



OGC Brief 5

REFLECTIONS ON LEGAL EMPOWERMENT OF THE POOR: THE IMPORTANCE OF DEMOCRATIC GOVERNANCE

Written by Noha El-Mikawy

This brief highlights some of the major issues that come to the fore when considering legal empowerment of the poor as an agenda to enhance poverty reduction, MDG achievement and rights-based development. It also points to areas of needed coordination among UN agencies and development partners and ends with a non exhaustive list of suggested implications for specific democratic governance interventions.

ACKNOWLEDGEMENTS

The author would like to thank Sudarshan, UNDP regional advisor in the Asia Pacific Region and Maaik Delangen of the Legal Empowerment of the Poor Project of UNDP for their comments on earlier versions. The ideas of Bibek Be-broy and Adriana Ruiz, who have been associated at various times with the CLEP, as well as the field experience of colleagues in UNDP country offices have helped inform earlier versions of this brief.

DISCLAIMER

The views expressed in this brief are those of the author and do not necessarily represent those of the United Nations, including UNDP, or UN Member States.

SITUATION ANALYSIS

Poverty reduction and the achievement of the MDGs are being currently threatened by financial, food and climate crises. These crises have increased the number of the poor and unemployed (also in developed countries), threatening to increase the numbers of those economically, socially and politically excluded from development. These crises are crises of governance and point, now more than ever before, towards the importance of enhancing democratic governance.

The independent Commission for Legal Empowerment of the Poor (CLEP) which produced a final report (*Making the Law Work for Everyone*) in July 2008 referred to democratic governance as "a fundamental aspect of empowerment providing an enabling framework based on broadly accepted norms and carrying instrumental attributes with the potential to enhance and expand political and economic opportunities for all". Hence, the CLEP embraced democratic governance and acknowledged its importance for legal empowerment. Reference was also made to rule of law and access to justice, inclusive institutions, access to information and civic engagement as cornerstones for legal empowerment.

The basic pillars of legal empowerment of the poor (LEP) include property rights, labor and business rights and access to justice & rule of law. Each one of these pillars embeds certain assumptions about development and poverty reduction. Debates and controversies abound over those assumptions, their validity and congruity with country evidence. The assumptions behind those pillars need to be constantly checked against the reality of country specific political economy, historical depth of institutional arrangements, and the processes on the ground that condition the capabilities of the poor.

The LEP agenda assumes that the protection of property rights, labour rights and micro and small businesses is fundamental to development and a cornerstone of empowerment. Though necessary, the LEP agenda acknowledges that those economic rights may not be sufficient without a holistic integrated approach which emphasizes democratic processes, institutions and values that should inform and govern any empowerment agenda. Furthermore, a rights-based approach highlighting issues of discrimination, marginalization and exclusion is considered imperative in order to underline the responsibility of the state and benchmark

failures of the market. A rights based approach enables the enhancement of capacities for civic engagement not only capacities for administrative management of LEP reform.

Thus, the national consultations (NCs) organized by CLEP have been important processes of bottom up engagement with the discourse of legal empowerment of the poor, increasing understanding of country specific problems and the need for nuanced solutions. That bottom up approach which should be carried through also on regional levels¹ will help provide valuable validation of the strategic multipliers of a LEP agenda for sustainable development, linking poverty reduction -via economic empowerment - with democratic governance - via respect, protection and enforcement of social, economic and cultural rights.

The democratic governance approach of UNDP sees that being possible through inclusive participation in processes of government by responsive institutions which are capacitated to uphold values which the UN family of nations agreed upon.

ISSUES LINKING POVERTY REDUCTION AND DEMOCRATIC GOVERNANCE

1. Law, Development, & Power Contestation

LEP denotes a distribution of power between rulers and ruled and a positive link between state, market and citizens. As a goal, LEP means actual achievement by the poor of increased control and influence using the law. As a process, LEP means ever expanding capabilities of the poor to control their lives, improve their livelihoods, and influence public policies that affect their capabilities and opportunities².

The challenge is in the "power" component of legal empowerment. Based on the notion of increasing one's power, LEP may be perceived as a zero sum game if someone has to be giving up power; LEP could be a variable sum game if seen as the expansion of power to include the poor. Managing LEP as a process of negotiating power relations is a democratic governance challenge.

In this context, a better understanding and documentation of the relationship between law and development within specific political economy contexts is imperative. As much as the poor can be liberated by law, some cases exist where the poor are oppressed by law³. The relationship between law (whether codified or customary), development and empowerment is not automatic and needs to be understood and documented.

¹ As suggested by the 63rd General Assembly of the United Nations (December 4 2008) approved a resolution by which it adopts the proposals of the report of the Commission on Legal Empowerment of the Poor.

² See various publications by Stephan Golub published by World Bank, Asian Development Bank, Carnegie Endowment.

³ As example see Usha Ramanathan "Ostensible Poverty, Beggary and the Law" Economic & Political Weekly, November 1, 2008, pp. 33-44.

2. Diversity of Rights and of Systems Protecting Rights in a Global Context

In pursuing a legal empowerment agenda, caution is important so as not to assume that what is not codified is extra-legal or that rule of law is rule of statutory law, especially in contexts where law and justice are predominantly customary. Many countries in Africa still manifest complex systems of rights and not all are codified. In fact, many constitutions recognize diversity of rights systems. Some argue that such diversity of systems of rights may restrict the development of markets by constraining the commodification of factors of production.

Indeed, such diversity of systems of rights has trade offs. On one hand side, codified law is often problematic: its effectiveness requires capable administration, effective courts, political and social respect for the law, and these are issues of governance not law. Furthermore, rule of law (codified law) often needs to be strengthened by access to justice that is sensitive to the poor, marginalized and women. On the other hand, non codified rights, e.g. customary rights, may violate human rights (especially of women and children). They may also be vague and inapplicable across communities.

The CLEP recognizes the need to consider this diversity, to structure the relationship of state and non state systems and foster reform when human rights are in danger. Language like simplification and standardization may be operational but problematic: the state often lacks legitimacy; furthermore, identity politics can be easily mobilized with explosive results in diverse and unequal societies

In this context, a better understanding and documentation of the relationship between diversity of law systems in specific contexts of state legitimacy, state (and nation) building and conflict prone societies is key to sustainable and peaceful legal empowerment of the poor. The global nature of trade, migration and climate adaptation linkages complicates this picture in fact. That too needs documentation.

3. Market based Formalization vs Pro poor Development

Formalisation alone does not enhance tenure security, is unlikely to generate credit flows to the poor, is most likely to expose property held by the poor to expropriation by elites, and is not only expensive but difficult to maintain. Hence, a shift *towards* an integrated governance-poverty approach needs to be better understood and supported.

The main issues in an integrated approach include: the role of the state as regulator and arbiter not as predator / owner; security of rights condoned by a system of social relationships and an equitable political economy over and above formalization; responsive – not only effective and efficient- pro poor administrative systems of property; sustainable pro poor land use management

practices, and pro poor regional or trans-national land and water management⁴.

To pursue this agenda in sensitive and context specific manner with cutting edge solutions, coordinated efforts of UNDP, FAO, IFAD, HABITAT, development banks and other international and national NGOs is imperative.

4. Labour, Business and the Political Economy of Development

Two important areas of the legal empowerment agenda are the protection of core labour rights of the poor and promotion of formal business enterprises to reduce informality of micro and small enterprises, where most jobs for the poor are now created. There is a list of challenges associated with these areas, which if unaddressed will continue to disempower the poor:

- Economic rationality of choosing informality when political economies discriminate against the poor and are corrupt in public administration and in social services
- The seeming comparative advantage of low labour standards & low labour cost in informal sector
- Perverse effects of trade, migration, and rapid urbanization as well illustrated in the ILO report *The Global Employment Challenge*⁵
- Perverse effects of environmental degradation and low local content in extractive industries

These issues will require coordinated efforts on the part of UNDP, ILO, and development banks. Partnership with international initiatives such as Global Compact regional organizations, and national and international NGOs will be key to success.

5. Civic Engagement as the Bedrock of Legal Empowerment

The LEP agenda underscores the need for a bottom up approach, sensitive to country context and national / regional dynamics. This makes the knowledge gained and the alliances built during national consultations important. A bottom up process of LEP makes it imperative to converse with civil society organizations, social movements, local opinion leaders, etc. As the national consultations of the CLEP and the World Bank series on the Voices of the Poor well documented, the poor distrust holders of power as much as they are deprived of social services and influence. Thus, accountability of the political and administrative elite is a challenge to be overcome; this will require empowering the poor via a wide network of partners.

⁴ See OGC discussion papers and policy briefs on land governance and urban property rights
http://www.undp.org/oslocentre/overview/land_governance.html

⁵ See http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/article/wcms_092210.pdf

Documenting experiences & sharing them in open spaces (virtual and otherwise), forging alliances of research, activism and policy, and allowing for regional platforms of interaction are key to civic engagement. Experiences to be documented need to allow for success and failure, showing the potential, constraints and risky limitations of any LEP agenda: Where LEP is relevant, how? Where LEP has proven badly pursued, why? These are critical issues for a sensitive development agenda.

6. Synchronizing Not Sequencing: Imperative of Monitoring and Measurement of Progress

If the call is to alleviate poverty and empower those who are currently poor and disempowered, and if the intention is to do it with high sensitivity to local context, innovation and learning, then means of measuring and assessing progress become imperative. This requires a holistic definition of what is progress and an inclusive process of measuring it with pro poor and gender sensitive indicators in an inclusive and participative assessment process, linking official quantitative data with anecdotal, qualitative evidence in country-led and institutionalized partnerships. Monitoring should serve less the purpose of naming and shaming and more that of fostering domestic accountability via highly disaggregated data that is sensitive to poverty and gender dynamics as well as in-country regional variations. Predominant indicators on inputs and outputs for legal empowerment in any of its aforementioned pillars needs to be complimented by indicators that measure processes of respecting, protecting and fulfilling rights.

CONCLUSION: IMPLICATIONS FOR A DEMOCRATIC GOVERNANCE AGENDA

There is an infinite number of issues and possibilities to enhance the inclusion of the poor through democratic governance programming. Here is a non exhaustive list of examples:

Inclusive participation

- Identify modalities of inclusion, including access to information and public interest litigation, to suit specific political economy contexts
- Enhance debate on LEP reform proposals in the public space occupied by political parties, civil society organizations, social movements etc. depending on the mobilization channels available per country
- Enhance the presence of LEP reform and policy trade offs in communication channels that attend to the needs of the poor
- Develop capacities for participative planning, budgeting & monitoring of LEP agenda

Responsive Institutions

- Enhance capacity of parliaments to address LEP reform proposals / policy trade offs
- Enhance capacity of public administration to respect, protect and enforce LEP reforms

- Build up a governance agenda for MDG 8 so that trade, ODA & debt relief support LEP
- Support cross practice initiatives in land governance, non renewable natural resource expenditure and environmental sustainability as key drivers of informality
- Identify how LEP works on the local level and how local governance creates an enabling environment for pro poor outcomes of LEP

UN Values

- Enhance DGG support for social & economic rights within its work on human rights and rights based approaches to development
- Enhance DGG anti corruption work in the areas of access to justice, property, labour rights and micro and small enterprises.
- Enhance the gender sensitivity of any LEP proposal⁶.

⁶ See "A User's Guide to Measuring Gender-Sensitive Basic Service Delivery" 2009
http://www.undp.org/oslocentre/docs08/users_guide_measuring_gender.pdf



United Nations Development Programme

Oslo Governance Centre
Democratic Governance Group
Bureau for Development Policy

Borggata 2B, Postboks 2881 Tøyen
0608 Oslo, Norway

Phone +47 23 06 08 20

Fax +47 23 06 08 21

oslogovcentre@undp.org

www.undp.org/oslocentre