The Commission on Legal Empowerment of the Poor: An Opportunity Missed

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With a constellation of high profile global thinkers and leaders, the Commission on Legal Empowerment of the Poor promised to reposition law and justice concerns at the centre of thinking on poverty alleviation. The Commission has succeeded in generating greater interest in the nexus between poverty, injustice and legal exclusion and is a welcome addition to the battle of ideas and concomitant battle over resources over how to raise the living standards of the poor and disadvantaged. However, this article, which analyzes the Commission's final report from the perspective of a legal empowerment practitioner, concludes that the Commission is an opportunity missed. The Commission's failure to properly tackle the political economy of reform and to justify its policy agenda with empirical data limits its value to the practitioner and will curtail its impact with policymakers.

Introduction

The December 2004 tsunami wreaked unprecedented human and physical loss on coastal areas of Sri Lanka, India, Thailand and Aceh, Indonesia. Billions of dollars poured in to reconstruct the damage. But restoration of lives depended on more than just new houses, fishing boats, schools and clinics. Thousands of inheritance and guardianship cases emerged, crucial for the distribution of property. Legal identity had to be restored so people could access money locked in bank accounts and insurance policies. With 300,000 land parcels affected in Aceh alone, infrastructure reconstruction could not proceed without clarity over land boundaries and usage rights. In short, development needs went well beyond bricks

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and mortar. The law was central to the effort. And yet, in conflict-affected northern Sri Lanka and Aceh, the state legal apparatus had little role to play in addressing these problems. It had almost no credibility, a consequence of years of bloody conflict, as well as broader problems with the legal system.

Part of the local government and international development response in these circumstances was to underpin the broader development effort with community legal empowerment.[1] This entailed grassroots campaigns to educate people on their property rights; providing legal aid and mediation services to settle disputes; and supporting the non-state justice systems that carried the burden of dispensing justice as the state undertook the long path to restoration of human resources, physical assets and public legitimacy.

While these responses seem logical, such a legal empowerment approach remains the outrider in the field of law and development. Most development initiatives tend to focus on the formal legal system and institutions at the national rather than the local level. The dominant paradigm remains a top-down, state-based approach that is not grounded in local realities and experiences of the poor.

The Commission on Legal Empowerment of the Poor (hereafter referred to as 'CLEP' or 'the Commission') was established with the aim of shifting this paradigm. The comparative advantage it brought to this endeavor was a constellation of prominent global thinkers and eminent senior officials and decision-makers.

This article critiques the Commission report, 'Making the Law Work for Everyone', not through detailed academic analysis but from the perspective of a practitioner. It draws on interviews with selected members of the Commission Secretariat and Working Groups, practitioners from non-governmental organizations and donor agencies and the author's personal experience working on legal empowerment in a number of countries, including as a member of the Steering Committee for the CLEP National Consultations in Indonesia.

In short, the report has generated global interest in the nexus between poverty, injustice and legal exclusion. It is a welcome addition to the battle of ideas (and concomitant battle over resources) over how to raise the living standards of poor and disadvantaged communities. The profile and credibility of those associated with the effort has undoubtedly pushed legal empowerment further into the mainstream of thinking on poverty alleviation. Not unlike David Beckham moving to

[1] For example, in Thailand, the Asia Foundation set up a Tsunami Rights and Legal Aid Referral Centre – see http://www.tsunamilegalaid.info/eng/ (accessed 28 November 2008). The International Development Law Organization was active in Aceh and Sri Lanka – see International Development Law Organization, *Final Narrative Report: IDLO's Post-Tsunami Legal Assistance Initiative for Indonesia (Aceh Province) & Sri Lanka*, 2008. Also on Aceh, see Government of Indonesia/United Nations Development Programme, *Access to Justice for Peace and Development in Aceh*, 2006 and World Bank, *Strengthening Access to Justice in Aceh*, 2006.

the US Major League Soccer, it has garnered public attention and a degree of legitimacy to an issue that needed it.

However, an honest critique of the report can only conclude that, given its composition of Nobel Prize Winners, heads of state and Ministers, the Commission has not met expectations.

There are four fundamental gaps. As the report itself says, 'Politics cannot be wished away.'[2] The Commission was uniquely positioned to advise technocrats precisely how to grapple with the challenges of policy and institutional change required to empower the poor; to 'make the law work for them', not just the wealthy, political elite and well-connected who dominate the formation of social and legal norms and the institutions that regulate them. But the report shies away from this challenge, laying out instead a set of technocratic responses that add a little, but not much, to existing knowledge. A chapter on 'Breaking the Political Impasse', drawing on the Commission's collective experience, would have been a fascinating and valuable contribution, but it is missing.

Secondly, the central theme of the report is the extension of formality into the informal sectors of land, business and labour. As the report states, 'if the law is a barrier to the poor … then the idea of law as a legitimate institution will soon be renounced.'[3] But this overlooks the undeniable fact that the law and legal institutions already have been renounced by the poor. It is precisely for this reason they operate outside the law – they rightly see the law and those that enforce it as tools of oppression, not empowerment.

What is needed first is not an extension of formality, but rather a complete reconfiguration of the relationship of the poor with the law. In proffering technical solutions, the report fails to address *why* existing legal frameworks and initiatives to achieve empowerment of the poor are not working. It leaves law and development practitioners stuck with the age old challenges of how to realize the normative potential of good laws and good ideas when the institutions supposed to enforce them are corrupt or inaccessible, or where normative orders beyond the state and standard development instruments carry more weight.

Thirdly, the report suffers from a critical dearth of empirical evidence to justify investments in legal empowerment. This leaves many of its central assertions open to rebuttal. It also fails to equip practitioners with the necessary ammunition to argue for resources for legal empowerment over proven poverty alleviating alternatives such as roads, health clinics or basic education.

Finally, from a practical perspective, there is an absence of guidance on prioritization and sequencing. A policy-maker seeking to adopt the Legal Em-

[2] Commission on Legal Empowerment for the Poor, *Making the Law Work for Everyone*, 2008, p. 45.

[3] Ibid., p. 3.

powerment agenda would face difficulties knowing where to start among the array of recommendations.

Ultimately, therefore, the Commission's work is valuable, but a missed opportunity. At this stage, it leaves behind a half-finished agenda.

To place the work of the Commission in context, this article first provides a quick overview of some other approaches to legal and judicial reform and legal empowerment employed by major international donor agencies. It then moves on to a brief discussion of the origin, structure, composition and working processes of the Commission. Following this are sections on the positive contributions of the report, an analysis of gaps and weaknesses and finally a look forward to the possible future of this important agenda.

The Global Context for Legal Empowerment

In this section we briefly review the global context for legal empowerment initiatives. As Golub discusses in his article in this journal, the dominant paradigm for legal and judicial reform very much remains a top-down, state-centered approach concentrating on the establishment of western-style courts for dispute resolution and buttressing related government institutions. This approach is partly based on the theory that properly functioning judicial and other legal institutions create an enabling environment for business by ensuring sanctity of contract and certainty over property rights. Golub employs the term 'rule of law orthodoxy' to describe this and associated rationales for concentrating justice-oriented development resources on state-centered, top-down efforts.[4]

Under this paradigm, state institutions (judicial and administrative) charged with enforcement of the law are the main unit of analysis. Technical experts will do a capacity assessment of, say, the Supreme Court, identify physical, human and institutional needs and design projects accordingly. Typical interventions include judicial training, court construction and computerization of case management systems.

Despite the Commission's claim to be first to draw the link between access to justice, economic rights and poverty, it in fact builds on a number of legal empowerment programs operating within the international law and development community that seek to change the dominant orthodoxy in this field.[5]

[4] S. Golub, 'Beyond Rule of Law Orthodoxy: the Legal Empowerment Alternative', Working Paper No. 14, *Carnegie Endowment for International Peace Rule of Law Series*, 2003.

[5] CLEP, *Making the Law Work*, at p. 15: 'This report … is the first to highlight how giving the world's poor women and men access to justice, and underpinning and enabling property, labour and business rights … can empower them to change their lives for the better.'

Major donor legal empowerment initiatives

Non-governmental organizations (NGOs) around the world have been conducting legal empowerment work for many years, but the major international donor agencies are only now beginning to catch up. Three major donor initiatives are discussed below.

United Nations Development Programme (UNDP). The UNDP has a well-established Access to Justice program in its global operations. The starting point of its excellent practitioner's guide, *Programming for Justice: Access for All,* is that 'access to justice is essential for poverty eradication'.[6] It defines access to justice in dispute resolution terms, 'the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards.'

The UNDP framework for access to justice goes beyond dispute resolution to encompass five elements; (i) Normative Framework – ensuring rules, both formal and informal, are pro-poor and non-discriminatory; (ii) Legal Awareness as the basic building block of legal empowerment; (iii) Access to Appropriate Forum – a forum for resolution of grievances, be it formal or informal; (iv) Effective handling of grievances; and (v) Satisfactory remedy obtained.

Underpinning this framework is an emphasis on participation of the poor in law-making and public oversight of justice institutions to promote social accountability.

Asian Development Bank (ADB). The ADB has undertaken some of the most innovative and in-depth work on legal empowerment, well before the Commission co-opted the term. In a 2001 study on the topic, conducted by the Asia Foundation, the ADB defined legal empowerment as 'The use of law to increase the control that disadvantaged populations exercise over their lives.' In a recent update completed in 2008 (also by the Asia Foundation), the definition was refined to 'the ability of women and disadvantaged groups to use legal and administrative processes and structures to access resources, services and opportunities.'[7]

The 2008 definition focuses more on the contribution of legal empowerment to development assistance projects. The core of this idea is, 'development assistance is undermined when citizens face systemic obstacles that prevent them from enforcing their rights and accessing productive resources, economic opportunities and public services.'[8]

[6] UNDP, *Programming for Justice: Access for All*, 2005, p. 3.

[7] Asian Development Bank, *Legal Empowerment for Women and Disadvantaged Groups Final Report*, 2008, p. 14.

[8] Ibid., p. 8.

The ADB adopts a three-tier ascending scale of legal empowerment that begins with awareness of rights, the law and legal institutions as the basis of empowerment. Awareness is a necessary but not sufficient first step. The next tier is whereby an individual or group gains understanding of strategies as to how to use formal and informal dispute resolution bodies and executive agencies that decide on their rights. The final level is the attainment of confidence and capacity to actually assert rights.

World Bank. The World Bank launched a 'Justice for the Poor' initiative in 2002. Commencing in Indonesia, it has now spread into parts of Africa and the Asia-Pacific region. The fundamental difference between the Justice for the Poor approach and the 'rule of law orthodoxy' is a perspective on justice sector reform that (i) focuses on the viewpoint of the user of the justice system, particularly the poor, vulnerable and marginalized; (ii) is built on a detailed understanding of social, political and cultural realities at the local level; (iii) recognizes the importance of demand in the development of equitable justice systems; and (iv) sees access to justice as a cross-sectoral concern.[9]

Learning from civil society. Common to all three programs is the close linkage between access to justice or legal empowerment with livelihood and economic well-being. If the programs work effectively, poor communities will understand and be able to assert their rights over property, labour and other economic goods. They will be organized in numbers to advocate for their rights, claim public services and confront powerful vested interests that work against them. They will demand better service from and hold accountable the institutions of justice (formal and informal) supposed to protect them.

Program activities draw on lessons learned from the operations of NGOs working at the grassroots level. One such example is a women's NGO in Timor Leste called FOKUPERS (Women's Communication Forum – East Timor).[10]

Integrating legal empowerment into mainstream development activities. FOKUPERS forms women's support groups in poor villages across the country. The initial emphasis is not on legal issues but basic needs – empowerment activities such as literacy and micro-credit. FOKUPERS facilitators build confidence and gain the women's interest and trust by focusing on the issues that count most to them – earning a

[9] For more on the Justice for the Poor program, see www.worldbank.org/justiceforthepoor (accessed 28 November 2008).

[10] This information is from personal interviews and field observation in February 2007 and July 2008.

living so their children can be educated and their basic health and shelter needs met.

With time and increased understanding, the groups often develop an awareness that their cycle of poverty has broader structural causes. Land acquisition without adequate compensation by plantations and forestry companies denies them their only productive asset. Inheritance laws might even prevent them from owning land in the first place. Informal marriages mean no division of property upon divorce. Wage discrimination and inability to claim lawful benefits and conditions in the workplace prevent them from getting ahead. Domestic violence and sexual assault have proven economic impacts on top of physical injury and social stigma, but are often treated with impunity at the village level through informal justice systems.[11]

After time, FOKUPERS shifts to legal empowerment. Activities include legal education, for both the women and decision-makers in the village; provision of intermediaries such as paralegals, who open access to dispute resolution bodies; and then facilitated support to actually take disputes to the legal system.

But even if a disadvantaged woman has full awareness of her rights, access to legal aid and the confidence to seek redress for a legal wrong, she may well still confront inequitable norms and inefficient or corrupt institutions. The final element of the legal empowerment work, therefore, is social mobilization and organization. Strength in numbers can help to push for changes in the normative framework.[12] And while public oversight is a blunt instrument, it can make justice institutions more responsive to the needs of the poor.[13]

Integrating legal empowerment into community and social development programs has a number of benefits. Firstly, it relates to the real needs of poor people. When the poor conceive of justice, they do not cite extracts from international human rights covenants, but talk of access to public services, rights over land and freedom from corruption and abuse of power.

Secondly, the approach is non-confrontational. Vested interests oppose legal empowerment of the poor. Opening dialogue with local governments and village leaders on legal issues and disputes can threaten those who benefit from keeping

[11] On the economic costs of domestic violence, see A. Morrison and M. Orlando, *The Costs and Impacts of Gender-Based Violence in Developing Countries: Methodological Considerations and New Evidence*, World Bank Working Paper 36151, 2004. On non-state justice, domestic violence and sexual assault in East Timor, see T. Hohe and R. Nixon, 'Reconciling Justice: "Traditional" Law and State Judiciary in East Timor', Working Paper prepared for United States Institute of Peace, 2003 and S. Butt, et al., *Looking Forward: Local Dispute Resolution Mechanisms in Timor Leste*, Paper prepared for Australian Legal Resources International, 2004.

[12] As ADB, above n. 7 states succinctly at p. 61, 'Organization is power'.

[13] World Bank, *Village Justice in Indonesia: Case Studies on Access to Justice, Village Democracy and Governance*, 2004.

disadvantaged groups marginalized. Few, however, object to economic empowerment and literacy programs.

Finally, integrating legal empowerment into broader development initiatives is a means of leveraging more resources than might be available through stand-alone law and justice projects. In Indonesia, for instance, the government is borrowing money from the World Bank for community legal empowerment within the rubric of a $100 million local governance and community development project.[14] The prospects of the government borrowing for a stand alone legal empowerment project, by contrast, are precisely zero.[15]

The poor do not know much about the law, but they know that it works against them. Rebuilding this relationship and restoring trust can only be done through practical examples of success and confidence-raising.

The main strategy of the World Bank and ADB in this field is to do precisely this; to take lessons from micro-level NGO operations like those run by FOKUPERS and mainstream them through other development initiatives that work at the community level on basic issues like agriculture or water supply. The strategy also includes rigorous scientific program evaluations, which NGOs could never afford, to generate evidence of impact.

While these programs are growing in prominence, their institutional sustainability remains fraught. Following its most recent study, the ADB is currently weighing up whether to continue the legal empowerment approach it has so innovatively pioneered. The World Bank's Justice for the Poor is expanding, but remains an emerging agenda.

Enter the Commission

Against this global context entered the Commission on Legal Empowerment of the Poor. Launched by a group of twelve countries and driven by the pioneering, if controversial, work of Peruvian economist Hernando de Soto, the Commission brought together an eminent group of thinkers and decision-makers.[16] The composition was impressively broad-based with government, academia, civil society and private sector representation from across the globe. Heads of the major

[14] For information on the Support for Poor and Disadvantaged Areas project, see http://p2dtk.bappenas.go.id/ (accessed 28 November 2008) or World Bank, *Project Appraisal Document on a Proposed Loan to the Republic of Indonesia for the Support for Poor and Disadvantaged Areas Project*, 2005.

[15] Of course there are exceptions, with Pakistan for instance taking a $350 million Access to Justice loan from the ADB. See http://www.adb.org/Documents/News/2001/nr2001207.asp (accessed 28 November 2008).

[16] Countries and organizations that funded the work of the Commission were Canada, Denmark, Finland, Iceland, Norway, Sweden, Switzerland, Ireland. Spain, the United Kingdom, the African Development Bank, the European Commission and USAID (in-kind support).

donor agencies signed up on the Advisory Board. UNDP took on the role of host organization. All the pieces were in place.

High level, high expectations

The Commission offered much. Its biggest asset of course was the Commission members themselves. Their names and profile represented major credibility.

The bare minimum expectation was that the Commission would bring global attention and political legitimacy to legal empowerment. Instead of an NGO, donor or an academic arguing the case, now it was Gordon Brown, Shirin Ebadi and Madeleine Albright. This sounds trite, but in the battle of ideas and over finite resources, it counts.

Legal empowerment is gaining a minor foothold, but remains on the fringe of debates on poverty alleviation and legal and judicial reform. Just as the top-down approaches to justice sector reform are built on limited evidence of success (as detailed to such effect by Carothers),[17] empirical data to convince policy-makers that legal empowerment works is admittedly equally thin on the ground.[18] It was hoped that the Commission could trawl its unmatched global network to generate this evidence.

Most of all, the Commission was expected to utilize its comparative advantage over the technocrats to articulate paths for change. It is one thing to say the poor need access to secure property rights in order to unlock the potential of capital. The world knows this already. Indeed, there would hardly be a developing country on earth without a range of donor programs struggling on land and property issues.[19] But it is another thing again to establish the complex pre-conditions for making it happen – a functioning land registry, clean government officials, efficient and unbiased dispute resolution mechanisms. Powerful vested interests work actively and often successfully to block such reforms. It was hoped the Commission might provide guidance as to how to break the reform impasse.

Composition, structure and process

To tackle this ambitious agenda, the Commission broke the task down into three pillars – Property Rights, Labour Rights and Business Rights. While Commission

[17] T. Carothers, 'Promoting the Rule of Law Abroad: The Problem of Knowledge', Working Paper No. 34, *Carnegie Endowment for International Peace Rule of Law Series*, 2003.

[18] There is a lot of qualitative and anecdotal evidence of impact as well as gradually accumulating quantitative data, but I am aware of only two major scientific rigorous impact evaluations of legal empowerment work: see World Bank, *Impact Evaluation of the Mediation and Community Legal Empowerment Component of the Support for Poor and Disadvantaged Areas Project, Indonesia: Concept Note*, 22 May 2008 and also ADB 2008, above n. 7, at pp.14-17 and Annex 3.

[19] The World Bank alone has spent close to $4 billion on land policy and administration since 1996 and currently has 68 active land projects.

members and the Executive Director, were continually at pains to stress that CLEP was 'not the de Soto Commission', it is no coincidence that these fields are closely aligned with the de Soto formalization agenda. Certainly no alternative explanation is offered in the report as to why these sectors and not others formed the basis of the Commission's work.

Following some internal deliberation, the cross-cutting issue of Access to Justice and Rule of Law was added as the 'enabling framework' for the three core elements. A fifth group, called Road Maps for Implementation of Reforms was also created to distill outputs into a toolkit for policy-makers and practitioners.

The Commission established a three-tier structure to deliver against these pillars. At the top were the twenty-one Commissioners themselves. Their work was supported by a Secretariat hosted by UNDP and led by an Executive Director, Naresh Singh.

Technical working groups of experts were established for each of the four pillars. Each group comprised around ten-fifteen members, with one or more of the Commissioners as Chair, a Rapporteur to write up findings, and technical experts drawn from international donors, the academic world, NGOs and elsewhere.

National Consultations were also held in twenty-two countries covering all the major regions to elicit input from local activists, government officials, academics and donors actually working on legal empowerment.

Dislocation of Effort. Managing such a large structure and addressing such a broad agenda in a limited period of time was never going to be an easy task. And so it proved.

Members of the Secretariat and Working Groups interviewed for this paper spoke of a dislocation of effort between different arms of the Commission. The Commissioners themselves held widely divergent understandings of the meaning of legal empowerment. Conceptual consensus was probably never reached among the group.

Some of the National Consultations were held before the Working Groups were well established and able to define the task. Consequently, outputs were often of questionable quality and relevance. In any case, working group members the author spoke to never actually saw outcomes of the National Consultations. Neither did most members of the Secretariat or the Commissioners themselves. This was most likely a product of timing and deadline pressure, but it regrettably cut the technical groups off from potential sources of innovation and inspiration from the field.

Initial versions of the main Commission report, drafted by Naresh Singh, Commission member Allan Larsson, and later, three UNDP officials, were produced before the Working Group reports were completed.

The task of the fifth working group to prepare toolkits was severely complicated by the fact it worked in parallel with the other groups. Limited time was available to synthesize final technical inputs and produce meaningful guidance on implementation. The group's final deliberations were held via e-mail after funding ran out.

The point of deconstructing the process in this way is not to needlessly criticize what must have organizationally been a complex task. Nor is to suggest that the work of the Commission was undertaken with anything but the utmost seriousness. On the contrary, the author's personal experiences with the National Consultations in Indonesia, discussions with Commissioners Erna Witoelar and Ashraf Ghani and communication with Working Group and Secretariat members suggest quite the opposite.[20]

However, the process dislocation exposes how an opportunity was missed. The conceptual building blocks were never fully established. Evidence and examples of success were not comprehensively gathered and studied. The collective experience of the commissioners, technical experts and national stakeholders was not fully captured. And, of course, one cannot escape the irony that a Commission espousing the principles of voice and participation of the poor seems to have operated in a mostly top-down manner.

Despite these challenges, in the next section we analyze the positive contributions of the report to the legal empowerment agenda.

Contribution of the Report

As with any such piece, readership of the Commission report will be limited outside an interested group of practitioners and academics. Thus, whether fair or not, the core message or 'sound bite' that emerges from the process will ultimately determine what it comes to represent.

If that message is distilled down to 'law and justice considerations are crucial to poverty alleviation' and that 'legal and judicial reform efforts must look beyond the state and engage directly with poor communities, civil society and the private sector', then the message resonates.

Opening up space

The report should open up political space for legal empowerment work. Donors who backed the CLEP initiative with financial and technical support will likely

[20] In Indonesia, for instance, highly respected Commissioner Erna Witoelar, a former Cabinet Minister and one of a select number of national figures with the credibility to traverse government and the donor community whilst retaining legitimacy with her civil society roots, led a committed and inclusive National Consultation process together with the Indonesian Legal Aid Foundation.

increase the volume of resources they allocate to this field. The 'rule of law orthodoxy' has been challenged.

This is both welcome and very much necessary. By way of illustration, we return to the post-tsunami story at the beginning of this article. Despite the conditions on the ground and the glaring need for legal empowerment, the Government of Indonesia's Master Plan for Reconstruction in the legal sector comprised little more than replacing lost personnel and rebuilding damaged assets.[21] This might seem reasonable at first glance. But in fact the justice system was fundamentally broken before the wave hit. Community trust was non-existent. Data gathered the year before the tsunami, for instance, showed that some courts in the province had handled only one case in the previous year.[22] Re-building them was irrelevant to the immediate needs of tsunami-affected communities, but this is what happened nonetheless.[23]

Thus, high level political impetus to consider new ways of constituting the justice sector and reconfiguring the way it interacts with poor communities remains critical.

The report makes a number of other important contributions, which are discussed below.

The three pillars – issues over institutions

Too often, justice sector reform initiatives commence with the question, 'What is wrong with the institutions of state that make and enforce laws?' Too little attention is paid to the more important question, 'What issues matter in the lives of the poor?' Lifting people out of poverty is, after all, the *raison d'être* of the international development community. As Golub has glibly stated, 'Entering the World Bank lobby, one sees large, stirring words about its vision for a world free of poverty, not a world free of judicial delay.'[24]

The Report's emphasis on assessing the needs of the poor commencing with issues central to livelihood helps shift the paradigm for law and development towards a people-based approach; a focus on the end rather than possible means.

The issues-based structure also highlights the cross-sectoral nature of law and justice concerns. Legal empowerment exists beyond courthouses and the legal

[21] Republik Indonesia, *Rencana Induk Rehabilitasi dan Rekonstruksi Wilayah Aceh dan Nias, Sumatera Utara: Buku VIII: Rencana Bidang Hukum* [Master Plan for the Rehabilitation and Reconstruction of Aceh and Nias, North Sumatera: Book VIII: Legal Sector Plan], 2003.

[22] UNDP, *Access to Justice: A Review of the Justice System in Aceh, Indonesia*, 2003, p. 35.

[23] As the information relayed at the beginning of this article suggests, however, most donors ignored the Master Plan (both in this and most other sectors) and developed more creative programs in conjunction with local governments and local organizations, who shared similar views as to the real needs.

[24] Golub, 'Rule of Law Orthodoxy', at p. 17.

profession. The Commission's work shows that increasing access to clean water, productive agriculture and business prosperity requires an understanding of legal obstacles and enabling factors. The 'rules of the game' count just as much as pipes, fertilizers and access to credit.

Looking beyond the legal institutions

Non-state justice systems. Research and field work across the developing world in Africa, Asia, the Pacific and Latin America has emphasized the importance of non-state actors to the delivery of justice. As Odinkalu said of Africa, for most people, 'their justice needs are fulfilled outside the state.'[25] And yet informal mechanisms are overlooked by reform programs in preference to opening up access to foreign investors.

The Commission report directly addresses this gap, stating 'it is vitally important to consider non-state justice.'[26] It lays out some suggestions on the important work of defining the interface between state and non-state justice mechanisms to make the law more relevant to the lives of majority of people in developing countries.

Executive government agencies. The report also identifies the importance of the executive government in dispute resolution, observing that 'reform has to include both improved access to legal justice and improved access to justice in the government bureaucracy.'[27] This is particularly crucial in countries such as China, Vietnam or Cambodia where no real separation of powers applies and the judiciary is essentially an extension of the administration.[28] People look to their village heads and local administrators to resolve resource and administrative disputes. They are crucial stakeholders in the delivery of justice.

[25] C.A. Odinkalu, 'Poor Justice or Justice for the Poor? A Policy Framework for Reform of Customary and Informal Justice Systems in Africa', in World Bank, *The World Bank Legal Review Volume 2: Law, Equity and Development*, 2006. For other countries, see S. Dinnen, 'Building Bridges – Law and Justice Reform in Papua New Guinea', *State, Society & Governance in Melanesia Project Working Paper 01/3*, 2001; S. Golub, 'Non-State Justice Systems in Bangladesh and the Philippines', Paper prepared for DfID, 2003; J. Faundez, 'Should Justice Reform Projects Take Non-State Justice Systems Seriously? Perspectives from Latin America', in World Bank, *Legal Review Vol. 2*; and M. Stephens, 'Local level dispute resolution in post-*reformasi* Indonesia: lessons from the Philippines', 5 *Australian Journal of Asian Law* (2003), pp. 213-259.

[26] CLEP, *Making the Law Work*, p. 63. For more on this topic, also see World Bank, *Forging the Middle Ground: Engaging Non-State Justice in Indonesia*, 2008.

[27] CLEP, *Making the Law Work*, p. 62.

[28] A recent study from Cambodia, for instance, shows the central role of the executive government in the resolution of land disputes: Center for Advanced Study/World Bank, *Justice for the Poor? An Exploratory Study of Collective Grievances Over Land and Local Governance in Cambodia*, 2006.

Paralegals as agents of legal empowerment. The report provides recognition of the role of paralegals as agents of legal empowerment. Ordinary community members trained in the law and dispute resolution, paralegals are to legal empowerment what village midwives are to primary health and community school teachers to basic education.

Programs such as Timap for Justice in Sierra Leone and PESANTEch in the Philippines have demonstrated the power of paralegals to educate and mobilize communities, open up access to resources to resolve disputes and apply public scrutiny to the institutions of justice (both formal and informal).[29] Globally such programs warrant additional support.

Link to livelihood. While some question the selection of Property Rights, Labour Rights and Business Rights as the three pillars of legal empowerment, the philosophy underpinning the choices is sound – legal empowerment must support livelihood.

Legal needs assessments attest to the centrality of property rights to security and livelihood.[30] The World Bank's Justice for the Poor initiative focuses on land and labour in Cambodia and property in East Timor and Kenya. Its Indonesia program works with farmers' associations, labour unions and women's groups. These priorities build on an understanding of community needs. They mesh with the work of the Commission.

Business rights: a new discourse?

The Commission defines 'business rights' as 'the right of people to start a legally recognized business without arbitrarily applied regulations or discrimination in the application of norms and procedures.'[31] This encompasses the right to vend, to have a workspace and supporting infrastructure and services.

Support for small traders and business people has been the bread and butter of legal aid and advocacy NGOs for years, but is an area oft-overlooked by donor programs. Adriana Ruiz-Restrepo, a Colombian lawyer and former member of

[29] On Timap for Justice see V. Maru, 'Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide', 31 *The Yale Journal of International Law* (2006), pp. 427-476. On PESANTEch see K. Bag-ao (2007), 'PESANTEch Through the Years: Empowering Marginalized Sectors, Identities and Communities Through Paralegalism', BALAOD Mindanaw http://www.balaymindanaw.org/balaod/articles/2007/pesantech.html (accessed 9 November 2008),

[30] See for instance World Bank, *Forging the Middle Ground*, at p. 16; The Asia Foundation, *Law and Justice in East Timor: A Survey of Citizen Awareness and Attitudes Regarding Law and Justice in East Timor*, 2004, p. 3; Australian Agency for International Development, *Making Land Work Volume One: Reconciling Customary Land and Development in the Pacific*, 2008.

[31] CLEP, *Making the Law Work*, at p. 30.

the Commission Secretariat, told the author how informal business people with whom she works are already drawing on the Commission Report to claim so-called 'business rights'. The Commission report can and is already being used as a tool for advocacy.

An Opportunity Lost

The Commission represented an historic opportunity to advance a hitherto marginal agenda. It has partially delivered. Most significantly, legal empowerment has been placed more squarely in the international development agenda.

But the Commission failed to grasp where its true potential lay. This was not to restate technical solutions, but to engage the issue that bedevils development practitioners in all fields of endeavour – how to bring about policy and institutional change in an environment often hostile to reform. In this section we delve further into this lost opportunity.

How to advance a policy agenda

There are a number of pre-conditions for advancing a policy agenda. These include political support, resources and a coherent strategy. Coherent strategies in turn require a compelling storyline; a theory as to how/why impacts will be achieved; empirical evidence supporting or refuting key claims; and practical initiatives entailing implementable responses to a policy challenge.

It's politics, stupid. However, at the core of agenda change is politics. The Cultural Revolution of China, for instance, was not launched following a needs assessment, comprehensive social analysis, public consultation, piloting, impact evaluation and gradual scale up.[32] Where the political winds blow fair, policy change can follow without compelling strategies or evidence.

But political winds rarely blow fair for legal empowerment. As the ADB has stated, 'While some constraining factors are significant but benign, others reflect a determined effort on the part of certain interest groups to keep disadvantaged groups on the margins of society.'[33]

In many developing countries, intertwined networks of political patronage and cronyism link government and the private sector in mutually reinforcing power

[32] The point here is not to portray the Cultural Revolution as successful policy change, but merely to demonstrate that massive social and political reform can be and is regularly driven by politics and ideology, not empirical data.

[33] Asian Development Bank, *Legal Empowerment for Women and Disadvantaged Groups: Good Practices Guide for Incorporating Legal Empowerment Components into Asian Development Bank*, Operations 2008, p. 14.

relations that benefit from maintenance of the status quo. Control over economic assets – land and natural resources, labour markets and business – is the grease that oils the wheels of this machine. Legal empowerment – with its emphasis on voice, social organization and rights for the poor – directly confronts dominant power structures.

Even in the most poisonous of political systems, opportunities for reform exist. But the burden of proof required to secure support is much higher. An articulate storyline and theory might convince a few, but promoting a new agenda carries a higher burden to produce evidence and demonstrated practical, implementable interventions.

It is against these measures that the report falls short – there is no strategy for political change, little evidence produced to justify the suggested reforms and an absence of implementable responses to turn the theory into practice. These deficiencies diminish its value to practitioners and will severely curtail its policy impact.

The missing chapter: breaking the political impasse

Among the twenty-one Commissioners were thirteen current or former Heads of State and Ministers. A chapter drawing on their collective experience entitled, 'Breaking the Political Impasse – Policy Change for Legal Empowerment', would have been a fascinating and valuable contribution; a genuine exploitation of the comparative advantage of CLEP. This is the missing chapter.

This is not to suggest the Commission overlooks politics and the imperatives of change. The report acknowledges the challenges of vested interests, weak governance and public mistrust of the state. Having recognized these challenges, however, the analysis that follows glosses over them. [34]

As the report says, 'Politics cannot be wished away. Powerful actors must be co-opted, won over.'[35] However, as a practitioner whose first question is often, 'How?' my first question here is also, 'How?' We turn now to the issue of Property Rights to further analyze this key gap in the report.

Property rights

In the preceding section we suggested that the Commission report might well be distilled down to stand for the propositions 'the law matters to poverty' and 'communities matter to the law.'

[34] Chapter 3, 'Legal Empowerment is Smart Politics and Good Economics' is an attempt to lay out the case for change, but it is light on convincing arguments and heavy on platitudes.

[35] CLEP, *Making the Law Work*, p. 43.

In fact, the CLEP agenda is significantly more far-reaching than this. Fundamentally the Commission stands for formalizing the informal economy, primarily in land and labour; to extend the protections of the law and to unlock billions of dollars of untapped capital. This is captured in the first recommendation on property rights, 'Institutionalize an efficient property rights governance system that systematically and massively brings the extralegal economy into the formal economy and that ensures that it remains easily accessible to all citizens.'[36]

In addressing the issue of legal pluralism, the report sensibly argues for a middle ground approach to incorporate traditional customary land rights. Under this approach, customary legal norms and structures are not abolished, but rather recognized and incorporated within a modern titling regime.

Global experience demonstrates that property rights reform inevitably creates winners and losers. There is a forest of literature describing the exclusionary effects of formalization, particularly the propensity to permanently disenfranchise the weak and marginalized.[37]

In discussions around a November 2006 presentation to government officials and donors in Jakarta, Indonesia, Commissioner Ashraf Ghani forcefully made the case for formalization of land title as essential for prosperity. But he equally laid out the trade-offs inherent in pursuing this agenda. Formalize land titles, he argued, and some people will inevitably lose in the short-term.[38] But fail to formalize, and genuine prosperity will never be realized. In short, keep things as they are and everyone treads water. Formalize and some must drown so the others can swim. These are the competing interests that governments must weigh.

Dr. Ghani's analysis of policy trade-offs does not appear in the report. In fact, in one of a number of unfounded platitudes, it claims that trade-offs can be avoided: 'Legal Empowerment of the Poor does not have to be a zero sum game where some people will gain and others will lose.'[39]

Given the certainty of 'losers' or at least those with a reasonable fear of loss, political and social opposition is unavoidable. Property rights reform unleashes active and passive forms of resistance from multiple sources – the political and economic elite who benefit from legal ambiguity; rural land holders with traditional customary title and well-founded fears of state incursion and the corrup-

[36] Ibid., p. 60.

[37] For example, see AusAID, *Making Land Work*, p. 14: 'opens opportunities for wealthy and well-connected landholders to claim disproportionately large amounts of newly registered land, at the expense of the poor and those who are less able to access formal institutions and advice.'

[38] As he also said in a background paper for the Commission, 'A reform destabilizes an existing array of interests': A. Ghani, 'Economic Development, Poverty Reduction and the Rule of Law: Lessons from East Asia: Successes and Failures', *Presentation for High Level Commission on Legal Empowerment for the Poor*, no date, p. 9.

[39] CLEP, *Making the Law Work*, p. 44. Though later in the report at p. 80 it is acknowledged that 'Legal Empowerment will in some cases also create policy losers'.

tion, rent-seeking and inefficiency it entails; and the civil society organizations that mobilize social and political opposition against formalization.

Managing this opposition is fundamental to turning legal empowerment concepts into action. This is the practitioner's challenge. And on this the report is silent.

To bring this analysis into the real world, we look at the 1960 Basic Agrarian Law (BAL) of Indonesia.

Land law in Indonesia. Like much of the developing world, Indonesian law is a pluralistic system, dating back to its Dutch colonial past. In the land law context this created two land systems, 'western land' and 'Indonesian land', the latter subject to traditional customary, or *adat* law.

Adat law is highly varied across different cultural and ethnic groups in the country, but the core principle is communal ownership and usage rights and community right of disposal called *hak ulayat*.

The Basic Agrarian Law (BAL) was passed in 1960 with the aim of providing unity, certainty and simplicity to all Indonesians in dealing with land law. In CLEP terms, to establish 'clear and predictable standards'.[40]

The BAL created four main rights, with the key being *hak milik* (right to own), essentially a form of individuated freehold title. At the same time, the BAL claimed a basis in *adat,* explicitly recognizing the ongoing functionality of *adat* law, including *hak ulayat*.[41] Crucially, though, it denied the opportunity to register *hak ulayat*.

Implementation of the BAL has been disastrous. While recognizing that *adat* law still exists, implementation of the system has been hostile towards it. Statutory restrictions on *adat* title have been exploited heavily by the state. Article 5 of BAL stipulates that *adat* must not be contrary to the national interest. This has given the government *carte blanche* to appropriate *adat* land for development projects and take the entire land reform agenda hostage to political aims.

The institutional structure to support land law, Indonesia's Land Administration Agency is notoriously inefficient and corrupt. The common practice of issuing multiple titles for the same piece of land has increased disputes and conflicts. It has naturally given rise to well-organized community and civil society opposition.

Forty-eight years after the passage of the BAL, 'the result is that Indonesian land law has become a volatile brew of mutually antagonistic aims, legal principles and ideologies.'[42]

[40] CLEP, *Making the Law Work*, p. 65.

[41] Also in Preamble Para (a): the land law is 'based on *adat* principles'. Undang Undang 5/1960 Peraturan Dasar Pokok Pokok Agraria [Basic Agrarian Act 5/1960].

[42] R. Haverfield, 'Hak Ulayat and the State: Land Reform in Indonesia', in T. Lindsey (ed.), *Indonesia: Law and Society*, 1999, p. 42.

Indonesians have voted with their feet. Only around twenty percent of all land in the country is currently registered.

Not unique. The Indonesia experience is far from unique. The potent mix of political interference and bureaucratic malfeasance and intransigence is common throughout the developing world. This is the political and social maelstrom into which the Report's Legal Empowerment agenda is thrust.

Indeed, often times the only parties with a clear agenda for formalization of land title are the bilateral and multilateral international development agencies that fund it.

But donors rarely know how to navigate or break this complicated political impasse. There are very few global examples of successful integration of traditional and modern systems of land usage. Donors like cookie-cutter policy responses that deliver predictable results in a short time frame. But, as Fitzpatrick points out, 'there is no 'best practice' model for recognizing customary tenure.'[43]

The point here is not to argue against formalization of property rights as a precondition for prosperity. There is not a wealthy country in the world without a functioning property rights system as the basis for raising and generating capital. Even China is exploring the establishment of a modern titling system.[44]

However, implementation requires a reconfiguration of the legal system to incorporate traditional norms, not an expansion of the existing corrupt system. It requires functioning executive institutions for implementation. The CLEP report offers little in terms of historical or contemporary analysis as to how to expand formality without falling victim to its flaws.

Labour rights

Similar criticism could be leveled at the section on Labour Rights.

The Report adopts a strong human rights based approach, drawing on a number of International Labor Organization (ILO) conventions.[45] But again the report falls short in two main areas – political economy of reform and evidence of benefit against cost.

The report recommendations involve significant resource implications. The recommendation to support inclusive social protection, for example, guarantees access to medical care, health insurance, old age pensions and social services, re-

[43] AusAID, *Making Land Work*, p. 17.

[44] The Economist (2008), 'Land Reform in China: Still Not to the Tiller' http://www.economist.com/opinion/displaystory.cfm?story_id=12471124 (accessed 22 November 2008).

[45] The author does not argue with the importance of equitable labour conditions. Indeed, programs I have worked on in Indonesia support rights education and social organization for labourers and access to legal services to enforce rights to lawful benefits and conditions in the workplace.

gardless of employment status.[46] This is a laudable goal, but even the world's wealthiest country, the United States of America, does not have universal health care.[47]

In Volume II of the Commission Report, the Labour Rights Working Group provides a more detailed analysis of the resource trade-offs inherent in these recommendations. Evidence on the impact of labour regulation, for instance, is mixed.[48] Some data suggests a negative impact on growth, others the opposite. After weighing these up, however, the Report's final word is, 'cost concern cannot be accepted as an argument for non-compliance.'[49]

Such moral and human-rights based arguments rarely hold sway with Ministries of Finance and Development Planning Agencies that set budgets and allocate financial resources.

Move beyond moral arguments. Economics should not be the singular lens through which all policy reform is viewed. But to advance beyond the margins, legal empowerment practitioners and thinkers need to understand and speak the language of the economists. Every dollar spent on health insurance for informal traders, for instance, is one less spent on productive public goods or that could be put toward private sector investment and job creation.

Thus, investments in legal empowerment must be justified not only in social and human rights terms but in economics. Evidence does exist, both of the positive economic benefits of legal empowerment and of the damage caused by failure to act in the form of social conflict and untapped economic potential. De Soto's own work has gained such currency precisely because of the depth of research and data that backed his central argument.[50] Unlike the CLEP report, de Soto quantified the problem in administrative and financial terms.

Legal identity. The section on legal identity is a case in point. Universal access to legal identity as the one of the cornerstones of access to justice is in fact the report's first recommendation.[51]

Having seen first hand the economic consequences of the lack of legal identity in rural villages across Indonesia, this recommendation has merit. For instance, women who marry without a marriage license can be divorced without division of

[46] CLEP, *Making the Law Work*, p. 70.

[47] 15.7% of American citizens have no health insurance: C. Denavas-Walt, et al., *US Census Bureau Poverty and Health Insurance Coverage in the United States: 2004*, August 2005, p. 16.

[48] Commission on Legal Empowerment for the Poor, *Making the Law Work Volume II*, 2008, p. 159 et seq.

[49] Ibid., p. 153.

[50] See H. de Soto, *The Mystery of Capital*, 2000.

[51] CLEP, *Making the Law Work*, at p. 5.

property or alimony. This consigns not only the women in question to poverty, but perpetuates the inter-generational transmission of inequality to their children.

But like the section on labour rights, the massive roll out of legal registration entails enormous expense. In least developed countries where government services are limited or non-existent and virtually nobody is registered, legal identity is almost irrelevant. As a recent three-country study in Bangladesh, Cambodia and Nepal concluded, 'For legal identity to enhance access to benefits and opportunities, such services, benefits, and opportunities must actually exist.'[52] The Commission report – and the hand of practitioners charged with implementing its recommendations – would be strengthened by empirical data justifying investment in legal identity.

Country context counts. As low income countries, Bangladesh, Cambodia and Nepal have more immediate development priorities to actually extend basic government services beyond capital cities. For these countries, legal identity is lower order priority.

In wealthier countries where poverty is less about resource deficits and more about pockets of exclusion and inequality, however, legal identity could be vital for the poorest of the poor. In attempting to promote a bold global agenda the report has overlooked the subtleties of local context.

Breaking the political impasse – an example from Cambodia

In summary, the major gaps in the report are the absence of political economy analysis and hard data on the cost and benefits of legal empowerment. The Commission acknowledges that existing legal, political and institutional structures in developing countries militate against legal empowerment, but offers the reader little guidance on how to break this political impasse.

A recent example from Cambodia offers some insight into how this can be addressed, drawing on one of the Commission's pillars, Labour Rights.[53]

A new labour law passed in 1997 in Cambodia encompassed several of the major labour rights raised by CLEP – the right to form unions; to bargain collectively and to strike. It also established an Arbitration Commission to resolve labour disputes.

At the time of passage, prospects for implementation seemed thin. Another chapter in the annals of failed legal transplantation loomed, seemingly certain to fall victim to political interference, weak institutional capacity and the vast gap between standards in the law and in practice in the Cambodian workplace.

[52] Asian Development Bank, *Legal Identity for Inclusive Development*, 2007, p. viii.

[53] This case-study is drawn from D. Adler, 'Informalizing the Formal: Labor Relations in Cambodia', *Justice for the Poor Briefing Note Vol.1/3*, 2007.

As Adler observed, striking at one of the core challenges of legal reform in the developing world, 'Absent the anticipation of systematic enforcement, legislation was just one of many sets of norms competing for legitimacy and ascendancy in how decisions are made.'[54]

Yet a series of agreements and institutional arrangements innovatively lined up incentives to enforce the law in the garment industry. A bilateral trade agreement between the Cambodian and US governments linked export quotas to compliance with labour standards. Increased quotas generated revenue for garment companies and the government. Compliance monitoring was handled by an independent party, the ILO.

With financial incentives aligned towards compliance by all relevant stakeholders, 'this initiative has improved compliance with the labor law in Cambodia's garment industry.'[55]

Perhaps even more interestingly, space created under this regime for unions to organize and express voice, coupled with maintenance of the monitoring program, has helped to sustain the scheme even beyond the cessation of the quota system in 2004.

Lessons to be drawn from this example are not necessarily applicable on a global scale. Conditions unique to Cambodia and its specific industrial and geopolitical imperatives contributed to make the unlikely possible, at least in one industry.

The broader point, however, is that implementation of the CLEP agenda requires innovative country – or even sector-specific analysis. It must build on a detailed understanding of institutional incentives, grounded in social, political and legal context.

This point is discussed further in the next and final section on the future of the CLEP agenda.

The Future

The Commission on Legal Empowerment of the Poor took on an ambitious and far-reaching agenda. The establishment of a high-powered commission comprising prominent world leaders and thinkers has undoubtedly contributed to the promotion of the concept of legal empowerment.

But in addition to the glaring failure to fully address the political economy for reform or present hard empirical data to back its agenda, the final challenge is one of sequencing – knowing where to start.

[54] Ibid., p. 4.
[55] Ibid., p. 2.

The report sets out a massive array of recommendations, many of which are more aspirational than feasible.[56] Some resonate in certain contexts while being irrelevant or even counter-productive in others.

The CLEP report offers little guidance on prioritization and phasing. Marching orders for the Report were to be 'global and general but practical and specific'. This seems to have turned out to be as impossible as it sounds.

So, should one start with good laws but see them fail in weak institutions? Is it better to fix institutions and see them implement poor laws? Or should one focus on community empowerment as an agent for change?

Access to Justice and the Rule of Law is described as the 'enabling framework' for the entire CLEP agenda, but the kinds of far-reaching reforms anticipated under that pillar are long-term goals at best.

The Cambodia Labour Law example demonstrates that, even in the absence of open democracy and a free and functioning justice sector, pockets of reform remain possible with creative thinking geared to local realities. Building on such examples and generating empirical evidence of their impact can make such reforms sustainable and lay the foundation for broader systemic change.

Nationalize the Legal Empowerment agenda

Moving the CLEP agenda forward, therefore, will rely most fundamentally on transposing the report to the national level. The first step is to translate it into local languages, at least in the countries that held National Consultations. If communication failed from the bottom up, it should at least be improved on the way back down.

Secondly, national implementation working groups should be established in selected willing countries. These groups should develop fully costed concrete and implementable work plans, grounded in local context.

National implementation plans need to address the fundamental gaps in the CLEP report. These are the absence of political economy analysis for reform and the lack of empirical data underpinning reform proposals. Where such data does not exist, systems must be put in place to generate it through rigorous scientific impact evaluations.

There is some interest among the donor community to support these ideas. The UNDP, for instance, has established a Legal Empowerment team and is planning regional consultations and follow up projects. The World Bank has estab-

[56] There are multiple examples, but a sample of the less feasible recommendations includes, 'Repeal or modify laws and regulations that are biased against the rights, interests and livelihoods of poor people'; 'Encourage courts to give due consideration to the interests of the poor'; 'Increase access to employment opportunities in the growing and more inclusive market economy'. CLEP, *Making the Law Work*, at pp. 5-8.

lished a Thematic Group of experts to continue internal discussions on legal empowerment. Interestingly, this initiative came from Bank experts involved in the Commission's work rather than a top-down directive. The debate on the role of norms and the law in development has been considered too important to drop. Time will tell whether discussions will translate into action.

Conclusion

In conclusion, the Commission on Legal Empowerment for the Poor report is best described as an opportunity missed. On the positive side, the concept of legal empowerment has gained increased international profile and legitimacy. The Commissioners themselves will continue to use their significant personal influence to promote this agenda beyond the life of the Commission itself.

It must be recalled, however, that legal empowerment did not begin with the Commission and neither does it end with the release of this report. However, the civil society and international development agencies that support it must define their future agenda by the Commission's failings. Empirical cost-benefit evidence and an improved understanding of the political, institutional and social dynamics that prevent or enable reform are fundamental requirements if legal empowerment is to transition from its current position on the margins to the mainstream of development thinking.