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Human Rights and Legal Empowerment of the Poor

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Outline of Presentation

Studies of poverty have not been much concerned about how law can be used to advance the plight of the poor, and to reduce or eradicate poverty. Recently, however, the development discourse has begun to put emphasis on the significance of legal empowerment of the poor, suggesting that causal links exist between the legal position of poor people and poverty reduction. In a marking of the Human Rights Day on December 10, 2007, UN independent human rights experts issued a statement claiming that “from a human rights perspective, poverty can be described as the denial of a person’s right to a range of capabilities” and that poverty presents a state of affairs where violations of civil, cultural, economic, political and social rights interact and mutually reinforce each other.² This approach assumes that by improving the legal position and status of poor people, in terms of access to legal protection of property, as well as improvements in the security of their living environment, their chances of moving out of poverty increases considerably. This argument reflects to some degree the view expressed by poor people themselves in the World Bank’s survey *Voices of the Poor* (2000) that highlights lawlessness and fear of crime in the poor’s own description of how they experience poverty.

The relationship between legal position and social inequity has long been recognized by the sociology of law. The relationship has two main dimensions: Legal protection and security requires resources, including knowledge and access to institutions that is often the privilege of the affluent and rich. At the same time, crime, legal conflict and insecurity is more

¹ This article draws on an earlier work titled “Formalisation and poverty reduction: A human rights approach”. In M E Brøther and J-A Solberg (eds). *Legal Empowerment – a Way Out of Poverty*. Oslo, June 2006, published by the Norwegian Ministry of Foreign Affairs.

² Cf. <http://www.ohchr.org/english/events/day2006/statements.htm> (visited 11 December 2006).

widespread in areas where people live in poverty with little security resources and inadequate legal protection. In short, legal position and security is generally a social bias in disfavour of the poor.

Over the last few years, the impact of legal position - the property of having access to legal institutions, and human and financial resources to take advantage of this access - has become a field of interest for development studies and interventions. One reflection of this is the establishment of the UN High Level Commission for Legal Empowerment of the Poor in September 2005. The Commission was to set up “on the assumption and conviction that the fight against poverty can only be won and the MDGs [the Millennium Development Goals] only achieved if governments succeed in rendering legal recognition of the assets and institutions of poor people and democratizing the rule of law.”³ An apparent narrow focus on “property rights and assets” was gradually extended to include access to legal means and institutions in a broader sense (viz rule of law).

This point of departure for the Commission’s work was justified by the observation that the vast majority of the world’s poor live in the so-called informal or extralegal sector of the economy, without access to the benefits and protection of a legal order. Poor people, the Commission assumed, lack effective legal protection and recognition of their assets and transactions. They also lack protection of legal security or access to welfare provisions and institutions that make social security available (often complementing local and traditional systems of protection.)

This contribution addresses the legal empowerment issue (often and somewhat misleadingly referred to as the formalisation agenda) from a human rights approach, and asks whether and how the human rights discourse (including the right to development debate) can offer insights for addressing poverty reduction and eradication through strengthening the legal position of the poor. It refers to the justice sector reform programs in Kenya and Uganda, which explicitly aim to contribute to poverty eradication through governance reforms, in this case reforms of the justice and law and order sectors. Are legal (governance) reforms part of the poverty agenda? If they are, how are they interrelated with a notion of extreme poverty as a

³ High Level Commission on Legal Empowerment of the Poor. “Concept Paper”, September 6, 2006, cf. website: <http://legalempowerment.undp.org/reports/concept2action.html#5> (accessed, 27 September 2006).

violation of human rights? Can extreme poverty be confronted in legal reform programs, and if yes, how?

Addressing poverty and extreme poverty from a legal empowerment perspective may take its point of departure in the Independent Expert's conception of extreme poverty as social exclusion and deprivation of basic security. Basic security can mean many things, and poverty implies the combination of multiple insecurities. One type of insecurity is not to have one's basic needs secured. A former Independent Expert on Human Rights and Extreme Poverty, Leandro Despouy, suggested that the "specificity of extreme poverty is the invisible, but very real, threshold under which persons and communities are disempowered to exercise a whole set of their rights, civil, cultural, economic, political and social" and added that "the persistence of multiple insecurities over a long period, sometimes several generations, contributes to the decline from a situation of poverty into one of extreme poverty. Persons and communities are thus deprived of the possibility of assuming basic responsibilities and security necessary for the full enjoyment of their fundamental rights. This global and systemic condition affects one's human dignity and impacts on all his or her rights. It undermines the possibilities of those living in this condition to regain their rights and reassume their responsibilities in the foreseeable future" (see Despouy's Report E/CN.4/Sub.2/1996/13).

Legal studies that address the social functions of law suggest that better legal protection of basic physical security, as well as security for property and assets for production, may have significant social transformative roles. Effective legal protection and rule of law may not just help, but be a necessary condition for people to benefit from their material resources and properties. Applying Sen's terminology, it enhances people's capabilities to function as productive and social agents, and offers institutional guarantees for social and productive agency. It allows people to move around to do their business without undue interference. It also helps workers organise to protect their interests and jobs, or small-holders to protect them from undue interference from patrons or affluent landowners. A secure societal environment is important for markets to operate, for producers to sell their produce. Fear and danger of losing basic means of production – for instance secure access to land by legally secure title - make people less free to invest in land for better utilisation and output. Lack of security of employment makes people worse off in situations of cyclical economic decline, and may be catastrophic for people already living at a subsistence level.

Historical evidence records the social importance and impact of law and legal protection: The growth of the modern welfare state (for instance in the form of the Nordic model) was fundamentally the gradual expansion of legally secured entitlements in complex legal webs protecting labour rights and job security, social security for those in need of help, legal protection of pensions for the aged, access to health facilities for the sick, and special protection for groups in particular need of help.

The current legal empowerment agenda assumes i.a. that secure property to means of production, or title deeds for access to land (as property or user rights) can help improve people's opportunity to invest in production of marketable goods and hence, contribute to a long-term reduction or abolishment of poverty. It rightly observes that an important means of economic growth and welfare is the availability of funds for investment, and that security in legally secured property can give access to capital for investment. Legal empowerment and formalisation is, however, hardly a shortcut to poverty reduction. Formalisation of access to property and other assets as a strategy for legal empowerment faces complex practical challenges that need to be addressed. Chief among these are causes for poverty other than lack of access to property rights. Poverty is, as the High Level Commission itself acknowledges, a highly complex phenomenon; its eradication requires tackling the multiplicity of insecurities that make people *persistently* poor at a low level, and hence extremely poor.

In particular two issues are at stake: First, legal disempowerment is closely related to (and often caused by) social exclusion, as well as political marginalisation, and lack of influence and representation of the interests of the poor in political institutions. Second, poor people have difficulties retaining and keeping their property and assets, when they get them, because they are vulnerable to "bad times" and the need to trade off their assets for survival or other poverty-related causes. To be realistic, international efforts to strengthen the legal position of poor people, and the formalisation of property rights and security of assets as methods for poverty reduction needs to analyse and understand the role of social, economic, legal and political conditions and contexts for the *production* of legal empowerment. In processes for empowering the poor by better legal property and other asset protection and security, it is therefore a need for bringing in factors that can sustain legal empowerment institutionally and through the freedom to organize and engage in collective action. Rights without institutional structures, including support by social movements and collective organisations, are empty

promises, and “goods” to be traded off (in patronist relationships), resembling Thomas Hobbes’ dictum that “covenants without the sword are but words.”

The legal empowerment agenda, in other words, needs to take into account the social fabric and power relations in any given societal context in order to understand how social and economic structures, conflict patterns and cleavages and political institutions are part of the production of poverty, and hence reflect on how interests and power represent impediments to needed change in these structures. Securing people resources and freedom of agency through enhancing property rights and right to assets also requires attention to *contingent* rights and institutions that condition property rights, and make them realistic and enforceable and hence can fulfil their “empowerment vision.” It is in this context that the international system of human rights norms offers significant institutional guarantees for the formalisation of rights to assets in the informal sector. Potentially, the discourse of the right to development adds some conceptual clarity for this contingent functions for human rights in the legal empowerment effort that would also be helpful to draw on in the human rights and extreme poverty agenda.