commission on Legal Empowerment of the Poor was established as an independent global commission, and concluded its work with the report “Making the Law work for Everyone”. The Commission was co-chaired by Madeleine Albright and Hernando de Soto and hosted by the United Nations Development Programme (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.

In the words of Co-chair Albright:

*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*

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<sup>1</sup> This discussion paper has been prepared by Ewa Wojkowska and R. Sudarshan. The views expressed in this paper do not necessarily reflect the views of the United Nations Development Programme, its Executive Board or its Member States.

<sup>2</sup> Extract from Vikas Swarup, *Slumdog Millionaire* (originally published in 2005 as *Q&A*), Black Swan film tied-in edition, 2009.

*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.*

***Why a regional dialogue on legal empowerment of the poor?***

Ronald Coase, Nobel Prize winner for economics made the crucial connection between institutions, transaction costs, and neo-classical theory.<sup>3</sup> The neo-classical result of efficient markets only obtains when it is costless to transact. Only under the conditions of costless bargaining will the actors reach the solution that maximizes aggregate income regardless of the institutional arrangements. When it is costly to transact then institutions matter. And it is costly to transact. The critical role played by institutions, especially the legal framework and property rights, in economic growth and development, was articulated by Douglas North, winner of the Economics Nobel Prize in 1993.<sup>4</sup>

North also pointed out that the admixture of formal rules, informal norms, and enforcement characteristics that shapes economic performance. While the rules may be changed overnight, the informal norms usually change only gradually. It is the norms of particular societies that provide "legitimacy" to a set of rules. Therefore, he cautioned that economies that adopt the formal rules of another economy will have very different performance characteristics than the first economy because of different informal norms and enforcement.

The implication is that transferring the formal political and economic rules of successful western market economies to developing countries is not a sufficient condition for good economic performance. This also implies that there is a need to learn more about norms and institutional practices in developing countries so that institutions and laws that are conducive to their progress can be based on a sound understanding of what will work and what will not work.

This is one of the main reasons for organizing an Asian dialogue, with the aim of exploring ways and means to help policy makers in Asian countries to get access to knowledge and understanding pertinent for a durable institutional and enabling environment for elimination of poverty and better human development in Asia.

Douglas North's caution that norms and institutions cannot be transplanted from the West and expected to take root in developing countries is an important qualification to the very persuasive work of Hernando de Soto.<sup>5</sup> Thomas Carothers makes a similar argument with regards to rule of law assistance, much of which is provided to promote endpoint institutional reform. This has often meant that institutions such as ombudsmen offices were promoted just because they succeeded in one country or another, with little attention given to the institutional (formal and informal) specificity of countries in which these endpoint institutions were transplanted.<sup>6</sup>

The Commission on Legal Empowerment of the Poor was set up with a carefully selected group of Commissioners, a dedicated Secretariat, and a set of advisors contributing to five working groups, precisely in order to avoid simplistic analysis and solutions. The Commission's work enables us to appreciate and grasp better the complexities involved in creating appropriate legal and institutional frameworks whereby the hard work, creativity and entrepreneurship of poor people the world over is better rewarded, and poverty can be eliminated. The process by which the Commission proceeded to substantiate its argument included the organization of national consultations worldwide. Done by national experts and informed by focus group discussions and

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<sup>3</sup> Coase, Ronald, "The Problem of Social Cost," *Journal of Law and Economics* 3(1), 1960.

<sup>4</sup> *Structure and Change in Economic History*, 1981), and *Institutions, Institutional Change, and Economic Performance*, 1990.

<sup>5</sup> De Soto, Hernando, *The Other Path: The Invisible Revolution in the Third World*, 1989, and *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*, 2000.

<sup>6</sup> Carothers, Thomas, "The rule of law revival" *Foreign Affairs*, 1998, and *Promoting the Rule of Law Abroad: In Search for Knowledge* 2006.

national roundtables, those national consultations were an attempt to encourage bottom up understanding of the plight of the excluded. One of the three background papers to this regional dialogue summarizes some of the lessons to be learned from listening to the voices from the trenches.

*What is unique about the legal empowerment of the poor agenda?*

The debates and arguments among the Commissioners, and their responses to critiques cautioning against simplistic prescriptions, has resulted in a novel and unique approach that combines the human rights based approach to development with the insights of economics.

The combination of emphasis on human rights and on institutional requirements for the market to benefit the poor and produce inclusive growth brings together two discourses that have hitherto largely ignored each other. The confluence of human rights and lessons from economic history serves to illuminate the importance of ensuring that everyone, without discrimination, has the protection against abuse of power, and predictability and stability in their transactions, provided by the rule of law. The principle of non-discrimination is at the core of the CLEP recommendations – inclusion, not exclusion, from the realm of protection afforded by laws and institutions, is the key to poverty reduction.

The Commission's work is valuable to us when we confront the challenge of power relationships in society. Here we pose some initial questions for consideration:

*If the poor are empowered, will the rich not resist because they could be correspondingly disempowered?*

*How are we to resist the quick win presented by technical solutions when they do not address the exclusive nature of the law nor the exclusionary dynamics that kick-in during the implementation of otherwise pro poor laws?*

*How are we to turn a 'zero-sum game' into a 'positive-sum game'?*

*How can the human rights based approach, which has international and national legitimacy, help us in the implementing an agenda to make the law work for everyone?*

*How to foster a triangular relationship of cooperation between state, civil society and private sector to enhance the legal empowerment of the poor?*

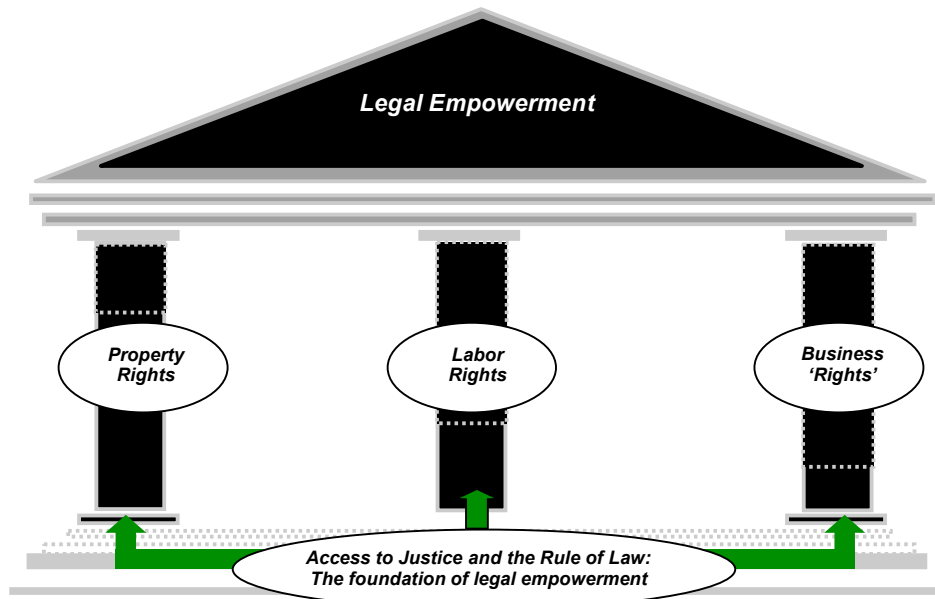
*What is legal empowerment of the poor?*

The term 'legal empowerment' has been around for some time. It has frequently been used to refer to alternative approaches to promoting access to justice and developed largely in response to discontent with traditional rule-of-law and law-and-development approaches. Stephen Golub is the author of a number of texts on legal empowerment, published in reports for the Asian Development Bank, the Carnegie Endowment, the World Bank and UNDP. 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'. It is seen as both a process and a goal. The agenda of the Commission on Legal Empowerment is broader than access to justice and legal services (although it does include these components), because it looks at the exclusion from the rule of law more broadly and draws particular attention to the property, the labor, and the business undertakings of the poor - these being the crucial elements on which the livelihoods of poor people depend.<sup>7</sup>

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<sup>7</sup> De Langen, Maaiké & Barendrecht, Maurits, "Legal Empowerment of the Poor: Innovating Access to Justice", in Jorrit de Jong & Gowher Rizvi (eds.) *The State of Access: Success and Failure of Democracies to Create Equal Opportunities*, 2008

## *The foundation and pillars of legal empowerment*



There are a range of definitions of legal empowerment. For the purposes of this paper, we use the following:

*Legal empowerment of the poor occurs when the poor, their supporters, or governments—employing legal and other means—create rights, capacities, and/or opportunities for the poor that enable them to use the law and the legal process to escape poverty and marginalization. Legal empowerment is a process of inclusion of all under the normative umbrella of laws, informed by international human rights norms, as an end in itself, and as a means of escaping poverty.*<sup>8</sup>

Notably, the UN General Assembly in December adopted a resolution on legal empowerment of the poor. The resolution, which was co-sponsored by 34 countries stresses the importance of sharing best national practice in the area of legal empowerment of the poor and requests the Secretary General to submit a report to the General Assembly at its 64th session on legal empowerment of the poor, including national experiences in this regard.<sup>9</sup>

### ***Legal empowerment and the MDGs<sup>10</sup>***

Legal empowerment of the poor enriches and complements the efforts to attain the MDGs with new tools and approaches that attack structural causes of poverty and exclusion. For instance, many poor people lack a legal identity, which is often used by bureaucrats and service providers to deny or complicate access to essential services such as education or health services (MDG 2, 4, 5 and 6). With no access to justice and effective means to enforce their basic rights, the poor lack power to hold the service providers accountable.

Legal empowerment also contributes significantly to eradicating extreme poverty and hunger (MDG 1) by giving the poor the ability to raise concerns and seek protection in situations where more powerful actors violate their rights. For instance, the poor rely heavily on natural resources such as land, water, forests and fishing grounds as key assets that provide income and means of survival. However, ownership and access to such resources is not always clearly regulated and established. This can result in expropriations, disputes related to access rights as well as exposure to environmental harm.

<sup>8</sup> Adapted from John W. Bruce et al., *Legal Empowerment of the Poor: From Concepts to Assessment*, paper prepared for USAID.

<sup>9</sup> General Assembly Resolution on Legal empowerment of the poor and eradication of poverty, A/63/L.25/Rev.1

<sup>10</sup> The section on legal empowerment and the MDGs is from *Legal Empowerment of the Poor – Occasional Fact Sheet*, prepared for Secretary General's High Level Event on the Millennium Development Goals, September 2008.

Women in developing countries are crucial contributors to the economic and social development of their communities and societies. But with discriminatory property and inheritance systems, they risk being evicted from their homes or from the land they cultivate, in case of death of or divorce from their husband. Legal empowerment works towards protecting women from discrimination and exclusion (MDG 3). With the number of female-headed households increasing because of the HIV/AIDS pandemic, legal empowerment of women has a broader societal effect.

Poor people are often exposed to harm stemming from environmentally insensitive development but lack the legal rights and access to justice to claim compensation. Natural disasters and environmental degradation tend to hit the poor harder and without access to formal rights, risk mitigation through insurance is impossible. In addition property rights provide people with a tangible stake in the future of a given area and thus an incentive for environmental sustainability (MDG 7).

A pro-poor legal framework is a prerequisite for achieving the MDGs and the efforts needed to bring it about reap untold rewards. Changes in the current situation with regards to property, labor and business rights, as well as the efforts for widening the legal space to embrace the excluded vulnerable groups could contribute significantly to improving lives of billions poor people. An internationally scaled-up effort to meet the MDGs coupled with real commitment to Legal Empowerment of the Poor can constitute a powerful and dynamic agenda for inclusion and human development.

#### ***Further questions for consideration by dialogue participants***

Legal empowerment of the poor is a complex agenda. We put forward the following questions, with the intention of generating ideas, stimulating discussion and seeking input from dialogue participants on how some of the challenges can be addressed and how best to take the legal empowerment agenda forward in the region.

*What does it mean to apply legal empowerment of the poor in practice? Is it legal empowerment if it only touches upon one or two out of the four pillars? Does legal empowerment necessitate a holistic approach, or do small, incremental changes within one or two components of legal empowerment also count?*

*How do we facilitate a convergence of one or more of the pillars in legal empowerment of the poor work of UNDP? Or said another way: How can we bring democratic governance closer to achieving poverty reduction goals?*

*How does legal empowerment help us address critical issues in the aftermath of the global financial crisis? What does legal empowerment mean in a period of high unemployment, increasing layoffs/closure of factories, and return of migrant workers to their hometowns? How is legal empowerment useful in building a stronger case for more investments in social insurance schemes, better social safety nets in the current context of economic, social and political crisis?*

*How do we take existing programmes (for example ongoing access to justice initiatives) and adapt and enhance them to have a broader focus on legal empowerment while still being faithful to a rights based approach?*

*How to combine technical quick wins with longer term reform to redress power imbalances that inflict the legal process of access to justice?*

*Legal empowerment of the poor is an enormous and daunting agenda and absent is practical guidance on prioritization and sequencing of recommendations. Where does a policy maker seeking to adopt the Legal Empowerment of the poor agenda begin?*

*Empirical evidence to justify investments in legal empowerment is lacking. How can we best equip reformers and practitioners with the necessary evidence and ammunition to argue for resources for legal empowerment over other alternatives?*

*If legal empowerment of the poor is a process, how to measure and monitor its progress for purposes of enhancing ownership and domestic accountability?*

### ***Anticipated Outcomes from the Regional Dialogue***

While it is premature to predict specific recommendations which may come out of the regional dialogue, it is anticipated that at least two key concerns will require significant attention. The first is the issue of political will, and the second refers to empirical evidence to justify investments in legal empowerment of the poor.

With regards to the first concern, given the political sensitivities and persistent negative perceptions associated with some of the measures to bring the poor and excluded under the normative protection of national laws (informed by international human rights norms) it is necessary to view these problems as not being unique to any given country, but rather as a common challenge to a group of countries that are economically, culturally or geographically inter-connected. A regional approach, or partnership is therefore put forward for consideration.

### ***A regional partnership***

In addition to collectively tackling such challenges, a regional approach would have the anticipated benefits of peer pressure from an external source that can help to change entrenched ways of thinking around sensitive issues such as illegality, identity and informality.

The Commission on Legal Empowerment of the Poor calls on countries to develop regional initiatives to further the legal empowerment agenda. The recent General Assembly resolution stresses the importance of sharing national best practices and requests for the Secretary General to report on the progress of legal empowerment.

An anticipated outcome of the regional dialogue is therefore the development of a regional partnership or policy oriented think-tank on legal empowerment of the poor, which would be capable of undertaking empirical research and collecting evidence of impact of legal empowerment interventions in the region and engaging with policy makers to advance the legal empowerment of the poor agenda regionally and nationally.

It is envisaged that such a partnership would be organized around the four components identified by the Commission on Legal Empowerment, namely: Access to justice and the rule of law; property rights; labor rights and business rights. The partnership would be a flexible mechanism (largely virtual in nature) to enable innovative thinking on how to further the legal empowerment agenda in the region and thus will be established with a minimum of bureaucracy. Activities could include:

- Establishing and facilitating a regional community of practice on legal empowerment to discuss key issues relating to legal empowerment;<sup>11</sup>
- Codification and sharing of lessons learned and development of guidance and best practice documents;
- Development of assessments, indicators and studies to measure impact of legal empowerment interventions;
- Awareness raising on legal empowerment;
- Regional cooperation programmes to further the legal empowerment agenda in the region;
- Policy development on legal empowerment;
- Encouraging policy networks of legal practitioners (judges and lawyers), law students, civil society advocates, legislatures and policy makers;
- Grants programme for piloting and incubation of innovative ideas and activities on legal

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<sup>11</sup> A 'community of practice' is associated with knowledge management and offers a collaborative structure that has proven to be extremely effective in the creation and transfer of knowledge. It is a great way to stimulate innovation or share existing knowledge on a particular subject, in this case legal empowerment. The mechanisms often used by communities of practice include e-discussion, face to face meetings, development of a common vision and joint development of knowledge products.

- empowerment in participating countries;
- Guidance on adaptation of ongoing initiatives which can be tailored and adapted towards the goal of legal empowerment of the poor.

*The need for improved statistics, diagnostics and evidence of impact*

What is clear is that the informal economy is far larger than most people recognize. However, the informal economy is still under-counted and under-valued in most countries. Few countries collect the statistics needed to fully capture all forms of informal employment. *Improved statistics* would help to focus the attention of policymakers on the economic contributions of the informal economy and the linkages between informal employment and poverty. More specifically, improved statistics would inform the design of appropriate legal reforms and policies for the working poor in the informal economy.

*Improved diagnostics* would help further the overall legal empowerment agenda. There are very few programmes that truly take the needs of poor people as a starting point for reforms. Policies and laws aimed at improving the lives of the poor often fall short of their ambitions as they are formulated from a top-down perspective that is not always properly reflective of the actual needs of the poor. Starting with the needs and views of poor people would certainly result in more appropriate and better targeted responses.

Similarly, *evidence of impact* would advance the legal empowerment agenda. There is a dearth of empirical evidence on the impact of legal empowerment initiatives. Such evidence would arm reformers and practitioners with the necessary ammunition to secure the necessary resources for legal empowerment interventions.

The tools for collecting these statistics, diagnostics and evidence need not be developed from scratch. There are a range of existing diagnostics and assessments, which can be used and adapted. In many cases data that is being collected for MDG reporting can be used for this purpose (although gender disaggregated data is still a pressing need).

No global or regional index for naming and shaming is needed. What is needed, however, are locally sensitive indicators that are locally developed and locally accepted. Such indicators are more effective in sustaining incentives for reform over time. Pooling regional resources for the participative and inclusive production and democratic dissemination of nationally and locally developed indicators of legal empowerment to monitor progress can be a welcome outcome of this regional dialogue.