

CIVIL SOCIETY AND THE CHALLENGE OF CHANGING POWER RELATIONS BETWEEN THE POOR AND THE ELITE

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Introduction

This chapter addresses the well recognised but much avoided subject, that of changing power relations between those who have and those who do not, and the roles of CSO's in doing so. While it locates this debate in the context of state –society relations and recognises that without state engagement and support lasting change will be elusive, it seeks to identify a concrete agenda for action which demands changes in laws and market arrangements and a leadership role for membership based organizations. The recent report of the UN commission on legal empowerment of the poor (UNDP /CLEP, 2008) provides an excellent working agenda as a basis for our discussions. This agenda seeks to use the law as the instrument of empowering the poor but provides a broad enough canvas for a comprehensive examination of the roles of CSO's in transforming power relations, covering as it does transformations in the domains of property rights, labour rights, business rights, access to justice and the fostering of a climate of the rule of law. These domains cover all aspects of the livelihoods of the poor as will be described below. In addition it provides a welcome departure from welfare and trickle down approaches to poverty eradication. One of the greatest impediments to successful CSO action in challenging power relations is agreement on a concrete agenda for action. As such, this agenda the result of widespread global and national consultations involving CSO's and states will be taken as the basis for our discussion of the roles of CSO's in transforming power relations.

Most current and past poverty reduction strategies were designed on the basis of economic growth and trickle down or on redistribution. Governments were supported to enhance their capacities to provide public goods and services including health and education, security and stability, and a macro-economic environment to stimulate growth and investment. This continues to be necessary but is not sufficient. More equitable distribution of opportunities for participation of the poor in growth has been hoped for, but remains largely unrealized, because of structural and institutional arrangements which have not been working for the large majority of people, most of whom have had to seek refuge in the informal sector to eke out a living. In short, while public poverty (shortages in public goods and services) requires continued attention, much greater attention needs to be given now to addressing the structural and institutional arrangements which are excluding the majority of people in poor countries from the economic, social, and political life of their countries and incapacitates them from getting themselves out of poverty.

The livelihoods of the poor (as for the non-poor) are based on the activities, assets and entitlements available to them, which they can use to get themselves out of poverty. Activities include working for an employer (labour) or for oneself (entrepreneurship). Assets include human, social, natural, and physical

and economic capital and the relationship between the owner and the asset is referred to as property rights. Entitlements are used in this context to refer to the freedoms and public goods and services based on equitable access to justice and the rule of law. An agenda for legal empowerment of the poor can therefore be developed on the basis of labour rights, legal instruments for entrepreneurship, property rights and access to justice and rule of law. Legal empowerment is about the transformations in structures institutions and processes which are necessary for the poor to have greater control of the factors influencing their livelihoods. Its goal is to ensure legal protection and economic opportunity is the right of all and not the privilege of few. Action is therefore guided by the twin goals of protection and opportunity and is accordingly anchored in the human rights and market based approaches to development.

Since the majority of the poor and excluded make their livelihoods in the so-called informal economy, special attention is being directed to this phenomenon, with the clear recognition that the formal and informal are not separate entities that one is always present in the other and that in many countries the informal appears as the norm. The goal of the legal empowerment agenda is not technical formalization of the informal but the systemic legal and political transformations required so that the poor and all others can use the instruments of the law to reduce poverty and create wealth and prosperity.

The section below presents a brief summary of the agenda for legal empowerment of the poor and provides the basis for the discussion of the roles of CSO's in the sections which follow. The subsequent sections are presented under the headings of: *setting the stage for CSO action* which analyses the preconditions for successful action; *towards an action framework* which offers an analysis of various actors, their influences and relationships; and *taking action* which gets down to practical considerations.

EMPOWERING THE POOR: The legal empowerment agenda:

As mentioned above this agenda is based on the four pillars of access to justice and the rule of law, property rights, labour rights, and business rights.

First Pillar: Access to Justice and Rule of Law

First among rights is that which guarantees all others: access to justice and the rule of law. Legal empowerment is impossible when, *de jure* or *de facto*, poor people are denied access to a well functioning justice system. Where just laws enshrine and enforce the rights and obligations of society, the benefits to all, especially the poor, are beyond measure. Ensuring equitable access to justice, though fundamental to progress, is hard to achieve. Even if the legal system is technically inclusive and fair, equal access to justice can only be realised with the commitment of the state and public institutions. Legal empowerment measures in this domain must:

Ensure that everyone has the fundamental right to legal identity, and is registered at birth;

Repeal or modify laws and regulations that are biased against the rights, interests, and livelihoods of poor people;

Facilitate the creation of state and civil society organisations and coalitions, including paralegals who work in the interest of the excluded;

Establish a legitimate state monopoly on the means of coercion, through, for example, effective and impartial policing;

Make the formal judicial system, land administration systems, and relevant public institutions more accessible by recognising and integrating customary and informal legal procedures with which the poor are already familiar;

Encourage courts to give due consideration to the interests of the poor;

Support mechanisms for alternative dispute resolution;

Foster and institutionalise access to legal services so that the poor will know about laws and be able to take advantage of them;

Support concrete measures for the legal empowerment of women, minorities, refugees and internally displaced persons, and indigenous peoples.

Second Pillar: Property Rights

Ownership of property, alone or in association with others, is a human right. A fully functioning property system is composed of four building blocks: a system of rules that defines the bundle of rights and obligations between people and assets reflecting the multiplicity and diversity of property systems around the world; a system of governance; a functioning market for the exchange of assets; and an instrument of social policy. Each of these components can be dysfunctional, operating against the poor. When the system fully functions, it becomes a vehicle for the inclusion of the poor in the formal economy, and a mechanism for their upward social mobility. When the entire system or a single component is dysfunctional, the poor are deprived of opportunity or discriminated against.

As reforms of property rights are inherently risky, full attention should be paid to securing the rights of the poor. Women, who constitute half the world's population, own only 10 percent of the world's property. Indigenous people and others also experience active discrimination. To ensure group rights, imaginative legal thinking is required. Providing the absolute poor with rights and access to assets means direct social interventions.

To be fully productive, assets need to be formally recognised by a system encompassing both individual and collective property rights. This includes recognition of customary rights. Embodying them in standard records, titles, and contracts, in accordance with the law, protects households and businesses. Evictions should only be an option in circumstances where physical safety of life and property is threatened, where contract agreements have been breached, or under fair eminent domain procedures. It must be by due legal process, equally applicable, contestable, and independent, and where the cost of eviction is fully compensated. Property rights, including tenure security, should not only be protected by law, but also by connecting the property of the poor to wide societal interest (by increasing the range of validation of their tenure security). The possibility is opened for the poor to use property as collateral for obtaining credit, such as a business loan or a mortgage. It encourages compliance by attaching owners to assets, assets to addresses, and addresses to enforcement; that is, making people accountable. As such, property reform

can strengthen access to legal identity and to justice. Property records unify dispersed arrangements into a single legally compatible system. This integrates fragmented local markets, enabling businesses to seek out new opportunities outside their immediate vicinity, and putting them in the context of the law where they will be better protected by due process and association of cause. Legal empowerment measures in this domain must:

Promote efficient governance of individual and collective property in order to integrate the extralegal economy into the formal economy and ensure it remains easily accessible to all citizens;

Ensure that all property recognised in each nation is legally enforceable by law and that all owners have access to the same rights and standards;

Create a functioning market for the exchange of assets that is accessible, transparent, and accountable;

Broaden the availability of property rights, including tenure security, through social and other public policies, such as access to housing, low interest loans, and the distribution of state land;

Promote an inclusive property-rights system that will automatically recognise real and immoveable property bought by men as the co-property of their wives or common-law partners.

Third Pillar: Labour Rights

The poor may spend most of their waking hours at the workplace, barely surviving on what they take from it. But labour is not a commodity. In the same way that property and the physical assets of the poor are recognised, so must the greatest asset of the poor – their labour and human capital – be effectively recognised. The legitimacy, even the acceptability, of the economy depends upon basic labour rights, as does the development of human capital necessary for sustained growth. In turn, the continuous improvement of labour and social rights depends on a successfully functioning market economy. The typical and tired pattern of low productivity, low earnings, and high risks must be replaced by the fulfilment of the *Fundamental Principles and Rights at Work* and the *Decent Work Agenda*, and the strategy to provide protection and opportunity to workers in the informal economy, a coalition described as an emerging global social contract. Here is how:

Respect, promote, and realise freedom of association so that the identity, voice, and representation of the working poor can be strengthened in the social and political dialogue about reform and its design;

Improve the quality of labour regulation and the functioning of labour market institutions, thereby creating synergy between the protection and productivity of the poor;

Ensure effective enforcement of a minimum package of labour rights for workers and enterprises in the informal economy that upholds and goes beyond the *Declaration of Fundamental Principles and Rights at Work*;

Increase access to employment opportunities in the growing and more inclusive market economy;

Expand social protection for poor workers in the event of economic shocks and structural changes;

Promote measures that guarantee access to medical care, health insurance, and pensions;

Ensure that legal empowerment drives gender equality, thus meeting the commitments under ILO standards that actively promote the elimination of discrimination and equality of opportunity for, and treatment of, women, who have emerged as a major force in poverty reduction in poor communities.

Fourth Pillar: Business Rightsⁱ

The poor are entitled to rights, not only when working for others but also in developing their own businesses. Access to basic financial services is indispensable for potential or emerging entrepreneurs. Just as important is access to protections and opportunities such as the ability to contract, to make deals, to raise investment capital through shares, bonds, or other means, to contain personal financial risk through asset shielding and limited liability, and to pass ownership from one generation to another. These rights may not be equally relevant to every entrepreneur but they are instrumental in poverty eradication and economic development. They must be accessible to all the many micro, small, and medium enterprises in the developing world – many operated by women - that employ a large portion of the labour force. The success or failure of this economic sector will often spell the difference between economic progress versus stagnation, increased employment versus widespread joblessness, and creation of a broader society of stakeholders versus deeper inequality leading to a weakened social contract. Legal empowerment measures in this domain must:

Guarantee basic business rights; including the right to vend, to have a workspace, and to have access to necessary infrastructure and services (shelter, electricity, water, sanitation);

Strengthen effective economic governance that makes it easy and affordable to set up and operate a business, to access markets, and to exit a business if necessary;

Expand the definition of ‘legal person’ to include legal liability companies that allow owners to separate their business and personal assets, thus enabling prudent risk-taking;

Promote inclusive financial services that offer entrepreneurs in the developing world what many of their counterparts elsewhere take for granted — savings, credit, insurance, pensions, and other tools for risk management;

Expand access to new business opportunities through specialised programmes to familiarise entrepreneurs with new markets and help them comply with regulations and requirements, and that support backward and forward linkages between larger and smaller firms.

ⁱ ‘Business rights’ need not yet be regarded as a new term in law, but rather as derived from existing rights related to an individual doing business, newly bundled together under this term on the basis of the vital instrumentality of businesses in the livelihoods of the poor.

SETTING THE STAGE FOR CSO ACTION

To kick-start as controversial and deep-seated a change as legal empowerment — an approach that threatens many vested interests — the positive role of national political leadership cannot be overstated. Pursuing a particular policy, such as expanding access to justice, requires a handful of leaders who agree on what the problem is and how to solve it. Some of these individuals may emerge as *'policy champions'* who drive reform forward by marshalling a broader coalition for change within government, and by overcoming objections and obstacles.

Before proceeding very far with legal empowerment activities, a contextual analysis must be done to establish what reforms are most in demand and which have the greatest likelihood of success. Such an analysis would also give guidance to the implementation process, and tell reformers which risks need to be mitigated, and which challenges must be addressed. This improves the likelihood of success. The focus should be on social and cultural factors potentially affecting implementation, on the economic context — which can also both help and hinder — and on the openness and capacity of the state. Supplementing the inventory of these concerns should be a careful analysis of the reach and hold that informal institutions have on the poor. The full contextual analysis is the basis for a feasibility review of various empowerment scenarios.

The distribution of power and wealth also matters for legal empowerment. If ownership of land, capital, and other productive assets are highly concentrated, reformers have to be cautious about regularising the system of economic rights. Entrenching existing inequalities in ownership will negate the value of reform for the poor and can even lead to further marginalisation. On the other hand, perpetuating exclusion from formal ownership due to unequal distribution of land and other assets may be an even worse option. Judgement must be married to context.

Legal empowerment will in some cases also create policy 'losers.' One example is redistribution of a right or benefit from one group of stakeholders to another when there are mutually exclusive claims to a fixed resource such as fertile land or minerals. Landlords, shopkeepers, moneylenders, and other local elites may see a threat from disenfranchised people exercising new rights or reviving latent ones. Professionals may also have a stake in maintaining the disempowering status quo, such as lawyers who would lose out if laws were translated into everyday language or if inexpensive means of conflict resolution spread. Policymakers may endeavour to minimise redistributive conflicts by expanding economic opportunities so that different interests can be negotiated to meet the needs of every side, but plenty of potential for confrontation remains as long as important stakeholders believe others' gains come at their expense. This may be linked to the fact that the mutual payoff to legal empowerment is in the future, and not now.

Resistance may also come from government officials, court officers, and others who interpret and administer laws, statutes, and regulations. Permits, business licenses, tax assessments, and the like are sources of power and potential illegal income through bribes, kickbacks, and other 'rent-seeking' behaviour. Government officials who gain from these policies and legal instruments may sabotage reform. Where possible, they should be given positive incentives to support legal empowerment policies instead of resisting them — for example by offering civil

servants promotions, interesting new responsibilities, training opportunities, or other perquisites if they help with implementation.

Instead of trying to block reforms outright, powerful economic actors may subtly manipulate them to their advantage — a phenomenon known as ‘elite capture.’¹ In many countries, for example, speculators pre-empt prospective titling programmes by buying up land from squatters at prices slightly higher than prevailing informal ones. Squatters benefit in the short term, but miss out on the main benefits of the titling programme, which accrue to the people with deeper pockets.ⁱ The sequential and conditional release of funds is one strategy for countering the persistent problem of elite capture.

Collective counteraction by the poor, to secure their rights in the face of resistance, is difficult. Even if potential policy losers are a minority, such as a handful of large landholders or government bureaucrats, they will tend to organise effectively to defend their vested interests. Prospective winners may not be aware of what they might gain and may rightly fear that they will lose out if change does not happen quickly. Hence, mobilisation of allies and supportive stakeholders, and finding ways to manage the critical ones, is fundamental. Success is most reliably won when one delivers measurable and meaningful benefits to the beneficiaries.

TOWARDS AN ACTION FRAMEWORK

To enhance the chances of effective involvement and success, a framework for understanding the opportunities, challenges and limitations of the roles of CSO will be outlined in this section, followed by an analysis of who can best become involved in what and how to do so. At its core the empowerment agenda requires changing the power relations between those who have and those who don’t, those who are able to use the law to their benefit and those who are not, those who are able to generate immense wealth and those who cannot, in other words to help the excluded gain greater control of the factors influencing their lives and livelihoods in the face of severe opposing vested interests. The role that CSO’s will be called on to play will be very different from providing health or educational services or microfinance to the poor. Their role will be more defined by social movements, political contestations, social mobilisation, and by building the capacity of the poor and excluded to struggle for and use their legal rights to get themselves out of poverty. And they will have to play these roles without being outlawed by the state or silenced by the elite.

We can derive a useful analytical-action framework by considering a societal situation in which large numbers of people are not able to use the law to make their living as the field of contestation. This situation can be rural or urban and is the typical situation of most developing countries with large numbers of people living in poverty in the informal sector. The two basic challenges are that the playing field is not level nor are the rules fair. Both are stacked against the poor. On the field are four arenas of action. These are 1) the state with a given set of actors (individuals and organisations), institutions (rules of their game), goals and motivations, 2) the market with its actors, institutions and logic, 3) formal civil society with its actors, institutions, goals and motivations and 4) informal civil society (or fourth places) in which activities are more spontaneous, accidental, short lived, chaotic, but at the same time a survival

space for largest numbers of the population. This fourth space has its own internal actors, institutions, goals and motivations, but can have as well powerful outside actors who have significant influence in this arena. Games are played within each arena and between one or more arenas at the same time. It is this complex situation that the CSO with an interest in legal empowerment of the poor must develop its game plan, identify its potential supporters and opponents, know its comparative advantage and forge strategic partnerships, define its short, medium and long term goals, chart its strategic pathways and assess its risks and strategies for mitigation.

The crucial factor underlying this framework are power relations and their influence on CSO roles. Some political analysts see civil society in 3 ideological camps: conservative, liberal and radical. Conservatives see the role of CSO's as advancing freedom towards democracy and economic progress, liberals see them as a countervailing force against an unresponsive and corrupt state and exploitative corporations and for the radicals they are a repository of the forces of resistance and opposition, forces that can be mobilised into a counter-hegemonic bloc or a global anti-globalisation movement. In practice most of today's development oriented NGO's are contracted by international organisations and governments to supplement government efforts at providing services to the poor, to foster the neo-liberal paradigm and to take the place of collective social movements and their confrontational politics which seek to change power structures rather seeking accommodations within it. (Veltmeyer, 2007). Howell and Pearce (2001) concluded that: "Donor civil society strengthening programmes. with their blueprints, technical solutions, and indicators of achievement run the risk of inhibiting and ultimately destroying that most important of purposes of civil society, namely the freedom to imagine that the world could be different.

For their 2008 international conference on the theme: "Whatever happened to civil society?" INTRAC (2008), concerned that short term humanitarian and development interventions do not undermine longer term civil society strengthening of local associational and institutional structures and life, outlined the main roles of civil society as to : help generate the social basis for democracy; promote political accountability beyond party politics; produce social trust, reciprocity and networks; create and promote alternatives through collective action; and support the rights of citizens and the concept of citizenship. It is this call to return to some of its original goals that is central to the agenda of changing power relations.

TAKING ACTION

The challenges and opportunities for taking action will of course be very different in different countries and depend to a large extent on the nature of the governance arrangements and the presence and strength of democratic institutions. In some countries it will be easier for CSO's to forge partnerships across the action arenas than in others. So as outlined earlier a careful contextual analysis will be required in each situation. Across the developing world activists who challenge existing power structures face attacks by police, hired thugs, and paramilitaries.(Kishwar 2007, (Sunday Tribune 2008), (Green 2008) But what would motivate CSO's to take action in this complex and even dangerous undertaking and what are some of the relevant issues which need to be clarified to lay the groundwork for action?

Active participation has intrinsic merits, creating strong bonds of belonging and purpose. It can build a sense of self-confidence and involvement, enabling excluded groups and individuals to challenge their confinement to the margins of society. However "CSO activism can involve exhaustive rounds of

meetings, voluntary toil, and confrontations with impervious or insulting authorities. People keep going out of commitment and belief, be it political, religious or simply a sense of duty.” (Green 2008).

The most likely CSO's to initiate action will be membership based organisations such as trade unions, farmers and fisher-folk groups, women's groups, faith based organisations, associations of waste pickers, street vendors, taxi drivers etc. Their role in legal empowerment of their constituents will be a natural extension of their current roles in protecting and fighting for the rights of their members and in seeking new economic, social and political opportunities. But they will require the support of range actors including NGO's, human rights groups, academics, lawyers and legal aid organisations, donors and the multilateral system. Many of these organisations with the possible exception of some human rights groups are not usually in the business of fighting for a change in the status quo power relations between the elite and the marginalised, especially in circumstances where the state is allied with or captured by the elite. This agenda will then only be undertaken when global political awareness and support for such change become evident. Such evidence must be translated into changes in donor and multilateral institutions priorities and funding of NGO's. The support of the state is central to success but experience suggests that this will not always be forthcoming. Vibrant political coalitions both at the grassroots and at the policy and political levels will be required to sustain the contestations between the state, the excluded and the elite which will be required for LEP.

An important factor which will determine the success or failure of the contestation process for LEP will be the legal basis for CSO formation and the legal framework in which CSO's operate. The stage of political development and the maturity of the democratic process will determine whether the state will dictate to CSO's what their roles should and should not be, and the extent to which they can be active in LEP. In countries with weak democracies the challenge is likely to be much more difficult and the struggle will be longer. However CSO'S are now in a position to utilise the human rights framework at the time of its sixtieth anniversary and to which most governments have acceded as a compelling entry point and to embrace a regulated markets approach which will now be the dominant market paradigm following the global economic crisis. The current crisis can also be used as the enabling environment or critical juncture in which fundamental institutional reform, otherwise very difficult to do, can be achieved. These conditions are all conducive to pushing governments to make changes in property rights systems, business and labour rights, and the overall access to justice and rule of law framework in countries. Finally CSO's have an opportunity to be visionary in their outlook and to think of win-win options in which the securing greater legal protections and opportunities for the poor and excluded can be shown to be in the best interests of the privileged, in other words to finally shift from the conceptualisation of power as necessarily a zero sum game to a search for win-win conditions in which power can be a positive sum game.

CONCLUSION

The agenda for legal empowerment of the poor is based on the four pillars of access to justice and the rule of law and property, labour and business rights in a well functioning regulated market economy. It will require the legal recognition of the rights of a large number of people who are currently unable to use the law to effectively protect and acquire assets and to explore new economic opportunities. While it should not be seen as a panacea, it is difficult to see how poverty will be eradicated without it. It will require the

strong involvement of CSO's in roles involving human rights advocacy, democracy building, policy dialogue and political contestations. The task ahead will be as difficult as it will be necessary if we are going to finally make poverty history. "At its best an active and progressive civil society can be profoundly transformative, enhancing the lives of both participants and society as whole, empowering poor people to demand change and to hold their rulers accountable. Over time, an active citizenship can make states more effective. When states are absent, civil society organisations can step into the breach to keep at least some level of services operating. But CSO's are not a magic path to development, nor are they a substitute for responsive, effective states capable of delivering tangible and sustained improvements in people's lives. In practice development requires both." (Green 2008).

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