



Legal Empowerment

A platform for resilience, innovation and growth

Concept Note

Synopsis

The people of the West-Asia North-Africa (WANA) region currently face an unprecedented set of interconnected challenges. These include the transition movements in Tunisia, Yemen, Egypt, Libya and Syria; protracted intra-regional conflict; and near unprecedented refugee flows. In the absence of regional frameworks for responding to shared challenges, these events have aggravated chronic development problems, including water deficits and weak natural energy sources. Recent deterioration in economic growth, investment and employment rates, as well as mounting pressure on public resources such as water, electricity and waste management, have further compounded difficulties. The consequences for social cohesion, equitable resource sharing and human dignity are becoming more apparent. As a result, the people of WANA sit at a complex crossroads of an emerging set of resource and institutional deficits, an unprecedented refugee crisis and fledgling transition processes.

A common thread in each of the abovementioned challenges is that the legal systems of many countries in WANA do not afford equal opportunity and legal protection to large segments of the population, most of whom are poor, minorities, women and other disadvantaged groups. In some situations, laws and institutions impose barriers and biases against the marginalized. In others, low rights awareness, lack of affordable legal services, and inefficient or opaque institutions, mean that justice is inaccessible. Such exclusion from the rule of law is deleterious in and of itself, and also has proven, negative implications for economic growth, livelihoods, social equity and stability.

Between 2005-2008, The High Level Commission on Legal Empowerment for the Poor focused global attention on these facts. What followed was a shift away from 'top down' approaches that aim to strengthen state justice apparatus, and towards strategies that enable the poor and marginalized to use the law to advance their rights and interests, and exercise increased control over their lives. Such efforts have included migrant workers using the powers of association to achieve income security, NGOs assisting poor people to access the courts, and educating parents about birth registration in order to facilitate access to education and health services. Legal empowerment is hence an inter-sectoral strategy that reaches beyond the law to address the causes of poverty, injustice and exclusion. The rationale is that where a population is empowered, entrepreneurialism is encouraged, growth patterns are equitable and inclusive, and cycles of exploitation and rights violations are interrupted, providing the marginalized with both the opportunities and the knowledge they need to lift themselves out of poverty.

While legal empowerment — both as a programmatic approach and a policy tool — has been expanded in many regions, in WANA states the debate has largely lost momentum. It may be that legal empowerment as a foundational element of development and poverty reduction was not convincing for policy-makers, or it may have been overshadowed by more immediate problems such as the Arab Spring, the conflict in Syria and the impacts of global recession. Against this backdrop, the concept of legal empowerment should be examined as a timely and realistic platform for addressing the specific challenges confronting the WANA region. These include fostering equitable economic growth, facilitating responsive political reform, alleviating poverty and promoting conflict resilience. How a legal empowerment agenda might contribute to such goals, and an understanding of the political, institutional and social dynamics required to enable such reforms, is the subject of the 2014 WANA Forum.

Background: the evolution of legal empowerment

(i) Orthodox approaches to legal development

Since the 1980s, international legal development assistance has focused on providing technical assistance geared towards improving the functioning of the traditional 'pillars' of the justice system: courts, legislatures, police and correction facilities. Examples include legislative reform; training and mentoring judges and lawyers; equipping courtrooms; and computerizing case recording and data management systems.¹ The rationale was that improvements to institutions and processes would translate into economic growth, heightened trade and investment, job creation and secure private property rights.² This 'top-down', technical approach to legal development has received broad criticism as having done little to enhance access to justice or address the day-to-day justice problems of the poor and marginalized. Two principal arguments have been put forward, each of which has a role to play to varying extents in different locations.

First, it was posited that institution-centric approaches underestimate the limitations of the state. They incorrectly assume that the formal legal system is the preferred and primary means of dispute resolution for disadvantaged populations.³ In fact, in developing countries (and particularly in conflict-affected states), dispute resolution, administrative processes and land transfers are most often regulated by customary or religious rule sets. Making institutions the basis of development thus not only fails to respond to the legal realities of the marginalized, but it represents an opportunity cost in terms of alternate strategies that may have greater impact.⁴ It also ignores the substantive aspects of justice delivery, such as the protection of basic rights under law, and the importance of popular confidence in the justice system.⁵

Second, such approaches center around a partnership between foreign specialists and a local legal elite, neither of whom have particularly good insight into the legal needs and aspirations of the poor.⁶ International practitioners have a tendency to focus on the formal legal system and replicate institutional process that they are familiar with, perpetuating the cycle of institutional emphasis.⁷ In addition, local actors may not be powerful or willing agents of change. State justice apparatuses often reflect the values and protect the interests of the

¹ In 2004, the Administrator of the UN Development Programme (UNDP) described international justice sector assistance as 'technocratic and apolitical in nature, focusing on the transfer of technical know-how to State institutions and on the technical modernization of institutions'. UNSC 'Security Council Stresses Importance, Urgency of Restoring Rule of Law in Post-Conflict Societies' (6 October 2004) Press Release SC/8209 13.

² S Golub 'Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative' Carnegie Endowment for International Peace Rule of Law Series: Working Paper No. 41 (October 2003) 3, 7-8. See also 'Report of the Secretary-General on Delivering justice: Programme of Action to Strengthen the Rule of Law at the National and International Levels A/66/749 (2012) [26].

³ Golub (n 2) 14-15; C Alkon 'The Cookie Cutter Syndrome: Legal Reform Assistance Under Post Communist Democratization Programs' (2002) J Dispute Resolution 327, 339.

⁴ Golub (n 2) 15-16.

⁵ A Potter 'The Rule of Law as the Measure of Peace? Responsive Policy for Reconstructing Justice and the Rule of Law in Post-Conflict and Transitional Environments' (paper presented at the UNU-WIDER Conference on 'Making peace Work' Helsinki 4-5 May 2004) 12-13; A Hurwitz and K Studdard 'Rule of Law Programs in Peace Operations (Report) International Peace Academy Policy Paper (August 2005) 4. Fukuyama argues that low-specificity activities with high transaction volume like legal administration are highly idiosyncratic and most subject to variance according to local conditions. As such, they are unsuited to technocratic reform by external actors. If led by external actors, successful reform depends on understanding the subtleties of the local environment, including norms and culture, and being highly flexible to such needs; F Fukuyama State-Building: Governance and World Order in the Twenty-First Century (Cornell U Press 2004) 112-116, 40. See also R Ehrenreich Brooks 'The New Imperialism: Violence, Norms and the "Rule of Law"' (2003) 101 Michigan L Rev 2275, 2284-2285; R Mani 'Exploring the Rule of Law in Theory and Practice' in A Hurwitz (ed) Civil War and the Rule of Law, Security, Development and Human Rights (Lynne Rienner 2008), 37-38.

⁶ Golub (n 2) 8-9, 24; SN Carlson 'Legal and Judicial Rule of Law Work in Multi-Dimensional Peacekeeping Operations: Lessons Learned Study' UNDPKO (March 2006) 16-17.

⁷ Golub (n 2) 13, 17-19, 22; R Mani Beyond Retribution: Seeking Justice in the Shadows of War (Blackwell 2002) 70.

powerful and wealthy, who can disproportionately capture outcomes there. Moreover, technical interventions do not overcome the fact that governance is highly political, and that too often, power trumps law. Reformed legislation, overseas study tours for judges and computerized case management systems rarely respond to the more causal issues in play, such as endemic corruption, lack of normative commitment to upholding the rights of certain groups, or institutional failure on the part of other sectors.

Such analysis culminated in a grave conclusion — despite an estimated US\$1 billion having been spent over the past three decades strengthening the rule of law, there was scant evidence that programming has had a sustainable impact on access to justice.⁸ This posed a significant concern, for donors, for justice practitioners, and for the estimated 4 billion people who are excluded from the rule of law.

(ii) The dawn of legal empowerment

The new millennium saw renewed consensus on the importance of justice to development, and sparked a wave of discussion on how justice sector assistance could be made more responsive and sustainable. At the same time, a new theory on the relationship between justice, poverty and development began to unfold. This theory centered around the idea that without knowledge of their rights and the tools to uphold them, the poor and marginalized remain trapped in a cycle of poverty, marginalization and exploitation. The new reasoning suggested that existing vulnerabilities make poor and marginalized populations more susceptible to forced eviction, unsafe and exploitative work environments, fraud, theft, sexual or economic exploitation and violence. Female victims of domestic violence or discrimination, for example, are more likely to suffer deprivation of income or assets.⁹ Crime and illegality also have a greater impact on poor and lives of disadvantaged people, and it is harder for them to obtain redress. As a result, they fall further into poverty, and the cycle continues. This is costly on two counts. First, trapped in this cycle, the poor and marginalized tend to over-consume health care services, and become over-represented in the correctional system and social security systems. Second, it is an opportunity cost. If rights-holders are unemployed, sick or in detention they cannot attend school, participate in the workforce, engage in entrepreneurial or support their families. Existing outside of the law, their resources cannot be properly protected or leveraged, they cannot access the necessary protections required to grow businesses, and their ability to create wealth is frustrated.¹⁰ It is also well established that these conditions — this marginalization-exploitation-poverty cycle — weakens a country's resilience to conflict and political instability.¹¹ Clear and equal access to justice and accountability systems is a deterrent to committing further injustice, or from taking justice into their own hands through illegal or violent means. The Arab spring provides a cautionary tale in this regard.

It was put forward that if poverty is both the cause and consequence of exclusion from the rule of law, then legal knowledge and the ability to use legal tools to protect and uphold one's rights must be an essential part of the enabling framework for the effective eradication of poverty. These ideas introduced a new way of understanding the justice-law-development challenge. Previously, the legal system was the link to economic growth and poverty reduction, and it was the deficiencies within the legal system that needed to be fixed. Under the new theory, the key problem was the marginalization-exploitation-poverty cycle, a cycle that needed to be interrupted, and it was the way that the poor and marginalized interacted with the legal system that held the key to the solution. Legal

⁸ Mani (n 7) 33, J Stromseth, D Wippman and R Brooks Can Might Make Rights? Building the Rule of Law After Military Interventions (Cambridge UP 2006) 65, Ehrenreich Brooks (n 7) 2281, 15, A Hurwitz 'Civil War and the Rule of Law: Toward Security, Development, and Human Rights' in A Hurwitz (ed) *Civil War and the Rule of Law, Security, Development and Human Rights* (Lynne Rienner 2008) 2.

⁹ 'Costs of Intimate Partner Violence Against Women in the United States'. (2003). *Centers for Disease Control and Prevention, National Centers for Injury Prevention and Control*. Atlanta, GA. p.18-19 Available: <http://www.cdc.gov/violenceprevention/pdf/IPVBook-a.pdf>.

¹⁰ UNDP 'Frequently Asked Questions on Legal Empowerment of the Poor in the Arab Region' 6.

¹¹ Making the Law Work For Everyone, Report of the Commission on the Legal Empowerment of the Poor (CLEP) (Vol I) 2008, 43.

pioneers put forward the idea that armed with knowledge and tools the poor could break out of this cycle themselves. This body of approaches came to be known as legal empowerment.

*A functioning and accessible justice system provides a mechanism for upward social mobility, whereas its absence prevents such transition.*¹²

(iii) Defining legal empowerment

It is important to highlight that there was no single moment that legal empowerment was born. Legal empowerment programming has been taking place for several decades, under different names, such as legal services for the poor, public interest law, and women's legal empowerment. Such initiatives were often driven by domestic civil society organizations with little or no international assistance. At the same time there have been some important milestones in the empowerment story, the most significant being the Commission on the Legal Empowerment of the Poor in 2005-2008 and the Report of the Secretary-General on Legal Empowerment of the Poor and Eradication of Poverty in 2009.

One result is that legal empowerment goes by many names depending upon which point in time one enters the discourse. The term "legal empowerment" was first coined in a 2001 Asia Foundation Report and defined as, "the use of law to increase the control that disadvantaged populations exercise over their lives."¹³ In 2005, the CLEP defined legal empowerment as: "a process of systemic change through which the poor and excluded become able to use the law, the legal system, and legal services to protect and advance their rights and interests as citizens and economic actors."¹⁴ This definition was later adopted in the aforementioned Report of the Secretary-General (2009).¹⁵

Other organizations have adopted more functional definitions. The Asian Development Bank adopts a three-tier ascending scale of legal empowerment. The first tier establishes rights awareness as the basis of empowerment. At the next tier, individuals and groups understand strategies on how to use formal and informal dispute resolution bodies and executive agencies that can protect their rights. The final tier is the attainment of confidence and capacity to assert rights.¹⁶

These definitions aside, legal empowerment is fundamentally about making the protections of the law accessible to ordinary people.¹⁷ It is grounded in the idea that poverty persists, at least in part, because the poor and marginalized do not enjoy legal rights or the power to exercise those rights: they are trapped in the marginalization-exploitation-poverty cycle. Breaking this cycle requires the existence of a reliable and efficient legal and political framework that specifically addresses the needs of poor and marginalized groups, one that allows them to protect and uphold their rights, and hold political, administrative and private sector power-holders

¹² Ibid 6.

¹³ S Golub 'What is Legal Empowerment: An Introduction' in Legal Empowerment: Practitioners' Perspectives, S Golub (ed.) IDLO (2010), 10.

¹⁴ CLEP (n 11) 3.

¹⁵ Report of the Secretary-General on Legal Empowerment of the Poor and Eradication of Poverty A/64/133 (2009). For additional definitions see further Golub (n 13) 6, 10-11.

¹⁶ M Stephens, 'The Commission on Legal Empowerment of the Poor: An Opportunity Missed' Hague Journal on the Rule of Law, 1 (2009) 132, 137.

¹⁷ Open Society Foundations, 'Legal Empowerment: An integrated approach to justice and development (Draft Working Paper), 2012, 1 ; <http://www.opensocietyfoundations.org/why-legal-empowerment>.

to account.¹⁸ The theory of change is that if people are given information, skills and tools, the poor and marginalized sections of society will be able to:

- Protect and uphold their rights;
- Access essentially services equitably; and
- Organize to advocate for their rights, confront corruption, and hold accountable the institutions of justice supposed to protect them.

Legal empowerment is not a substitute for other important development interventions. It is, however, a necessary condition for creating an enabling environment for providing sustainable livelihoods, inclusive economic growth and eradicating poverty.¹⁹

Informed by knowledge of the law and armed with specific tools, the poor and marginalized will find practical solutions to their own problems, thereby interrupting the marginalization-exploitation-poverty cycle themselves.

The Commission on Legal Empowerment for the Poor

In 2005, a Commission on Legal Empowerment of the Poor (CLEP), co-chaired by Madeline Albright and Hernando de Soto, was established to reexamine the poverty challenge from the perspective of the four billion poor people who are excluded from the rule of law. Its work followed the proposition that these people cannot climb out of poverty because, lacking the protections and rights afforded by law, their resources cannot be protected or leveraged.²⁰ The Final Report — Making the Law Work for Everyone (2008) — emphasized an enabling legal and institutional framework that offered protections and incentives in the areas of labor, business and property rights, enforceable at courts.

The CLEP's emphasis on livelihoods-related rights was ultimately criticized as overlooking the additional, more complex forces that prevent the poor from accessing justice. A further criticism was that it overlooked what was involved in establishing such a legal and institutional enabling framework — a functioning land registry, administrative processes free from corruption, and efficient and accessible dispute resolution mechanisms — as well as how to overcome powerful vested interests interested in maintaining the status quo.²¹

Despite these issues, the Commission must be credited for placing legal empowerment on the global map. The Report established a link between poverty, injustice and legal exclusion, and drew attention to how business, labor and property rights impact the poor.²² Critically, the Commission brought the agenda of the marginalized to the fore, not as the object of the problem, but as people, as partners, and as part of the solution. Unlike much of the UN architecture, real impact ensued from these actions. The orthodoxy was challenged; the playing field was

¹⁸ <http://www.opensocietyfoundations.org/projects/justice-and-development/background>

¹⁹ UNDP (n 10), 7

²⁰ CLEP (n 11) 1; see also D Banick, 'Legal Empowerment as a Conceptual and Operational Tool in Poverty Eradication' Hague Journal on the Rule of Law, 1 (2009) 117, 120.

²¹ JM Otto, 'Rule of Law Promotion, Land Tenure and Poverty Alleviation: Questioning the Assumptions of Hernando de Soto' Hague Journal on the Rule of Law, 1 (2009) 173, 174-180.

²² Stephens (n 16) 133, 143-143; S Golub 'The Commission on Legal Empowerment of the Poor: One Big Step Forward and A Few Steps Back for Development Policy and Practice' Hague Journal on the Rule of Law, 1 (2009) 101, 103.

modified.²³ Legal empowerment is now part of mainstream thinking on poverty alleviation and how to raise the living standards of the poor. The UNDP agreed to take a lead role on some of the Report's recommendations, and the United Nations General Assembly took note of the Commission's Report in December 2008, stressing the importance of sharing best national practices in the area of legal empowerment of the poor.²⁴ Over time, legal empowerment has become mainstreamed into the work of agencies such as UNDP, the World Bank and the Open Society Foundations, and well non-traditional legal actors such as Oxfam, the Norwegian Refugee Council, and UNHCR.

The characteristics of legal empowerment

Because legal empowerment involves a range of approaches, it is impossible to reduce it to select key elements. However, there are common characteristics and central features to all of the approaches:

1. Most fundamentally, legal empowerment involves the use of law and legal tools.²⁵ Law, however, is defined broadly to include not only legislation and court rulings, but regulations, ordinances, administrative processes and customary justice systems. This is because key livelihood-related issues, such as business and birth registration, access to education and health care, identity and travel documents, are handled by ministries and administrative authorities more often than through courts and legislation. Moreover, particularly for the rural poor, the customary legal system is usually more relevant to dispute resolution, land transactions and contract-related issues, as compared to courts which can be geographically inaccessible, expensive and conceptually difficult to navigate. This flexibility and range of entry points allows practitioners to craft solutions that are more reflective of reality and better respond to people's needs.
2. Legal empowerment is specifically geared towards the needs and priorities of the disadvantaged. Reforms or interventions that might 'trickle down' to benefit the poor but are geared towards the needs of a broader population group would not be classified as legal empowerment.²⁶
3. Legal empowerment has a grassroots orientation; it aims to cultivate agency and enhance the power of individuals and communities. The management of initiatives is usually decentralized, and most often occurs in the same locale as beneficiaries. Critically, unlike traditional legal development approaches, legal empowerment views the poor and marginalised as partners. As explained by the Open Society Foundations, legal empowerment does not say "I will solve this problem for you," but instead, "I will work with you to solve this problem, and give you tools with which to better face such problems in the future."²⁷ Legal empowerment is therefore as much about capacity building as it is about problem solving.
4. Legal empowerment is both a process and a goal. As a process, legal empowerment involves direct action. It responds to visible and immediate needs by providing concrete, practical solutions to legal problems and improving bargaining positions.²⁸ Examples include farming communities lobbying for use rights over scarce trans-border water resources, indigent women better understanding and pursuing their rights to alimony and child custody, and communities pressing for equal access to state-guaranteed services such as water, education and health care. As a goal, legal empowerment aims to strengthen marginalized populations in terms of their

²³ Stephens (n 16) 143.

²⁴ UNDP (n 10) 4.

²⁵ Golub (n 13) 13.

²⁶ *ibid.*

²⁷ <http://www.opensocietyfoundations.org/how-it-works>

²⁸ Golub (n 13) 13.

income and asset security, health, security, human dignity and freedom.

5. Legal empowerment is an interdisciplinary and cross-cutting issue, relevant to all fields of economic and social development. It also has close links to other cross-cutters such as gender (a vast majority of the adult poor are female) and the environment (most poor live on land that is highly vulnerable to climate change). As such, programs are often integrated into the work of other sectors, such as rural development, natural resources management, or gender; or into other activities, such as community organizing, advocacy, or the use of media. Legal empowerment recognizes that it takes a range of actors to respond to complex development challenges, including lawyers, doctors, teachers, agriculturalists, civil society, policy makers and administrative workers.

The pillars of legal empowerment

The Commission on Legal Empowerment of the Poor concluded that it is that the insecurity and lack of protection of the poor's assets and labor that curtails their productivity and feeds the poverty cycle. From this it elaborated four pillars of legal empowerment: access to justice, business rights, labor rights and land and property rights. The argument presented was that this body of rights was interconnected, reinforcing, and essential to effective development. As the empowerment discourse developed and more evidence about programmatic impact surfaced, it became clear that the situation was more complex. Development research was identifying a range of complex and interrelated factors that explained poverty, including poor income growth, inequality, social exclusion and entitlement failures, high population growth, environmental degradation, economic inefficiency, social and political instability and vulnerability to debt, disease and natural disasters. The realization of property, labor and business rights was therefore certainly connected to poverty reduction, but it was not a complete answer. Other areas equally important to the development-poverty alleviation puzzle included access to information, identity rights and rights to participation.²⁹

(i) Access to justice

The United Nations Development Program (UNDP) has defined access to justice as: "The ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards".³⁰ In practical terms, this means that access to justice exists when certain conditions are in place. The law must be:

- Fair and just;
- Affordable, both in terms of fees and lawyers costs, transport and opportunity costs;
- Conceptually accessible;
- Physically accessible;
- Laid out in a language understood (or through the assistance of an interpreter);
- Socially accepted and respected;
- Swift in execution and enforcement;
- Enforced — outcomes must be upheld.

These conditions are not black and white; the extent to which they exist may apply differently to different groups, in different locations or in different areas of law. In Saudi Arabia, for example, access to justice for wealthy men

²⁹ Banik (n 20) 119 ; Golub (n 13) 103.

³⁰ United Nations Development Programme, *Programming for Justice: Access for All: A Practitioner's Guide to Human Rights-Based Approach to Access to Justice (Bangkok: UNDP, 2005)* 5.

is quite good, however for women, state laws that prevent them from leaving the house or engaging in legal matters such as obtaining a passport without their husband's permission, mean that access to justice is severely restricted. Another example is the *Israeli Citizenship and Entry into Israel Law* which explicitly discriminates against Palestinians from the West Bank and Gaza Strip, restricting family unification for Palestinians, leading to a denial of residency rights, and obstructing the functioning of the Palestinian justice system. When analyzed through this lens, it is unlikely that there is any country that can boast equal and universal access to justice for all. It may be better, therefore, to understand access to justice in terms of progression along a continuum; a continuous journey, marked by hills, delays and expected detours.

Groups that may have difficulty accessing justice:

- Women
- Ethnic, religious or political minorities
- Children
- The elderly
- The poor
- People with disabilities
- People with HIV and AIDS
- People who operate under customary legal system
- Illiterate and people with lower education levels
- People living in remote or rural areas, slums
- Refugees

Access to justice is the principal pillar of legal empowerment. Not only is it a fundamental right, it is also a bridge to upholding other rights.³¹ Development experience has shown that while legal frameworks and protections may exist, this does not mean that the poor and marginalized can access them.³² This is the key reason why legal development must go beyond law reform to ensure that all groups within society have access to fair, effective forums for resolving conflicts, seeking protection from violence, and for addressing grievances with the state. Equitable access to justice requires ensuring quality services from a broad range of institutions, including the police, the courts, administrative tribunals across government sectors, ombudsman offices, and customary authorities. This may require the adoption of special measures for marginalized, including affordable legal aid services.

"Reforming the law on paper is not enough to change how the poor experience it day to day. Even the best laws are mere paper tigers if poor people cannot use the justice system to give them teeth. Even the best regulations do not help the poor if the institutions enforcing them are ineffective, corrupt, or controlled by elites."³³

Another argument is that access to justice is a cornerstone of effective and inclusive development. A review of development progress over the past 14 years has shown that countries with legitimate laws and credible

³¹ Access to justice is protected under article 14 of the International Covenant on Civil and Political Rights (1966) and articles 8 and 10 of the Universal Declaration on Human Rights (1948).

³² CLEP (n 14) 2.

³³ Ibid 31-32.

enforcement mechanisms made better progress in expanding opportunities for women and vulnerable groups to participate in economic and political life. Conversely, countries that lacked transparent and legitimate legal frameworks, had greater difficulty meeting targets in health, education and other social services.³⁴

(ii) Business and labor rights

The poor and marginalized are often trapped in the shadows of the informal economy —they operate businesses that are not registered and work without enforceable contracts. Operating outside of the law, the managers of informal enterprise are vulnerable to corruption and petty rent seeking. They cannot buy insurance and are highly vulnerable to shocks. They have few means of mediating disputes apart from bribes or violence.³⁵ They are also more likely to rely on personal networks or the informal market for credit, which exposes them to high interest rates and risk.³⁶ Employees are equally vulnerable. They cannot avail of the protection of labor laws, are exposed to unsafe working conditions, suffer from labor insecurity, and cannot benefit from social security or pension systems.³⁷ These problems are not gender blind; women are more likely to work in the informal sector, receive lower wages and operate under poorer working conditions than men and, for a host of reasons, face more barriers in lobbying for and upholding their rights when compared to men.³⁸

By contrast, when the poor and marginalized enter the formal economy, a range of benefits accrue. Entities can safely contract, providing protection to both employers and employees. This encourages managers to diversify their staffing structures beyond their families and social networks, therefore enhancing productivity, specialization and scope for innovation. With secure labor rights, employees can uphold their rights to safe working conditions and minimum wages.³⁹ The formal economy also encourages workers and their employers to invest in skills enhancement, which again enhances productivity. In addition, legal status enables businesses to raise capital and limit liability, thus increasing opportunity, potential for growth and profits.⁴⁰ Such market conditions facilitate the growth of small and medium-sized enterprises, which in turn attracts investment and stimulates employment. There is also evidence that these forces can counter rising inequalities in wealth within and between countries, an issue that experts believe weakens and destabilizes societies. Finally, as the informal sector formalizes, the tax base widens, increasing revenue for national development and social investment, and unlocking untapped capital.⁴¹

It is important to highlight that, in both the business and labor sectors, the poor and marginalized are not usually technically excluded from the formal economy. Rather, because the system works to their detriment, they make a rational decision not to enter. More often than not, the costs of entry into the formal market (costs of business registration, bribes, tax regimes, compulsory social security payments etc.) outweigh the benefits. In other situations, people choose not to interact with state institutions because of perceptions of corruption and/or bureaucracy.⁴² Legal empowerment thus requires an enabling framework of laws and administrative processes that promotes entrepreneurialism, protects investment, encourages the formalization of business practices and removes barriers that limit economic opportunity. Such a framework recognizes the right to buy and sell goods and have a workplace, as well as rights to access credit and insurance. The costs of formalization (including

³⁴ <http://www.opensocietyfoundations.org/projects/justice-and-development/background>

³⁵ CLEP (n 14) 38.

³⁶ Ibid 53.

³⁷ Ibid 37.

³⁸ Ibid 38.

³⁹ Ibid 53.

⁴⁰ Ibid 54-6.

⁴¹ The informal economy may constitute up to one third of GDP; *ibid* 4, 15-17, 30-1; Stephens (n 16) 148.

⁴² CLEP (n 11) 25-26.

taxes and business registration) should be affordable. Burdensome regulations that impose transaction costs on small business should be minimized, systems to confront corruption and bribery should be established, and processes should be uncomplicated and accessible. Basic incentives might also be set in place such as micro-credit, tax breaks and subsidies.⁴³

(iii) Land and property rights

Approximately three billion people around the world live without secure rights to their greatest assets: their lands, forests, and pastures.⁴⁴ Without security of tenure, and in the context of increasing global demand for land, the poor and marginalized are vulnerable to eviction, exploitation and bribery.⁴⁵ Armed with property rights, on the other hand, people can protect themselves against such circumstances and better obtain access to credit.⁴⁶ There is also evidence that connects functional property relations to stable economic growth and investment.⁴⁷ An accessible and efficient system that recognizes and allows people to uphold the human right to own property is thus imperative for legal empowerment. Such a system should recognize a range of property rights, including moveable and non-moveable property, in addition to property that can be individually, jointly and communally owned. A coherent system for maintaining property records, and a system for land registration and transfer that is simple, cost-effective and non-burdensome should be established.⁴⁸ Safeguards must be set in place that limit the state's right to appropriate land, prevent land grabbing and elite speculation, as well as special measures to recognize and promote the rights of women and customary rights holders, who are specifically vulnerable to the consequences of insecure tenure.⁴⁹

(iv) Access to information

There is a growing body of evidence demonstrating that that right to information is an enabling factor for ensuring that laws are implemented effectively. The right to access government information on specific issues of relevance to the marginalized should be guaranteed, including on legislation, administrative regulations and ordinances, judgments, and information on social services.⁵⁰ Journalistic freedom and freedom of association are also key enabling factors. Likewise, laws and structures that support a strong civil society must exist; such organizations play an important role in enhancing the capacity of the State to disseminate information on law and policy in formats that are accessible and comprehensible to disadvantaged groups.

(v) Legal Identity

A cornerstone of legal empowerment is identity. Without legal recognition, a person cannot make the law work for them. Legal identity documents are often a precondition for important activities, such as opening a bank account, purchasing property, and traveling, as well as accessing essential services such as education and health care. A lack of legal identity also leaves people vulnerable to various forms of exploitation, in particular, trafficking and underage marriage. Secondary forms of exploitation are a further issue. Women in informal marriages risk being unable to enforce their inheritance, alimony or child custody rights. State marriage, however, requires legal identity and documentation.

⁴³ *ibid* 7-9, 53, 60, 71-73.

⁴⁴ Namati and Open Society Foundations 'Measuring Justice in the Post-2015 Development Framework' 2.

⁴⁵ CLEP (n 11) 35.

⁴⁶ *ibid* 7.

⁴⁷ *ibid* 34, 49-50.

⁴⁸ *ibid* 7, 60, 66-7.

⁴⁹ *ibid* 51, 66, 80.

⁵⁰ Appeal to the Member States of the United Nations: Justice Should be Included in the Post-2015 Development Goals (2014), 2.

The poor and vulnerable are disproportionately affected in terms of lack of identity documentation.⁵¹ Causes include cost, bureaucracy, belonging to a certain group, and distrust of the State. The poor may also avoid registration for strategic reasons including tax avoidance or military conscription.

Governments should ensure universal access to legal identity as well as guarantee that no one is unfairly denied basic services or economic opportunities due to a lack of documentation. At the same time, registration should be affordable, accessible and uncomplicated, including providing multiple avenues for registration, bundling registration into other service delivery programs (e.g. vaccination, school enrolment, naming ceremonies, or culturally familiar rituals), and providing incentives to register one's identity.⁵²

(vi) Legal participation and accountability

Development economists have begun to make a link between poverty alleviation and economic growth, and improving access to essential services such as health, education and water. Poverty reduction efforts are stymied, on the other hand, where users are not able to access and participate in the functioning of public institutions, and hold them accountable. In practical terms, this suggests that individuals should be able to take part in creating and implementing laws and policies that affect them, particularly local governance over land and natural resources, public services like healthcare and education. This goes beyond participation in electoral processes, to include decision-making made through open and accountable processes, participation in monitoring essential services (such as healthcare, water, and education) and citizen accountability mechanisms. Such processes should be facilitated by enabling access to full rights to association and assembly, and an environment that provides civil society organizations with the necessary legislative and political space to operate effectively.

The rule of law is strengthened when all individuals are empowered to claim their rights, to request effective remedies and to express legitimate demands on public institutions for accountability in the fair and just delivery of public services.⁵³

Legal empowerment entry points

The emerging field of legal empowerment has pioneered practical methods for responding to the challenges outlined above. These include a range of approaches from improving dispute resolution mechanisms, to dealing with breaches in public service delivery, to helping rights-holders find practical solutions to their own problems informed by knowledge of the law. A common thread between these entry points is the possibility that they can be backed-up by the possibility of high-level advocacy and litigation. It must be highlighted that the most effective legal empowerment programs usually involve a combination of tools that are applied flexibly in a response to a given set of circumstances.

(i) Raising awareness of and capacity to exercise rights

Knowing one's rights and how to defend them is often the best prevention against violations. Conversely, a major impediment to responding to violations is that rights-holders are unaware of which acts are justiciable

⁵¹ CLEP (n 14) 32.

⁵² Ibid 61.

⁵³ 'Delivering justice: programme of action to strengthen the rule of law at the national and international levels: Report of the Secretary-General' (A/66/749) 2012 [22].

and/or how to enforce their rights. There are three main entry points for increasing the awareness of legal rights. The first is training, which may take a variety of forms, including community-based workshops, seminars or the integration of rights awareness into education curricula or other schemes. A second entry point is through print media, such as brochures, newspapers or posters. A third entry point is through popular literacy media such as television, the performing arts, interactive plays and audiotapes. Such initiatives are often highly suited to low literacy communities and those living in remote areas because they combine entertainment with an educational function, have the capacity to reach large audiences, and are not constrained by literacy factors. A similarly cost-effective option is radio broadcasts; options include dramatizations, interviews with key legal actors or personalities, and facilities for listeners to send questions via SMS (text) and receive answers on air.⁵⁴

(ii) Legal aid and advice

Legal counseling and representation services targeting poor and marginalized populations might be provided for free, at low cost or on a sliding scale through means-testing. Services might include:

- Legal aid and advice offices (particularly in remote locations or where disadvantaged populations live);
- Telephone hotlines;
- Mobile legal clinics;
- Referral services; or
- 'Legal aid days' where clinic staff travel to communities to undertake legal awareness raising and/or provide legal aid services.

State entities can also undertake empowerment-gearred actions, for example:

- Operating mobile courts staffed by court judges, often assisted by translators, who travel periodically to communities to overcome the cost and distance factors that otherwise make the court system inaccessible; or
- Taking steps to make the formal justice sector more appealing to poor and marginalized users, for example by reducing and simplifying filing procedures, streamlining case processing to reduce the number of times that disputants need to appear in court, eliminating or reducing case filing costs (particularly for indigent persons), providing staff that accompany rights-holders through legal and administrative processes, employing translators or multilingual court staff, and allowing cases to be heard in local dialects.

A common challenge is the cost and reach of legal aid services. Whether they are provided by the state or an NGO, legal aid is expensive. Often there are too few lawyers vis-a-vis demand, and lawyers are often ill-equipped to deal with plural legal systems. One response strategy is the use of paralegals. Paralegals are laypersons (or law students or law graduates doing compulsory training) who have legal literacy skills, knowledge of substantive laws and skills in how to negotiate the court system. Their function is to provide a bridge between the formal legal system and society, thus demystifying the law and making justice more

⁵⁴ For example, in Burundi: T Dexter and P Ntahombaye, *The role of informal justice systems in fostering the Rule of Law in post-conflict situations: The case of Burundi*, Centre for Humanitarian Dialogue (2005) 35. A similar entry point is television programs on legal rights using, for example, mock trials, see for example, 'My right' television program in Armenia (World Bank, *TV Show Increases Awareness of Legal Rights in Armenia* (2005) World Bank <<http://www.worldbank.org.am/WBSITE/EXTERNAL/COUNTRIES/ECAEXT/ARMENIAEXTN/0,,contentMDK:20591687~menuPK:3950073~pagePK:1497618~piPK:217854~theSitePK:301579,00.html>> at 21 March 2011).

accessible.⁵⁵ Paralegals can offer a range of legal services that do not necessarily need to be provided by a lawyer, such as advice on:

- If a rights violation has occurred;
- An individual's legal rights in a particular situation; including relevant laws and options for legal recourse, so that client can make an informed choice on next steps;
- How to access government or NGO legal aid; and
- How to file a claim in court or at an administrative tribunal.

They might also accompany a client through a legal or administrative procedure. In some contexts, they also provide quasi or complementary legal services such as mediation, conduct community legal education, or undertake advocacy work. Where most effective, paralegals are linked to legal aid services that can assist with disputes that require such services.

(iii) Mediation and dispute resolution

Dispute resolution services provided by non-government organizations (NGOs) is a recent but growing response to access to justice vacuums caused when formal justice systems are inaccessible, unsatisfactory or ineffective. They are generally free, and decisions are usually nonbinding. Staff may be local or external to the communities in which they operate, and are trained, in mediation, legal skills, human rights and gender equality. Services provided might include investigation, mediation, post-mediation monitoring of decisions as well as complementary functions such as community legal education and dispute resolution training for community leaders. Like paralegals, to be most effective, NGOs should be linked to legal aid services that can assist with disputes that are either unsuitable for, or cannot be resolved through, mediation. An advantage of both paralegal and mediation models is that they can interrupt a cycle of dysfunctional decision-making. Moreover, providing users with the option of resolving a dispute through an alternate forum can encourage courts (which have a vested interest in remaining relevant and maintaining their power over dispute resolution) to self-reform and become more responsive to the needs of disputants.

(iv) Navigating authorities and engaging with government

Often, the most significant legal issues relevant to the poor involve dealing with bureaucratic processes or government authorities. These might include land registration, obtaining identification for school enrolment, medical care or travel, or opening a business. Where procedures are corrupt, too complicated or too costly, individuals can be deprived of access to essential services such as health care and education. It can also lead to rights abrogation — for example, it is easier to traffic a girl child whose identity is not registered in the system. Remedial programs might include low literacy materials to help navigate systems and that highlight the official cost of different processes, help desks in government offices, paralegals who will assist rights-users with administrative procedures, translation services, offsetting costs for indigent persons, and training of staff to better understand the needs and vulnerabilities of the marginalized.

(v) Advocacy and collective action

Advocacy is the development and sustainment of a dialogue with 'change makers' in support of a particular point of view, policy or action. The aim of advocacy is to make a single party, powerful institution, or community aware of an issue and to encourage action, with a view to changing policies and/or practices. Often, advocacy can also be about changing discourses, attitudes and behaviors that form the context within which these policies or

⁵⁵ E Harper, *Customary Justice: From Program Design to Impact Evaluation* IDLO (2011) 64-65.

practices are embedded. Advocacy can take place at a variety of levels and can be carried out by various actors, from local communities to international institutions. Advocacy comprises a plethora of activities: it might be conducted in writing — for example sending a letter to a foreign mining company; or in person — by meeting with a government official about particular problems and its implications. Other methods include lobbying, media work, and popular campaigning. A closely related entry point is collective action in the form of demonstrations, class actions, petitions, and community pressure or dialogue groups.

(vi) Strategic litigation

Strategic litigation involves referring carefully selected cases to court, with a view to bringing about changes in the law, practice or public awareness. Although the initial step is to resolve an individual complaint, the broader aim is to obtain justice for a whole group that is facing a problem or might find itself in a similar situation. This may be achieved through precedent setting or creating progressive jurisprudence, eliminating a practice through a new threat of litigation, or prompting legislative reform. Strategic litigation also offers tactical leverage; not only can it mobilise the judiciary, other state actors and social advocacy groups, it can also generate broader public support in respect of social injustices.

An obvious question arises from the above discussion: Does the new era of development leave any room for orthodox, top-down processes of law reform? It is critical to highlight that legal empowerment does not question the critical role of law and legal institutions. Indeed, there is little point in knowing your rights if the law is discriminatory, or in being able to access the courts if judges are corrupt or there is no enforcement of decisions. Legal empowerment requires a legal and political framework that specifically addresses the needs of poor and vulnerable groups, and includes practical measures that enable them to access justice and hold political and administrative leaders to account.⁵⁶ In reality, top-down and bottom-up approaches need to work together, at a pace and with sequencing that reflects the specific needs of each environment. It must also be highlighted that legal empowerment is not a silver bullet, and it is unwise to treat it as such. The legal empowerment movement simply served to tip the scales and reach a state of greater equilibrium, one where the importance of institutional reform is complemented by the role of users in promoting justice.

Steven Golub analogizes the current rule of law reform paradigm to a public health campaign that only concentrates “on urban hospitals and the doctors staffing them, while ignoring nurses, other health workers, maternal and public education, other preventative approaches, rural and community health issues, building community capacities, and non-medical strategies”. Rule of law, like health, cannot be addressed merely by central institutions, but must involve a wide spectrum of societal actors, especially the informal institutions of the poor, indigenous and disenfranchised.⁵⁷

Challenges and strategies for the resolution

(i) Legal employment and the language of revolution?

In countries recovering from conflict or working to maintain stability, legal empowerment – the foundation of which is the power of individuals to know and uphold their rights, organize for collective action, and demand accountability, including from the government – may be perceived as a high-risk strategy. Indeed, some have posited that legal empowerment as a policy and programmatic tool did not take off in WANA as it did in other regions because some governments found it threatening. Legal empowerment can, however, be understood as

⁵⁶ Banik (n 20) 118.

⁵⁷ Golub (n 13) 66.

reactive and preventative politicking. In Jordan in early 2011, widespread dissatisfaction with rising food prices, inflation, unemployment and perceived lack of democratic freedoms, culminated in widespread demonstrations.⁵⁸ Protestors called for elections and complementary political and legislative reforms. Executive authorities responded swiftly. On 17 October 2011, King Abdullah II replaced the sitting Prime Minister and charged him with reviewing constitutional reform proposals, revising the political parties and municipal elections laws, and developing a new elections law that would include the establishment of an independent election commission. This agenda appears to be more substance than propaganda. The proposed constitutional amendments presented to the King on 14 August 2011 included modifications to the balance of power between the different branches of government, expanded individual rights and the establishment of an independent Constitutional Court. It remains to be seen whether such action will be sufficient to mollify civil discontent. Such reactionary and preventative governance, however, is a positive example of how self-reform can facilitate a strengthening of the rule of law, promote more effective governance and insulate against unrest. More evidence needs to be collected that examines how sense of voice, access to opportunity, and accountability enhance a country's resilience to conflict.

In cases where the governments of fragile states are supportive of empowerment agendas, programmers need to plan ahead and carefully sequence activities. For example, Where corruption or discrimination in courts and administrative agencies is endemic, resolving such issues should probably be prioritized before projects designed to promote increased use and access. Legal empowerment also ultimately involves winners and losers; potential spoilers should be identified, their likely actions anticipated, and response strategies set in place.

Finally, in situations where legal empowerment is eschewed, legal empowerment may best be pursued through 'backdoor' strategies that involve partnerships with other sectors. Examples might include integrating worker rights education into microcredit or workplace training programs, promoting birth registration through free vaccination programs, or educating teachers on children's rights and parental responsibilities.

(ii) Political economy

The greatest challenge to legal empowerment is that those who can make it a reality are often also the ones who have the strong vested interest in maintaining the status quo. Legal empowerment directly confronts, and sends dominant power structures into flux.⁵⁹ It does this by reallocating and reorganizing allocation of resources, power and influence, as well as modifying social relations, especially with respect to gender and resource holdings. Such redistribution is likely to be resisted at every level. The challenge is thus how to bring about policy and institutional change in an environment often hostile to reform?

The Commission on Legal Empowerment's solution to this quandary was to sell legal empowerment as 'smart politics': a long-term approach that will benefit a country, its elites and the disadvantaged alike". Commentators have criticized this blind faith in "employing rational persuasion to get self-interested politicians and other elites

⁵⁸ Mobilized by organizations including trade unions, tribal opposition groups, leftists, and the Islamic Action Front, the Jordanian protest movement began on January 15, 2011. Protestors called for the resignation of Prime Minister Samir Rifai and for the government to take action against rising food prices, inflation and unemployment. The UN Food and Agriculture Organization's Food Price Index for Jordan averaged 25 percent higher in December 2010 than December 2009, the steepest rise since the FAO began monitoring food prices in 1990. Jordan's unemployment rate has reached an unprecedented high, with estimates ranging from 12.5 to 30 percent.

⁵⁹ Stephens (n 16) 147.

to forfeit their own advantage for the well-being of society”,⁶⁰ as one of the Commission’s most serious failings. Equally, however, there are no other groupings likely to be able to push legal empowerment forward: As Moore notes, empowerment implies “more political confrontation than international organizations are able to cope with.”⁶¹

The answer may lie somewhat in the middle. First, carefully crafted and evidence-based advocacy may be effective. The arguments behind legal empowerment are powerful and difficult to cast off from a social justice perspective. Likewise, the expense of legal empowerment’s absence is great; rent-seeking, corruption and rights violations are economically and socially costly.⁶² Arguments need to be grounded in a country-specific or thematic-specific evidence base; additional research needs to be conducted in this regard.

Second, governments need assistance in facing the very real challenges associated with supporting legal empowerment. As noted above, legal empowerment usually involves winners and losers. Not all conflict cannot be ‘programmed away’; some battles need to be fought in order to forge better deals. Such support might include dealing with the destabilization that may follow a reallocation of resources and power away from the rich and powerful and towards the majority poor. Likewise, to the extent that bribery and corrupt practices are linked to insufficient wages, such problems need to be dealt with at their source. Entry points might include programs aimed at heightening the efficiency of agencies and saving costs which could be funneled into job creation or salary increases; creating new jobs for those made redundant because of legal empowerment programs; and creating incentives for government personnel to support legal empowerment. It also must be recognized that even where frontline officials do not have a vested interest in resisting change, they often have little incentive to serve the needs of the poor and vulnerable equitably. “They may instead succumb to real and perceived disincentives to provide equitable service, such as the limited ability of the poor to pay legitimate and illegitimate fees, the time and cost necessary to visit remote areas when the poor live, and concerns over visiting uncomfortable and unhealthy impoverished areas”.⁶³ Programs that promote better service delivery must anticipate such resistance, and incorporate punitive and/or incentive measures.

(iii) When empowerment is disempowering

Legal empowerment is about facilitating ways in which individuals and communities can take charge and uphold their rights. Where the legal framework is not protective of rights, or in situations where the social infrastructure is not supportive of rights, the outcomes can be less than ideal, especially in the early days of programming. When supporting women to better access the justice system, for example, they may be verbally abused or humiliated, risk retaliatory violence, or the outcome of a legal case may be decided incorrectly. It is impossible to program away all risk of failure, but it is important to be aware that vulnerable individuals are involved, and that sometimes the results can be disempowering.

Because legal empowerment is more flexible, focuses on pragmatic solutions, and vests decision-making in rights-holders, ethical problems tend to arise more often when compared to strict rule of law programming. Beneficiaries may make rational decisions to balance social imperatives against solutions that better promote their rights. Such balancing may not be compatible with strict doctrines of human rights that international practitioners are often bound to follow. A common example is where customary justice systems abrogate the rights of weaker stakeholders; such as through weak penalties for domestic violence, widow cleansing and wife

⁶⁰ Golub (n 22) 101.

⁶¹ M Moore, ‘Empowerment at Last’ J Intl Dev 2001, vol. 13, issue 3, pages 321-329

⁶² CLEP (n 11) 43.

⁶³ UNDP (n 10) 13.

inheritance, and punishments that involve violence. To assist such groups, legal empowerment might facilitate access to alternate fora for mediating disputes, such as community paralegals, mobile courts or NGOs offering mediation services. As legal empowerment programmers in Bangladesh have found, in order for such alternatives to be accepted by both parties, they may need to offer justice that is more protective, but not too dissimilar from what is currently on offer. Women may also have rational and strategic reasons for wanting to remain within orthodox spheres of dispute resolution, even when these are discriminatory. A woman suffering domestic violence may not want a divorce, following which she may lose housing and financial security, social protection, or custody of her children. Instead, she may prefer to remain married, but negotiate violence down to a more acceptable level. Such situations pose ethical dilemmas for legal empowerment programmers.

(iv) Scope and sustainability

Another challenge relates to scope. Legal empowerment, because it focuses on individuals' capacity and relationship with the legal system, can be slow and labor intensive; because of the sheer numbers of the disempowered, broad programs are often required. These factors make legal empowerment, when done properly, a costly exercise. The realities of modern rule of law programming, however, are such that comprehensive initiatives can generally only be implemented on a small scale and/or within a limited timeframe with three to five years being the general program cycle. And it is unlikely that funding modalities will change significantly in the near future, particularly in the context of today's global economic challenges. While this issue of scope cannot be easily addressed, there are measures that can reduce its consequences. The legal development community needs to invest greater resources into researching the impact (and hence cost effectiveness) of legal empowerment programming. If it can be demonstrated that legal empowerment, despite requiring a sustained financial commitment, produces better results than technocratic approaches, it may be easier to obtain funding for longer-run programs. Greater efforts towards complementarity in programming should also be pursued. It is not uncommon that in one country, several agencies will be implementing programs with legal empowerment components. These agencies often adopt different approaches and target beneficiaries that do not significantly or consistently overlap. While each usually respond to key areas of deficiency, the fact that they do not reinforce one another, in addition to their small scale, results in limited overall empowerment impact. If strategies could be aligned and beneficiary groups coordinated, synergies might be created, resulting in a greater contribution to legal empowerment. Of course, turning such an agenda into reality is more easily said than done. Development actors, donors, governments, local NGOs and partner populations, have different views and objectives. Gaining consensus on a common approach will always be problematic. If greater cooperation is to be pursued, prerequisites have to ideally include enhanced inter-institutional dialogue on empowerment approaches, regular debate on the effectiveness of different approaches, and large-scale empirically-driven evaluations that are shared and used to come to agreements on best practices.

(v) When the law is the problem

In some situations, the most serious threats to rights are grounded in the legal framework itself. How can the poor make the law work for them when regulations require that cases can only be brought before the courts by an attorney, or reporting a case of rape can result in criminal prosecution? In such situations, specific techniques such as advocacy, collective organization or strategic litigation may be evoked as a means of promoting changes in the law. Alternate strategies for resolving conflict, such as mediation, may also be employed. However, it is clear that mediating cases that involve human rights violations is rarely acceptable.

(vi) Drivers of orthodox approaches

Any discussion of challenges would not be complete without examining the drivers of the technocratic approaches that continue to dominate legal development assistance. One such driver is lack of insight on the part of international programmers into how legal systems evolve and how to improve accountability. Programs need to be founded on a more sophisticated understanding of legal development; the evidence base needs to be more rigorous and better understood. A related issue is the need to balance nationally-owned and led strategies with the need to insulate programs from self-interested decision-making. The institutional beneficiaries of legal development will often prefer new courtrooms, overseas study tours and computerized systems over programs geared towards the poor's ability to uphold their rights. Under the rubric of national-ownership, the development community still sometimes facilitates this. A better balance needs to be found, between local ownership, the experience of international development experts, and evidence of impact.

A final driver is the supply-driven nature of international legal development assistance. Donors often favor programs that prioritize quick and visible results, minimize the risk of failure, and respond to the concerns of influential governments, including refugee flows, drug trafficking and terrorism.⁶⁴ Such imperatives lead to prophylactic interventions designed to quickly restore peace, rather than to build a justice system that responds to local conceptions of justice and engenders support for the rule of law.⁶⁵ The solution lies in improving the rigor of program development processes, as well as more partnership-driven and dialogue-based relationships with donors, informed by a stronger evidence base.

Legal empowerment and WANA

While legal empowerment — as both a programmatic approach and a policy tool — has expanded in many countries, in WANA the debate has largely lost momentum. It may be that legal empowerment as a foundational element of development and poverty reduction was not convincing in the first place, or it may have been overshadowed by more immediate problems such as the Arab Spring, the conflict in Syria and the impacts of environmental change and global economic recession. Legal empowerment was disregarded in lieu of more reactive politicking, containment strategies and stimulus interventions, rather than being seen as an innovative means of responding to new challenges. This is a missed opportunity in a region where legal empowerment is critically needed.

⁶⁴ A Hurwitz 'Towards the Enhanced Legitimacy of Rule of Law Programs in Multi-Dimensional Peace Operations: Global Trends, Local Concerns (paper presented at the European Society of International Law Research Forum May 2005) 20 Programming may also reflect the thematic interests of donors or mandates of implementing agencies such as a focus on human rights or gender. For example, it has been argued that the Afghan Independent Human Rights Commission has fared much better in terms of technical and non-technical support than other initiatives which are, arguably more demand-based; 'Assistance to Justice and the Rule of Law in Afghanistan: A Strategic Analysis' (Report) Centre for Humanitarian Dialogue (February 2004) 16.

⁶⁵ R Mani 'The Rule of Law or the Rule of Might: Restoring Legal Justice in the Aftermath of Conflict' in M Pugh (ed) *Regeneration of War-Torn Societies* (MacMillian 2000) 91–94. See also R Mani *Beyond Retribution: Seeking Justice in the Shadows of War* (Blackwell 2002) 53 and 78. Kleinfeld Belton argues that it is confusion with respect to the multiple and divergent objectives of rule of law programs that has led to technocratic programming. She argues that practitioners and policymakers define rule of law by institutions or organizational attributes instead of end purposes. By fusing conversations on the goods that rule of law brings to society with what it takes to get there, 'goals such as making the state abide by the law, equality before the law and efficient and impartial justice have [thus] been confused with the existence of legislatures, judiciaries, law schools, police services and prisons'. C Bull *No Entry Without Strategy: Building the Rule of Law under UN Transitional Administration* (UN University Press 2008) 65.

(i) WANA: Recurrent pressures and emerging challenges

West Asia-North Africa can easily be divided into the haves and have-nots: those with rich natural resource bases, and those without. Jordan, for example, has no extractable oil and is the third most water scarce country in the world. Water may be delivered once per week in larger cities such as Amman, but as infrequently as every 12 days in some rural areas. Up to 60% of piped water does not reach the end user; part of this problem is illegal syphoning. These problems affect the health, economic and livelihoods sectors. Poor access to water and sanitation have direct links to child mortality (particularly from diarrhea and cholera), malnutrition, low workforce and education participation rates (the latter particularly affecting girls), as well as protection problems such as threats of violence and sexual assault.⁶⁶ High population growth, the depletion of groundwater reserves and the impacts of climate change will exacerbate these challenges in years to come. And while initiatives to improve access to water and sanitation – such as the Disi Water Conveyance Project⁶⁷ and the use of reclaimed water and desalinated sea water through the Red Sea-Dead Sea canal – have strong potential, the challenge will be to ensure that such resources are equitably shared.

The transition movements in Tunisia, Yemen, Egypt, and Libya, as well as the continuing instability in Syria and Iraq, and the unresolved conflict in the Occupied Palestinian Territories, impact the entire region. Countries involved have had to buffer civic violence, breakdowns in service provision, and the destruction of infrastructure. Those countries not directly affected must navigate the spillover effects of the conflicts around them. The crisis in Syria, for example, has led to refugee populations in Lebanon, Jordan, Turkey, Iraq and Egypt of more than 2.5 million, in addition to the 21 million refugees and internally displaced persons from Pakistan to Morocco. Jordan alone is home to 63,000 Iraqi, 560,000 Syrian and almost 2 million Palestinian refugees. Of the Syrian refugee population, which now accounts for more than 10% of the Jordanian population, 80% are residing in host communities and more than 50% are children.⁶⁸ While the costs in terms of human suffering and dignity cannot be quantified, the burdens assumed by the host populations, are very real. Overcrowding is now a serious problem in hospitals and schools, and the growing number of urban refugees is placing pressure on public resources such as water, electricity and waste management. Many core population groups perceive Syrians refugees as causal factors in rising unemployment and accommodation costs. Such sensitivities are not necessarily misplaced. Limited options mean that Syrians, although most do not possess work permits, are prepared to work for low wages and pay above market rental prices.⁶⁹ The refugee crisis has had repercussions for national GDP figures for the second year in a row, and there is a legitimate argument that domestic funds should be funneled towards national development priorities. And it is impossible to analyze the effects of the refugee crisis without referencing the concomitant security issues. Lebanon, Turkey and Jordan have not been swept up in the wave of countries engulfed by the Arab Spring — although regional dynamics have prompted important reforms. Despite this, the conflicts close to these countries — including the civil war in Syria, continuing instability in Iraq and the unresolved conflict in the Occupied Palestinian Territories — are pressures that are exacerbated by natural resource constraints and refugee influxes.

A final set of challenges relate to unemployment, entrepreneurial opportunity and growth. Despite high secondary and tertiary education rates in many Arab states, youth unemployment sits at 22% for men, and as

⁶⁶ HRH Prince Hassan bin Talal, Keynote address to UNESCWA Arab High Level Forum on Sustainable Development on water and sanitation in the context of the post-2015 agenda (2 April 2014).

⁶⁷ The Disi Water Conveyance Project is a water supply project in Jordan. It is designed to pump 100,000,000m³ of water per year from the Disi aquifer, which lies beneath the desert in southern Jordan and northwestern Saudi Arabia.

⁶⁸ UNHCR portal <http://data.unhcr.org/syrianrefugees/country.php?id=107>

⁶⁹ <http://www.doingbusiness.org/rankings>

high as 40% for women. Members of the informal economy, which make up 60% of the Arab workforce, are exposed to unsafe working conditions (especially in the garment-making and domestic labor fields), and enjoy poor access to entitlements such as minimum wages, social security and insurance. A review of where Arab countries sit on the “Ease of Doing Business Index” illustrates the stifling of entrepreneurialism caused by difficulty in obtaining credit, enforcing contracts, and accessing training and skills development. These concerns must be considered against a poor economic outlook with inflation as high as 11% in some countries, and one fifth of the Arab population living beneath the poverty line.

(ii) Access to justice for the poor and marginalized

It is important to understand how the people of WANA respond to such challenges. For example, what redress options are available if a person is deprioritized in provision of water, not being paid minimum wage, cannot start a small business due to bureaucratic red tape or if a refugee being exploited by their landlord? A lynchpin in each of these woes is that access to justice is difficult, especially for the poor and marginalized, and in particular for women.

Studies have exposed alarming deficits in accountability, and clear linkages between wealth and access to justice. In Jordan, each year, approximately 5000 cases are not referred to a court and around 9,000 cases go to court unrepresented, because the affected person cannot afford it. Alongside this battle of access is a crisis in confidence. Around 40% of all cases not referred to court are said to be resolved amicably. It is likely that many of these are solved using traditional dispute resolution methodologies. Little is known about such systems, particularly how marginalized groups such as women, the poor and the less powerful fare in such negotiations. These concerns particularly extend to the almost 20% who do not refer their case to court because of shame, custom or tradition. Of this group, 35% are women and more than 50% of cases involve a criminal law issue. Questions need to be asked about why such a large number of persons feel that the justice system is not the most effective means of resolving disputes.⁷⁰

What are the likely outcomes of this situation? From the Arab Spring movements, we know that poor access to basic resources and limited economic opportunity, coupled with weak accountability, breeds instability. As foreign aid donors rush to address pressures on resources and livelihoods to avoid further disintegration, they cannot forget to extend and improve access to justice. Moreover, as these goals are mutually synergistic, they must be pursued in complement. What are the potential strategies to ameliorate such stresses, and what role might legal empowerment approaches play in such strategies?

(iii) Legal empowerment as platform for change, innovation and conflict resilience

It is argued that legal empowerment represents a proactive, realistic and timely opportunity to confront many of the challenges facing the WANA region.

First, justice and the rule of law are broadly recognized as cornerstones of effective and inclusive development, essential for sustained economic growth, and positively linked to the eradication of poverty.⁷¹ Moreover, it is now more clearly understood that the poor and marginalized do not want charity or even direct assistance. Instead, they want opportunity — to receive education, access essential services reliably and at reasonable cost, to work, start business, purchase property, and protect themselves from shocks such as job loss, bereavement and unexpected emergencies. From an economic development perspective, this is also what the poor and

⁷⁰ Justice Centre for Legal Aid, Legal Aid Survey (2012), on file with author.

⁷¹ Report of the Secretary-General (n 15) [3-6].

marginalized need, as direct assistance does not build healthy and growing economies. Legal empowerment also makes sense on all levels. It is marginalized individuals who have the biggest stake in obtaining access to basic resources and services, securing and retaining fair conditions of employment, and protecting themselves from violence, criminality and exploitation. It is logical, therefore, for them to assume the lead role.

“The rule of law is not a mere adornment to development; it is a vital source of progress. It creates an environment in which the full spectrum of human creativity can flourish, and prosperity can be built.”⁷²

Second, legal empowerment approaches embrace the ‘messiness’ between justice and other development goals in a way that is particularly relevant to the WANA region. It acknowledges that justice issues transcend the legal sphere; rights violations are often wound up in questions of socio-economic opportunity, good governance and environmental sustainability. For example, a family may be living in poverty because a male breadwinner had to leave his work due to chronic illness that could not be treated because the family did not have the necessary identity documents. This family is dealing with a wide range of issues: economic, health, legal and administrative. If children have left school because the family could not afford the fees or because they were sent to work, additional components are in play. Because legal empowerment works with other sectors and in an inter-disciplinary manner, practitioners are able to identify and better respond to the problem the rights holder is facing.⁷³ Through such inter-sectoral partnerships, a broader range of actors can adopt legal empowerment methodologies. Initiatives on natural resources management, public health, education, livelihoods, small business enterprise, and governance might all be improved by integrating legal empowerment components. In operating environments where justice and rights are politically or socially volatile issues, such partnerships allows interventions to take place where more direct approaches might be frustrated.

Third, legal empowerment responds to one of the most significant, but least understood, challenges for access to justice in WANA — the problem of rights apathy or a weak rule of law culture. Access to justice is not possible unless people believe that the law can work for them. Without such confidence, a legally literate population, access to legal aid and transparent administrative processes, are missed opportunities. Promoting such values, however, is an elusive area and one that is often eschewed in orthodox programming. Legal empowerment, by contrast, sends a message to the individual and the broader community that the law is a powerful tool that can work for you; it heralds the power of the individual to assert their rights and hold duty-bearers to account. It asks, and provides individuals with the tools to step up, participate, and demand more.

There is growing evidence that legal empowerment might also serve as an approach for responding to development problems across other sectors, by helping to build legal and administrative frameworks, predictable and fair enforcement, and opportunities to equitably resolve grievances and claims. A sector that is particularly relevant to the WANA region is access to clean water and sanitation. Legal empowerment cannot produce water, but it can prevent water from being illegally siphoned off and ensure equity in distribution by giving rights-holders the skills to demand accountability. Improvements in these areas have proven multiplier effects. Improved access to water and sanitation reduces water-borne illnesses, promoting economic and school

⁷² Commission on Legal Empowerment of the Poor, “Making the Law Work for Everyone” Vol. 1 (2008) See also: the Programme of Action A/66/749 and October 2011, S/2011/643; The Rule of Law and Transitional Justice in Post-Conflict societies August 2004, S/2004/616; “Uniting our strengths: Enhancing United Nations Support for the Rule of Law,” S/2006/908, 14 December 2006).

⁷³ For example, a community whose land is under threat of encroachment from a mining company might simultaneously receive legal aid assistance to register and obtain secure customary title over their land, negotiate with the mining company for a fair sharing of profits and measures to ensure minimum environmental degradation, and learn new cultivation and water management techniques.

participation and reducing burdens on health and social services. Expanding income generation opportunities reduces poverty, improves school retention rates and reduces criminality, particularly for youth where there are proven links between unemployment, criminality and extremism.

Finally, legal empowerment must be seen as reactive and preventative politicking, and a bridge to more effective governance. Individuals possessing the tools to uphold their rights and demand accountability facilitates a more effective social compact by forcing government (at all levels) to be more responsive to the needs of individuals. A stronger social compact, in turn, promotes conflict resilience, efficiency and productivity.

Moving forward: WANA 2014

Legal empowerment as a means of realizing both justice and broader development goals requires certain precursors as well as strategies to overcome the challenges outlined in this paper. Innovation in several of these areas is being pursued in WANA countries at both local and national levels. This work might be grounded in efforts to develop a better understanding of what legal empowerment means in the regional context. Importantly, the key principles of legal empowerment are foundational to the Islamic legal tradition:

- Equality between persons and protection of the weak and marginalized, including orphans, the poor, women and the elderly;
- Justice, the protection of rights, and the ability to seek accountability for rights violations;
- The right to equality before the law, including equality of opportunity and equality of treatment regardless of social origin, wealth or religion; and
- Ownership of property, including the rights of women to own property.

The embeddedness of these principles within Islamic jurisprudence supports the proposition that legal empowerment represents a timely and effective platform for addressing the specific challenges confronting WANA. How a legal empowerment agenda might contribute to such goals, and an understanding of the political, institutional and social dynamics required to enable such reforms, should be the subject of further dialogue involving justice sector employees, NGO and legal aid workers, religious scholars from different faiths and legal empowerment practitioners. While the roadmap remains unclear, with these groups working in cooperation, we can arrive at the solutions. The 2014 WANA Forum represents a humble start in this regard.