Legal Empowerment and Poverty Reduction: The conceptual and empirical challenges ahead

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INTRODUCTION

The CLEP Report published last year makes interesting reading. It has made a very important contribution to developing the LEP approach and giving it high visibility on a global scale. The challenge now is steadily shifting to the issue of operationalisation and implementation. In this presentation, I will argue that it is crucial to a) continue to strengthen the theoretical underpinnings of the concept; b) identify a set of strategies that have historically been successful in improving access to justice for the poor in various parts of the world; and c) devise ways to closely link the LEP with the general development experience so far as the global concept is operationalised and applied by developmental actors at local levels.

This presentation is divided into two sections –one conceptual and the other empirical.

SECTION 1: ACCESS TO JUSTICE AND THE RULE OF LAW AS AN ENABLING FRAMEWORK FOR LEGAL EMPOWERMENT

It is now largely accepted that access to justice and the rule of rule can provide an important and overarching umbrella for development activity. I agree with the CLEP report that law and its foundations are crucial on two counts. First, law provides the 'platform' on which important socio-economic and political

institutions exist, 'and to be legitimate, power itself must submit to the law' (p. 3). Second, laws cannot be considered as legitimate or 'revered as a foundation of justice' if they create barriers for the wellbeing of the poor (p. 4). Hence, rights are enjoyed and guaranteed only when the law 'works for everyone' and 'defines and enforces the rights and obligations of all'. This in turn creates opportunities for the poor, cushioned in an atmosphere of certainty and predictability (p. 2).

The popularity of the legal empowerment approach rests on it being an alternative position to the considerable focus by major international development actors on implementing rule of law reforms in developing countries. Indeed, such attempts have been termed as a top-down 'rule of law orthodoxy' paradigm by Stephen Golub (one of the pioneers of the legal empowerment concept), who goes on to argue that for several years the discourse on law and development has focused largely on law, lawyers and state institutions rather than on the legal needs of the poor. Similarly another prominent scholar in this field, Thomas Carothers (2003, 3), argues that efforts to promote rule of law are often characterised by a 'surprising amount of uncertainty' about how exactly these will lead to economic development and democratisation. He also criticizes the promoters of rule of law of being unclear on 'how the rule of law develops in societies and how such development can be stimulated beyond simplistic efforts to copy institutional forms'. This is again where LEP as an approach can make a major contribution with its focus on the two central conditions of 'identity' and 'voice'.

Despite the efforts of the CLEP, however, the conceptual foundations of the legal empowerment approach remain weak and unconvincing to many and the following *four sets* of *interrelated issues* appear important here.

The first relates to the fact that development research over the past few decades has consistently highlighted a wide range of interrelated factors that cause poverty, including low growth of income, inequality, social exclusion and entitlement failures, inadequate social services, high population growth, environmental degradation, economic inefficiency, social and political instability and vulnerability to debt, disease and natural disasters. Hence, I believe that it would be a mistake to simply focus on the insecurity and legally un-protected aspects of work and assets, which would entail ignoring these other – and more important – causes of poverty. Thus any improvements in access to justice for the poor must be linked with the general problem of development at large.

Secondly, the democracy-growth-poverty discourse has now largely established that there is no consistent connection between democracy on the one hand and economic growth and poverty reduction on the other. Indeed, empirical evidence shows that democracies are neither among the best nor among the worst in reducing poverty; conversely non-democracies show enormous variety in this field, having exhibited some of the most impressive results in eradicating poverty *without* adhering to a legal or rule of law approach (e.g. in Southeast Asia) while at the same time failing miserably in Sub-Saharan Africa (Varshney 1999; Banik 2006). Thus, non-democratic countries will not simply become democratic just to empower the poor and to please those advocating the LEP solution. We must

therefore address the nature and types of strategies that would be important in societies that are currently non-democratic and will probably remain so for a considerable amount of time in the future. At the same time we must develop nuanced strategies aimed at dysfunctional democracies, in addition to the prescription that they should strive towards becoming better democracies.

The third issue relates to the fact that despite numerous references to human rights principles and approaches in the LEP discourse, it is unclear how legal empowerment and human rights are linked conceptually. Moreover, given the relative popularity of human rights-based approaches to development and poverty reduction (hereafter HRBA) there is already some confusion regarding how and to what extent this and the LEP approach relate to, and perhaps, complement each other.

While there are numerous criticisms of the HRBA – including doubts over the justiciability of social, economic and cultural rights – and if we were to temporarily set aside for the time being some of the most persistent criticisms, one way of strengthening the LEP approach would be to view it as a sub-set of the broader HRBA discourse. This has been actively advocated by someone like Arjun Sengupta (2008). Viewing legal empowerment as an integral part of the human rights discourse allows for the use of existing international human rights instruments that have been largely accepted by the international community. This includes the idea that the obligation to fulfil the rights of the poor transcends national boundaries and extends to all countries that have ratified the human rights treaties and conventions.

The fourth, and final point in this section, relates to the limits of legalism. There are indeed many benefits of legal approaches but also important limitations. For example, legal approaches do not pay adequate attention to moral disputes that characterise the implementation of human rights principles (Mckled-Garcia and Cali 2006; Andreassen 2008). They also underestimate the ability of political actors to ignore, bypass or selectively implement judicial recommendations and verdicts. And this is of particular concern given the gradual deepening of the global financial crisis when certain more pressing issues (like tackling the credit, currency and debt crises) may be accorded prominence at the expense of new approaches aimed at reducing poverty. Thus any attempts to improve access to justice must be aware of such challenges and pitfalls.

SECTION 2: THE EMPIRICAL EVIDENCE

There is now considerable evidence from countries in Latin America, Africa and South Asia, where attempts have been made to undertake constitutional and judicial reform and make justice more accessible to the poor. In relation to the Asian experience, China has, of late, been portrayed as a state where rapid economic development has occurred largely in the absence of respect for the rule of law. But this does not capture the entire picture. Indeed, a most interesting development in China has been the growing forms of legal activism in rural areas of the country. The government's attempts at promoting its rule of law agenda have, thus far, had little impact in the villages. And peasant lawyers – who live in the countryside, do not have formal legal training and provide gratis legal advice –

have managed to fill an important vacuum in this respect by gaining knowledge about laws and judicial processes and passing this on to fellow villagers, even defending them in court. Their areas of speciality include cases that are seldom prioritised by formal legal institutions, for example various forms of abuse of power by party cadres, including illegal expropriation of land (or land grabbing), extortion of fees and taxes, forced abortions and destruction of local environmental resources (Brandstädter 2008). Given the very political nature of the cases they handle, peasant lawyers have become the surprise package around which there is a growing movement on human rights issues and the rule of law in rural China. But how long can they continue such work and will there be a sustained interested to remain the profession given uncertainties of a regular income and considerable political pressure?

Another interesting experiment is from Bangladesh. The growth and development of the *shalish*, a form of alternative dispute resolution (ADR), has received increasing attention from development practitioners as one of the most effective access to justice initiatives pioneered and now spearheaded by NGOs in the country (Hossain 2007). It is particularly interesting to briefly reflect over the *sequencing* of some of the strategies employed by such organizations before the current system of Shalish became institutionalized. Thus, early attempts to systematize efforts to provide legal services to the poor resulted in three pioneering approaches which now form the backbone of legal services programmes across the country (Ibid). The first involved building relations with the local bar association and consequently obtaining commitments to provide *pro*

bono services from practicing lawyers. Second, some organizations which initially began with a focus on ADR later moved onto provide legal aid and to undertake pioneering work in public interest litigation including on issues affecting the urban poor and women in particular. Third, several organisations began to specialise on issues such as the environment (e.g. BELA[1]) and women and children (the BNWLA[2]). As a result, legal services programmes became better known and several development organisations undertook initiatives to develop collaborations with them or to incorporate similar services within their own activities. Thus, 'Increasingly, these organisations began to revisit their roles, no longer envisaging themselves as limited to service delivery but rather to mobilising individuals and communities to claim their rights, and engaging alongside in policy advocacy and law reform informed by their experiences on the frontlines of the justice system' (Ibid.).

I have elsewhere examined interventionist and rather impressive role of the Indian judiciary on the right to food (Banik 2007). Starting from the late 1980s, and based on Public Interest Litigation from civil society, Indian courts have conducted several investigations and repeatedly confirmed the occurrence of starvation-related deaths in many parts of the country. The ensuing investigative reports and court rulings helped to create an impressive social movement, focused considerable media attention on certain starvation-hit areas of the country and put several state governments on the defensive. In this sense such judicial actions not only had symbolic value but also managed to firmly place the issue of starvation

[1] Bangladesh Environmental Lawyers Association.
[2] Bangladesh National Women Lawyers' Association.

deaths on the regional and national political agenda. However, successive governments and senior administrators in India have paid little attention to court rulings, repeatedly questioning the credibility of the empirical evidence and the impartiality of the investigating agencies. My general conclusion therefore is that in order for judicial interventions to have a major impact, there must be stricter sanctions (e.g. jail) for noncompliance.

Amidst general gloom, a recent development, however, offers a ray opf hope. It has recently been established that 1/8th of the approx. 200,000 cases pending in the High Court in the East Indian state of Orissa involved the state government. And in almost 90 per cent of the cases, court orders — both in replying to notices or implementation of orders involving judicial redress — were not complied with by the government. Thus, the judges of the Orissa High Court, 'wary of no response to notices and non-compliance of orders, have been issuing contempt notices' and have ordered government officers to personally appear in court to face charges. And in January of this year, the Court initiated criminal proceedings against a senior bureaucrat for contempt of court as a court order, issued in August 2007, for the adoption of a particular type of garbage disposal system which had been skirted despite several court directives and deadlines. In another instance, when the Court realized that an order it had issued five years ago had not been complied with, it restrained a senior official of the education department from drawing his salary. In their pursuit of forcing the administrative

apparatus to do its job, the Court observed just a few weeks ago that 'Wilful non-compliance is like a cancer in the administration of justice'.[3]

CONCLUSION

I wish to end by drawing your attention to the question of whether empowerment is a means to poverty reduction or an end in itself. Moreover, who is actually to be empowered? And by whom? The dilemmas and uncertainties that dominate globally are aptly summarized in a recent World Bank study (Alsop et al. 2006, 2):

> As a relational concept, empowerment often means redressing imbalances of power between those who have it and those whom do not. This can imply that empowerment is a zero-sum game – that is, one person or group gains power at the expense of another. Unfortunately, while this does not have to be the case, it is often taken to be so, and actions to empower certain groups or individuals can meet with resistance. Efforts to empower may be undermined at all levels.

Indeed, 'empowerment' implies 'more political confrontation than international organisations are able to cope with' (Moore 2001, 321). The immediate challenge ahead is to ensure that leaders of poor countries feel comfortable with the concept and are fully aware of the implications that genuine legal empowerment can bring about. If they feel threatened by such results, the LEP agenda will not succeed in

[3] 'Judges in war with babus', *The Telegraph,* Calcutta, 03 February 2009.

the long term. At the same time it is important to question whether top-down and state-centred arguments that rely heavily on convincing governments (i.e. politicians) of the merits of the LEP approach are really the best way of going about business. If in fact politicians are indifferent or resistant to the rule of law and to enforcing judicial decisions, etc., what does this say about the prospects for getting them to really implement legal empowerment?

While they can be major vehicles of social and political change, politicians in many poor countries can also prove to be major obstacles in the field of empowerment. The experience so far also shows that legal empowerment programmes have been most successful when they have targeted communities and specific policies or laws rather than simply focusing on a top-down, politician-led approach. Similarly, multilateral institutions and rich countries in their roles as donors must accept a sense of responsibility for operationalisation of the LEP agenda and thereby be prepared to be held to account should this new approach fail to deliver the expected level of results. And this willingness to be held accountable for failed advice and programmes must be clearly communicated to developing countries that are on the verge of embarking on a large set of LEP-influence reforms. Such information will allow leaders to take on the risk of championing a new (and perhaps even unproven) idea. While this is an important issue for many developing country governments, it strangely enough remains under-researched. Thank you.