

The Past, Present and Possible Future of Legal Empowerment: One Practitioner's Perspective

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Abstract

This paper offers one practitioner's perspective on the origins, evolution and possible direction of legal empowerment (LE), which in some ways is a new field and in others is a continuation of many kinds of efforts linked by certain common elements. While receiving increasing international donor attention and support (though still relatively little compared to conventional law-and-development programmes), most legal empowerment work is primarily carried out by international and country-specific civil society groups because they tend to demonstrate more of the requisite initiative, dedication and flexibility than do government agencies. A limited but growing array of research findings indicates more legal empowerment progress and impact than that demonstrated by top-down, government-centred legal programmes, such as judicial reform.

For legal empowerment, the next two decades could bring increasing use of the term, launching of relevant initiatives and evidence of impact. Another conceivable outcome, however, could be that the term will thrive but the underlying concept, activities and strategies will barely survive – that legal empowerment terminology could mask many conservative, state-centric programmes. In a more constructive vein, the future of LE should include broader and deeper research, going beyond the initial efforts underway and generating evidence of various initiatives' impact (or lack thereof) and resulting lessons. Finally, and most hopefully, the most potentially powerful trend for legal empowerment could fall outside the justice sector. That is, ironically, the greatest potential for the field could involve its increased integration into socioeconomic and governance development initiatives, such as those pertaining to health service delivery or local government budget accountability.

Keywords: legal empowerment – law and development – rule of law – governance – accountability – civil society – justice for the poor – Commission on Legal Empowerment of the Poor – rule of law orthodoxy – Global Legal Empowerment Network – Haki – Namati

By Any Other Name...

This paper offers one practitioner's perspective on the origins, evolution and possible direction of legal empowerment (LE), which in some ways is a new field and in others is a continuation of many kinds of efforts linked by certain common elements. I offer the perspective in the first person in order to address the matter in an informal manner.

While there are many viable definitions for this emerging field, I currently favour *the use of law and rights specifically to help increase disadvantaged populations' control over their lives*. Without delving into the definition's details, three key considerations for understanding the concept are:

- The word "specifically" is employed to distinguish LE from most rule-of-law (ROL) work supported by development agencies. LE directly engages and/or benefits the disadvantaged. In contrast, most ROL work - sometimes called ROL Orthodoxy for its conventional approach - mainly aims for benefits to only indirectly, eventually trickle down to the poor via reforming laws (e.g., regarding foreign investment) or government institutions (most notably judiciaries).
- Even more than being about law, legal empowerment is about increasing power/control for the relatively powerless.
- Such increased power can both flow from the use of law and/or result in law reform and, even more crucially, legal implementation – the actual enforcement on the ground of decent laws that all too typically exist only on paper in many countries.

In some ways, legal empowerment is just a catch-all term for an array of activities and strategies that sometimes go by other names: legal aid, developmental lawyering, structural legal aid and justice for the poor, for example. It also subsumes public interest litigation and social action litigation, and substantially overlaps with social accountability.

The importance lies not in the nomenclature, however, but in the concentration on specifically benefiting the disadvantaged, as opposed to ROL Orthodoxy. The value of weaving together diverse strands of strategies and activities that comprise legal empowerment is that it provides a focus for rethinking and invigorating how law and development should be integrated.

The Past

Certain intellectual roots of the concepts underlying legal empowerment merit some brief illumination. In the 1970s a small, New York City-based international NGO, the International Center for Law in Development (ICLD), began promoting a “legal resources” approach by which the law was seen as a resource for helping the poor mobilise to assert their rights and improve their situations. The notion here was that in various ways law could be used by the disadvantaged for political and developmental ends.

Analogous trends were starting on a country-specific level across the globe in the 1970s and 1980s. For instance, when I first arrived in the Philippines in 1985 to work for the Asia Foundation, a San Francisco-based international NGO that funds and implements various development projects across Asia, a number of young Filipino NGO attorneys were starting to employ the legal resources approach. (Some came to call it alternative lawyering, as in an alternative to conventional legal practice and legal aid.) Moreover, many also were taken with the work and writings of Senator Jose Diokno, a human rights activist prominent in the opposition to the country’s dictator, Ferdinand Marcos. Diokno preached “developmental lawyering.” This aimed to cast lawyers as development actors partnering with the poor to seek change that promoted social change and that went beyond individual case work.

The actual origins of the term “legal empowerment” stem from a 2001 study that I co-authored for the Foundation, under a research contract that the organisation had received from the Asian Development Bank (ADB). The study focused on the creative ways in which (mainly) NGO attorneys and their partner populations and organisations were carrying out legal services in seven Asian nations. While it would be pleasing to claim that the term was a product of an intellectual effort to propound a new perspective on law and development, the reality of its origins are much more mundane. The original title that the ADB had used in commissioning the study featured legal literacy, which was misleading in that it suggested that the report was simply to be about legal knowledge. When I proposed to my co-author that legal empowerment better described the focus, it was simply to find a decent substitute for that title.

While the concept slowly gained increase traction in subsequent years, the trigger for garnering greater attention came with the 2008 report of the Commission on Legal Empowerment of the Poor (CLEP). The Commission has received criticism from many quarters for simultaneously adopting: grandiose claims (most notably, that four billion people are poor because they are excluded from the rule of law); a narrow conception of legal empowerment (*inter alia*, downplaying the roles of civil society, women and political economy analysis); and a top-down, government-centred approach to promoting a mainly bottom-up approach (reflected in part in its original name, the High Level Commission on Legal Empowerment of the Poor). More and more, then, individuals and organisations concerned with legal empowerment sidestep CLEP’s vision for the field. To its great credit, however, CLEP did focus on aspects of the law crucial to the poor and did spark greater interest in LE in certain international development circles.

This included interest by the philanthropist George Soros, who was influenced by both CLEP and the advocacy in favour of LE by the Open Society Justice Initiative (especially its programme on legal capacity development), a part of his sprawling Open Society Foundations (OSF) network. That in turn has translated into OSF supporting a number of new legal empowerment initiatives.

The Present

OSF is by no means the only organisation taking an increased interest in legal empowerment. Bilateral aid organisations such as the Australian, Norwegian, United Kingdom and United States development agencies have been providing support for various legal empowerment initiatives. Multilaterals such as the UN Development Programme and the World Bank have become similarly engaged, the latter mainly through its growing Justice for the Poor Programme. Other institutions, such as the International Development Law Organization, also are playing a role.

International and domestic NGOs are increasingly employing the term – though, again, I should emphasise that what they are doing is far more important than what they call their work. Still, the growing role of the concept is reflected in the existence of new international NGOs and networks concerned with LE activities and strategies. These include the international NGO Namati, the Global Legal Empowerment Network (which it hosts) and another new legal empowerment network, Haki.

There are also new initiatives taking place on the academic and scholarly fronts. The University of Oslo has hosted an array of activities and publications. The Australian National University is becoming engaged with the field. A new law journal article argues for applying legal empowerment in the U.S. context. A number of university courses include the topic. And I am fortunate enough to start teaching courses solely on legal empowerment in the 2012-13 academic year, at the University of California at Berkeley Law School and at Central European University in Budapest.

Having said all this, the fact remains that if one walks into most development agency offices around the world and starts talking about legal empowerment to most of their personnel, the likely response will be blank stares. But this is to be expected in a relatively new field that comprises more an inchoate array of initiatives than a cohesive set of programmes.

Most legal empowerment work is carried out by international and country-specific civil society groups, be it NGOs or community-based organisations (CBOs) comprising the disadvantaged. This is not to preclude current or potential roles for governments in developing or transitional societies, particularly where they partner with NGOs and CBOs. But civil society tends to take more of the initiative, demonstrate more of the dedication and evince more of the flexibility requisite for effective LE operations.

Perhaps the most promising new trend regarding legal empowerment goes beyond what is being done, to what is being researched. To various extents and in various ways, funding agencies such as OSF, the World Bank (though its Justice for the Poor program) and the Australian and British aid agencies are supporting applied research on the impact of legal empowerment work. It may take years for the research to gather steam and produce results. But building on the scattered studies that already indicate progress and impact of LE initiatives, the new research could significantly document whether and how legal empowerment makes a difference and the various ways in which it can and should be pursued. In contrast, decades of heavy funding for ROL Orthodoxy has produced a paucity of proof that certain types of programmes falling under its rubric (notably judicial reform) have been effective.

The Future

Speculating on the future of legal empowerment can take the forms of predicting what could happen or indicating what should happen. I will do a bit of both.

One very possible outcome is that, thanks to the efforts of various institutions, including those I have mentioned above, over the next two decades we will gradually see increasing: use of the term, launching of relevant initiatives and evidence of impact. We should not underestimate, however, the extent to which the political and bureaucratic forces that drive decision-making in international development will continue to hold sway. Even if growing evidence of LE impact emerges – and I am cautiously optimistic in this regard, but willing

to grant the possibility that findings could prove disappointing – this will not necessarily translate into expanded political and financial support for this work.

Another conceivable outcome, however, could be that the term will thrive but the underlying concept, activities and strategies will barely survive. That is to say, there is a tendency in international development circles for popular terminology to mask work that is irrelevant to or even runs counter to the previously plain meaning of the words being used. At one point, access to justice featured legal aid and related services that helped the poor gain access to the courts and other justice forums. In many quarters now, it has been broadened to include almost anything that is justice-related – it is only a slight stretch to claim that for certain agencies even changing a broken light bulb in a courthouse would fall under the rubric of increasing access.

Similarly, some views of human rights work have expanded to the point where in some circles it no longer features organisations such as Human Rights Watch, Amnesty International and their country-specific counterparts. Under the guise of human rights-based development (HRBA), even the most ineffective programmes with the most repressive regimes can be considered human rights work since they focus on “duty bearers” within the HRBA framework. It is possible that legal empowerment could go down a similar path.

In a more constructive vein, the future of LE should include broader and deeper research, going beyond the initial efforts underway and generating evidence of various initiatives’ impact (or lack thereof) and resulting lessons. It is worth the investment to ascertain whether and how this field should grow.

To end on a hopeful note, the most potentially powerful trend for legal empowerment could fall outside the justice sector. Ironically, the greatest potential for the field could involve its increased integration into socioeconomic and governance development initiatives. The scattered evidence of impact that I referenced above includes examples of this possible direction. A pilot project in Uganda has yielded improved health service delivery and bottom line impact, such as decreases in infant mortality where beneficiaries were enabled to understand and act on their relevant rights. Making use of a freedom of information law in India has allowed community groups to monitor and hold accountable local governments’ budget allocations. If such integration of legal empowerment becomes more the rule and less the isolated exception in development circles, it could greatly enhance the growth of the field. And much more to the point, it would greatly benefit the disadvantaged, who seek and deserve greater control over their lives.